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

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

DEFENDANTS' POST-TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Other Authorities

SUMMARY OF ARGUMENT

Plaintiffs have fallen far short of their burden to prove, by a preponderance of the evidence, that the Dallas County Commissioners Court redistricting plan violates Section 2 of the Voting Rights Act ("Section 2") or constitutes intentional, racially discriminatory vote dilution in violation of the Fourteenth Amendment. Plaintiffs' claims fail for a number of reasons, not the least of which is that there are simply too few Anglo voters who support Republican candidates remaining in Dallas County.

First, plaintiffs lack standing because to the extent any of them allege an injury whatsoever, it is purely a partisan one. Plaintiffs testified that their sole desire was for more Republicans on the Court, but they did not bring a partisan gerrymandering claim, and the mere desire for more Republicans does not constitute an injury *on account of their race*. Coupled with their professed lack of any contact with the Commission (including no involvement with the redistricting process) and inability to identify any concrete harmful conduct flowing from the Enacted Plan, plaintiffs fall far short of their burden to demonstrate a particularized personal injury. There is no evidence that plaintiffs opposed preclearance of the plan in 2011 before the Department of Justice. Moreover, because the map plaintiffs propose would actually *reduce* their electoral opportunities, the remedy they seek could not redress their (supposed) harm.

Second, plaintiffs do not satisfy the first *Gingles* precondition for Section 2 claims because plaintiffs offered no evidence or analysis to show that their proposed additional Anglo majority district would function as an opportunity for Anglo voters to elect their candidate of choice. Indeed, the evidence shows that plaintiffs' proposed plan would likely *decrease* electoral opportunities for Anglo voters because not only is their new district more likely than not to elect Democratic

candidates, but the reduction in Anglo population in the existing district threatens that district's performance for Anglo voters as well. Although Anglo Republican voters consistently prevail in endogenous and exogenous elections in the existing Anglo majority district under the County's challenged plan, reconstituted election returns show that under plaintiffs' proposed plan, the Democratic candidates for president and county sheriff would have won all four of plaintiffs' proposed districts. Moreover, plaintiffs likewise fail to establish *Gingles* prong one because their proposed plan fails to adhere to (and violates) traditional redistricting principles. By disregarding the County's adopted redistricting criteria—particularly its preference for respecting existing voting precinct boundaries as well as respecting the population growth and decreases in Dallas County as reflected in the 2010 census—in order to advance their singular focus on race-based objectives, plaintiffs fall short of their obligation to adhere to non-racial, traditional redistricting criteria necessary to create an additional performing compact district.

Third, plaintiffs have not satisfied their burden to establish *Gingles* prong two because they have not shown that Anglo voters in Dallas County are politically cohesive. Rather, the undisputed evidence shows that Anglo voters are ideologically split into three groups—Democrats, Tea Party supporters, and mainstream Republicans. This was demonstrated by defendants' experts' election analysis, by the testimony of plaintiffs' own counsel in the statewide redistricting case, and by lay testimony at trial. Indeed, there was no contrary evidence. Moreover, as Mr. Angle explained at trial, this lack of cohesion is particularly pronounced among the precise group of Anglo voters upon whom plaintiffs rely to draw their second majority Anglo district. Those Anglos are substantially more Democratic than Dallas County's Anglo voters as a whole. That lack of cohesion among Anglo voters is fatal to plaintiffs' effort to satisfy *Gingles* prong two.

Fourth, it is not sufficient for plaintiffs to merely establish the presence of racially polarized voting, rather, under the Fifth Circuit's *en banc* precedent, that polarization must be legally significant—*i.e.*, it must be attributable to race, rather than merely partisan politics. But the evidence, including the testimony of the plaintiffs themselves as well as their counsel, shows that ideology and partisanship, and not anything related to race, explains the voting choices of Dallas County Anglo Republican voters. In fact, the evidence shows that a considerable percentage of the Anglo voters in Dallas County vote for Democrats. In any event, plaintiffs' racially polarized voting analysis was the result of an unreliable data set leaving the Court without the evidence it needs to find plaintiffs' have met their burden on this issue.

Fifth, even if plaintiffs had satisfied all three of the *Gingles* preconditions, their Section 2 claim would still fail because they offered no proof in support of the vast majority of the nine totality of the circumstances factors that courts consider in vote dilution cases. Indeed, the evidence at trial and the documentary evidence shows that none of these factors support a finding of liability here. The only factor plaintiffs even made an effort to prove was the presence of racial appeals in campaigns, but their expert's analysis was methodologically unsound and unreliable (because of major selection bias) and it relied on data that exclusively postdated the enactment of the 2011 redistricting plan at issue in this case. Plaintiffs have not satisfied their burden to show the totality of the circumstances warrants Section 2 relief.

Sixth, plaintiffs did not meet their burden to show a lack of proportionality in the election of Anglo-preferred candidates. In fact, the evidence demonstrates that the Enacted Plan is near perfect in population proportionality. As of the latest Census data, Anglos make up 33.1% of the county population and 45.1% of the CVAP. Blacks are 21.9% of the county population and 26.7%

of the CVAP while Latinos are 38.3% of the county population and 21.9% of the CVAP. DX 59-10; Joint Pre-Trial Order (Apr. 12, 2018), ECF No. 126. Blacks have the opportunity to elect a candidate of choice in one district and Latinos have the opportunity to elect in another. The roughly 77% of Anglos who historically support Republicans also have the opportunity to elect in a district. Finally, the roughly 23% of Anglos who historically support Democrats have influence in the remainder district along with leftover population of Black and Latino voters. All of this was achieved in compliance with valid criteria set by the County and well within traditional redistricting principles. There are simply not enough Anglo Republicans left in the County to meet plaintiffs' objective: election of two Republicans to the Commissioner Court. Plaintiffs' own proposed remedial plan bears this out. Plaintiffs' refusal to offer a performance analysis of their proposed remedy district coupled with the performance analysis of plaintiffs' plan performed by defendants' experts demonstrated this to be true. Plaintiffs did not and cannot meet their burden to show a lack of proportionality in these elections.

Seventh, plaintiffs do not come close to meeting their burden to prove that the Enacted Plan was motivated by an invidious, racially discriminatory purpose to dilute the votes of Anglos in Dallas County. Indeed, plaintiffs offered *zero* evidence of intent. Their expert analyzed the wrong map, and when questioned about his analysis, explained it was incomplete and not important anyway—that the "single-minded purpose" of packing Anglo voters could be divined simply from the total number of Anglo voters in the district. That is certainly not the law. As defendants demonstrated, the plan was drawn based upon lawful and race-neutral districting criteria, including a specific request from an Anglo Republican Commissioner to draw a strong Tea Party district. The creation of a strong Tea Party district was a political decision that at least four members of the

Commissioners' Court supported, including two of the three Anglo incumbents. Race was considered only after the fact and in the maintenance of the pre-2011 effective black and Latino districts. The County was appropriately and lawfully concerned about obtaining preclearance of the plan from the Department of Justice and, in fact, preclearance was granted. Considerations of race were entirely lawful to ensure that the Enacted Plan satisfied the County's obligations under Sections 2 and 5 of the VRA. Indeed, plaintiffs agreed that those districts were required and their own expert testified it was important that they be preserved and he even purposefully added more Black and Latino population to them when crafting plaintiffs' map. Moreover, an analysis of the *Arlington Heights* factors by defendants' expert (plaintiffs did not even offer such an analysis) shows that the plan was not enacted with a discriminatory intent.

This is not a close case. Plaintiffs have offered no evidence on a number of required elements, and the evidence defendants offered proves defendants, not plaintiffs, are entitled to judgment on both of plaintiffs' claims.

STANDARD OF REVIEW

Plaintiffs bear the burden of proof on their Section 2 and Fourteenth Amendment intentional vote dilution claims. *See Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009) ("[P]laintiffs bear the burden of proof in a VRA case, and any lack of record evidence is attributed to them"); *Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (*en banc*) ("The challengers bear the burden to show that racial discrimination was a substantial or motivating factor behind enactment of the law . . . ."); *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 459 (N.D. Tex. 2010) (plaintiff must prove Section 2 case by preponderance of the evidence).

ARGUMENT

I. Plaintiffs Lack Standing to Sue Because They Testified They Suffer No Injury from the Enacted Plan.

Plaintiffs failed to satisfy their burden to prove they have standing because they testified they suffered no cognizable injury redressable by their legal claims. "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (emphasis and bracket in original). The Supreme Court "has stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id.* A "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, and n.1 (1992)). Although plaintiffs in redistricting cases usually are able to demonstrate standing, here plaintiffs have not even attempted to offer evidence establishing any injury. Indeed, plaintiffs testified that their real objective was simply an additional Republican seat. But this is not a partisan gerrymandering case, and plaintiffs must demonstrate some particularized harm they experienced on account of their race. They have not done so.

Plaintiff Anne Harding testified that she has never communicated with her Commissioner or her staff, has never asked for any service from the Commissioners Court, she did not participate in the redistricting hearings, did not contact the Commissioners Court or the County Judge regarding the redistricting, and acknowledged that she testified at her deposition that her desire was for a new map that would elect an additional Republican. Vol. 2 Tr. at 10:22-14:1; *see id.* at 17:23-18:4 (Q: "Ms. Harding, defense counsel read you or played a part of your deposition where you said

you would like to see districts where Republicans could win. What did you mean by that?" A: "I'd like to see more fair districts for the Commissioners Court where it's not a certain outcome that a Democrat will win."). This is insufficient to meet plaintiff's burden to show Ms. Harding faces a particularized injury from the redistricting plan on account of her race. Rather, the injury she identifies is purely a political one. In this case, plaintiff's obligation is to demonstrate an injury on account of race. Ms. Harding's testimony falls short of meeting that burden.

Plaintiff Holly Morse testified that she has never contacted her Commissioner with any particular needs, she never attended a Commissioners Court hearing at which redistricting was discussed, she was not sure who her Commissioner even was, she has never contacted her Commissioner requesting any responsiveness to the needs of her community, she thought her Commissioners district was insufficiently conservative but does not know what she means by that, she has never experienced discrimination, she has never been discriminated against in voting, could offer no examples of discrimination against Caucasians in Dallas, thinks her Commissioner does not represent her values but does not know what she means by that, and would not support a map that resulted in four Democratic Commissioners. *Id.* at 221:4-225:16. To the extent she articulated any harm, it was related to the ideology of her Commissioner—something she could not even define—and something that is not an injury the VRA is designed to remedy. Ms. Morse's testimony falls far short of satisfying plaintiff's burden to demonstrate she has a particularized, redressable injury.

Plaintiff Peter Schroer testified that his Commissioner was John Wiley Price, that he does not attend Commissioners meetings, he does not make contact with his Commissioner often, that he *agrees with Mr. Price* on "a lot of" policy issues, *id.* at 229:9-10, he gave no comments during the redistricting process, he wants a districting plan with less jagged boundaries, is unaware of what

justifications there may be for the jagged lines and identified plaintiffs' map as being more jagged than the Enacted Plan, he has never had a problem voting, has never been the target of government-based discrimination, and he could not say how he would change the Enacted Plan, *id.* at 228:3-236:25. This is not close to establishing a concrete, particularized injury Mr. Schroer has experienced on account of his race related to the Enacted Plan. The presence of "jagged lines" is not an injury redressable through a VRA or Fourteenth Amendment claim and, if it was, plaintiffs' proposed plan would be thrown out for being excessively jagged.

Plaintiff Gregory Jacobs testified that he might vote for his Commissioner, Theresa Daniel, if she switched party to Republican, he disliked the placement of various cities in the map because "[t]hey bear no political relationship to each other," Vol. 4 Tr. at 6:18-19, but he did attend any redistricting hearings or contact any of the Commissioners regarding redistricting, did not look at the map until five years after it was enacted, he has nothing to say about Ms. Daniel personally, he could not identify any issues on which he disagrees with Ms. Daniel, he found Commissioner Price friendly and professional, he would "rather have more Republicans" on the Court, thinks the current plan is unfair because "it doesn't have enough Republicans elected" and was created "so that the Republicans couldn't win," *id.* at 9:8-23, he has no personal problems with the Commissioners Court, could not identify "any harm to [him] personally with respect to the [C]ounty [C]ommissioners court makeup at the present time, and thinks the motivation for creating the Enacted Plan was "political." *Id.* at 4:16-10:20. To the extent Mr. Jacobs identified any injury (he testified he could not identify any harm), it was purely political. A desire to have more Republicans elected is not an injury redressable by plaintiff's VRA and intentional vote dilution claims.

Because the only injury identified by plaintiffs was a desire for more conservative or Republican districts, and because they have not alleged a claim for partisan gerrymandering, plaintiffs have no standing to challenge the Enacted Plan under the VRA or as intentional, racial vote dilution. They have offered no evidence of a particularized, personal injury redressable by their legal claims. And as shown below, plaintiffs' proposed plan would *reduce* their opportunities to elect their candidates of choice (Republicans), and thus the relief they seek would not redress their (nonexistent) injuries. Plaintiffs lack standing. *Raines v. Byrd*, 521 U.S. at 818.

II. Plaintiffs Have Not Met Their Burden of Proof to Establish a Section 2 Violation.

Plaintiffs have not met their burden to establish a Section 2 violation. To prove a Section 2 discriminatory results claim, plaintiffs must first demonstrate the presence of three preconditions announced by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). If plaintiffs cross that threshold, they must then prove that the totality of the circumstances support a Section 2 violation finding. *Johnson v. De Grandy*, 512 U.S. 997 (1994). Plaintiffs have done neither.

A. Plaintiffs Have Not Satisfied Gingles Prong One.

Plaintiffs have not met their burden to establish *Gingles* prong one. Under the first precondition for Section 2 relief, plaintiffs must prove "the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1395 (5th Cir. 1996). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). Although plaintiffs must show it is mathematically possible to draw an additional majority-minority CVAP district, *Gingles*

prong one ultimately focuses on whether such a district would "elect candidates of [the minority group's] choice." *Id.* As the Supreme Court has explained in discussing "the first *Gingles* factor[,] . . . it may be possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC v. Perry*, 548 U.S. 399, 428 (2006). Thus, prong one requires a functional analysis as to whether plaintiffs' proposed district would actually perform in elections to afford the plaintiff minority group the opportunity to elect its candidates of choice.

In addition, the compactness inquiry under *Gingles* prong one is not limited to the appearance of the district's lines, but rather must account for whether the proposed district respects "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Gonzalez v. Harris County*, 601 F. App'x 255, 258 (5th Cir. 2015) (quoting *LULAC*, 548 U.S. at 433). This is so, the Supreme Court and the Fifth Circuit have explained, because "[t]he recognition of nonracial communities of interest reflect the principle that a State may not assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted) (bracket in original); *see also Gonzalez*, 601 F. App'x at 259. In assessing whether plaintiffs' proposed redistricting plan respects traditional districting principles, courts must consider the locality's preferences. "[W]hen a locality adopts a redistricting plan according to certain traditional districting principles, . . . the district court must consider all such principles relied on by the locality, any opposition to such reliance by § 2 plaintiffs, and any traditional districting principles which § 2 plaintiffs may incorporate into their hypothetical plan in an effort to demonstrate comparable consistency with the plan." *Gonzalez*, 601 F. App'x at 260. Where plaintiffs' proposed plan fails to account for the locality's districting principles, the court may "justify the adopted redistricting plan"

and conclude, under *Gingles* prong one, that "the minority group's proposed plan fails to comparably account for" the locality's principles. *Id.*

1. Plaintiffs Have Not Established that their Proposed Districts Would Afford Anglo Voters an Opportunity to Elect their Candidates of Choice.

Plaintiffs have not satisfied *Gingles* prong one because they have not met their burden of proof to show their proposed districts would elect their candidates of choice. To begin, it is not even clear that plaintiffs' new proposed district is still a majority Anglo CVAP. As Dr. Lichtman testified, as of the most recent American Community Survey ("ACS") release, the district's Anglo CVAP was 52.9%, down from 54.5% the prior year. Vol. 5 Tr. at 120:1—15. But that figure is based on 2012 through 2016 data, with a midpoint of 2014. As Dr. Lichtman noted, "that's still four years old, and unquestionably the Anglo CVAP in that district is substantially below by now 52.9 percent. Probably below 50 percent and certainly would be below 50 percent by 2020 given what's happening in terms of the changes in that area of the county." *Id.*; *Compare* DX 60-138 (2011-2015 ACS data, Proposed District 4 Anglo CVAP of 54.5%) *with* DX 60-139 (2012-2016 ACS data, Proposed District 4 Anglo CVAP of 52.9%). It is thus unlikely that plaintiffs have even met the "bright line test" of majority minority CVAP as of the date of trial. *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 456 (N.D. Tex. 2010) (quotation marks omitted).

But even if the 2012-2016 ACS data is accepted at face value without projecting the downward Anglo CVAP trend to 2018, plaintiffs have still not established *Gingles* prong one because they have not shown that their proposed Anglo majority districts will functionally perform to give Anglo voters an opportunity to elect their candidates of choice. Indeed, plaintiffs did not even attempt to do so, offering *no* evidence or analysis of elections in their proposed districts. Dr.

Morrison testified that he had no opinion as to whether Anglo voters would have the opportunity to elect their candidates of choice under plaintiffs' proposal:

> Q: When you produced your map here today that the plaintiffs are proposing, . . . you have not done what we call a functional analysis to see how it performs in various elections?
>
> A: Correct. That's outside the scope of what I was asked to do.
>
> Q: And so you're unable to given the opinion, one way or the other, whether or not the map the plaintiffs are advocating would actually elect the Anglo candidate of choice in two districts?
>
> A: That would be something you'd have to look to a political scientist to do.

Vol. 2 Tr. at 116:17-117:3; *see also id.* at 50:6-23 (Morrison testifying he did not analyze election performance but that political scientist would have "tools and ability" to do so); *id.* at 51:7-16.

Plaintiffs' political science expert, Dr. Hood, did not do this analysis either:

> Q: You didn't provide any analysis in your reports of whether the candidate of choice of Anglos can usually win elections in any of the plaintiffs' remedial map, correct?
>
> A: That is correct.
>
> . . .
>
> Q: You don't disagree it's standard for political scientists when they're measuring functionality of a district, whether it performs for the group in question that's in the majority, that it is a standard practice for political scientists to review reconstituted election returns and other political data to make that assessment?
>
> A: If someone were going to do that, yes.
>
> Q: Do you know i[f] anybody did a functional analysis of the plaintiffs' remedial map? Do you know?
>
> A: All I can say is I didn't. I can speak for myself.
>
> Q: And you don't know of anybody else then?

> A: I don't know of anyone. Again, I wasn't asked to do that and I didn't perform that analysis.

Vol. 3 Tr. at 37:9-12 42:4-21.

The only analysis on this score was actually conducted by *defendants'* experts, Mr. Angle and Dr. Baretto, and those analyses showed that plaintiffs' proposed plan would lead to a *decrease* in the opportunities for Anglo Republican voters. Defendants' experts analyzed reconstituted election results from 2016 in both the Enacted Plan and plaintiffs' proposed plan, examining the top of the ballot—the presidential race—as well as a downballot race—the county sheriff race. *See* DX 59-24 (Angle Rebuttal Report); DX 63-11 (Baretto Rebuttal Report). That analysis showed that Anglo Republican leaning voters have the opportunity to elect their candidates of choice in one district under the Enacted Plan, while Democratic candidates Clinton (president) and Valdez (sheriff) won the remaining three districts where Anglo Democratic leaning voters live among the largest concentrations of Black and Latino voters in the County. DX 59-24 (Angle Rebuttal Report). However, under plaintiffs' proposed plan, Democrats would have carried all four of the districts, including the two Anglo CVAP majority districts. *Id.* In other words, plaintiffs' proposed map would result in depriving Dallas County Anglo leaning Republicans (voters such as these plaintiffs) from the ability to elect a candidate of choice in *any* district. Indeed, in the downballot sheriff race, Democrat Valdez would have received an outright majority in each of plaintiffs' proposed districts. *Id.*; *see also* DX 60-8, 60-9 (Angle Supp. Report); Vol 4 Tr. at 173:22-174:5 (Angle); Vol 5 Tr. at 6:8-16:18 (Baretto). Moreover, as Dr. Barreto's analysis revealed, data from the 2018 March primaries demonstrated that more people in plaintiffs' proposed second Anglo majority CVAP district voted in the Democratic primary than in the Republican primary (by eight points), and Republicans barely had more voters in the other Anglo majority CVAP district. DX 64-7.

What plaintiffs tried unsuccessfully to do with the creation of their map was use the approximately 23% of Anglos who historically support Democrats along with the remainder who support Republicans to meet bare 50% Anglo CVAP thresholds in two districts. However, the evidence shows that doing this results in two districts that perform for Democrats. This is likely why the plaintiffs did not perform any election analysis of their proposed plan. Simply put, while there may be enough Anglos (at least using the five-year ACS average) to draw two districts with bare Anglo CVAP majorities, that is not the end of the inquiry under *Gingles* prong one. Because approximately 23% of Anglos in the county typically support Democrats, and because all Anglos are not concentrated in one area of the County, divvying up Anglo population that is concentrated in north Dallas County between two districts in an area where Democratic leaning Black and Latino voters also live, results in two districts that elect Democrats. In short, plaintiffs' proposed plan would dilute the vote of plaintiffs (Republican leaning Anglos) and not remedy any alleged harm.

Plaintiffs bore the burden of proving that their proposed plan would *increase* the opportunities for Anglos (in this case Anglo Republicans) to elect their candidates of choice. They did not even attempt to do so, and thus did not meet their burden to establish *Gingles* prong one. Indeed, the only evidence on this question showed that not only would plaintiffs' proposal not *increase* electoral opportunities for Anglos, but it would actually *decrease* them. *See LULAC v. Perry*, 548 U.S. 399, 428 (2006) ("[I]t may be possible for a citizen voting-age majority to lack real electoral opportunity."); Vol 5 Tr. at 16:6-15 (Baretto) ("It's questionable as to whether or not even one Republican district will remain, because they have moved a lot of those Republican Anglo voters out. The second district does not at all appear to be a performing district for Republican interest, and . . . [i]t would jeopardize the existing Republican district."). Plaintiffs have therefore failed to

meet their burden at *Gingles* prong one to show increased electoral opportunities are possible for Anglo voters.

2. Plaintiffs Have Not Satisfied the "Compactness" Requirement Because their Proposed Plan Disregards the County's Adopted Districting Criteria and is Based Solely on Race.

Plaintiffs have also failed to satisfy their burden at *Gingles* prong one because their proposal fails the "compactness" test because it disregards the County's legitimate, traditional districting criteria and instead is based solely on race. "[W]hen a locality adopts a redistricting plan according to certain traditional districting principles, . . . the district court must consider all such principles relied on by the locality, any opposition to such reliance by § 2 plaintiffs, and any traditional districting principles which § 2 plaintiffs may incorporate into their hypothetical plan in an effort to demonstrate comparable consistency with the plan." *Gonzalez*, 601 Fed. App'x at 260. The court is to examine compliance with traditional districting criteria to ensure that it is supported by non-racial justifications to avoid the "assum[ption] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted) (bracket in original).

On April 26, 2011, the Dallas County Commissioners Court unanimously adopted a list of redistricting criteria to guide the drawing of a new plan. DX 58-87; 58-88. Those criteria, in order of priority, were: (1) compliance with one-person, one-vote requirement; (2) compliance with Sections 2 and 5 of the VRA; (3) accounting for population increases and decreases; (4) drawing lines based upon "whole voting precincts (VTDs)," and where not possible, drawing lines in a manner "that permits the creation of practical voting precincts and that ensure that adequate polling place facilities exist in each voting precinct"; (5) drawing complete countywide plans; (6) respecting

"municipal and other significant geographic boundaries," and (7) drawing geographically compact and contiguous districts. DX 58-88.

Plaintiffs have not satisfied the compactness requirement of *Gingles* prong one because the evidence at trial demonstrated that not only did they completely disregard these criteria in drawing their proposed plan, the sole motivating factor behind their plan was race, and not any non-racial, traditional districting criteria. *See LULAC*, 548 U.S. at 433. Plaintiffs' proposed plan was drawn by Mr. Bryan, overseen by their expert, Dr. Morrison. Vol. 2 Tr. at 45:23-46:19. Dr. Morrison testified that he never provided Mr. Bryan with the County's adopted redistricting criteria:

> Q: Now, you realized that Dallas County in advance of doing the 2011 redistricting had adopted redistricting principles?
>
> A: I remember seeing a document that had that heading, yes.
>
> Q: And these redistricting principles laid out in – in a priority order that various items that the Commissioners Court thought was important that the final map reflect. Isn't that true?
>
> A: I remember seeing that, yes.
>
> Q: Now, ultimately you never provided that list of redistricting principles to Mr. Bryan; isn't that a fact?
>
> A: There was no need to provide those principles to him. I was instructing him based on *my judgment* as to what principles *I* wanted to start with and which ones I wanted to balance and respect going forward.

Vol. 2 Tr. at 77:4-17 (emphasis added).[1] So plaintiffs' map was premised upon Dr. Morrison's priorities, without regard to those unanimously adopted by the Commissioners Court.[2] Among the departures from the County's priorities, reflected in the Enacted Plan, were the plaintiffs' failure to respect voting precinct boundaries—including by splitting at least 42 separate precincts, the existence of "unnecessary city splits of relatively small suburban cities that don't exist in the current map[,] . . . includ[ing] the cities of Coppell, Hutchings, Wilmer, Duncanville and Cedar Hill" and a split in Mesquite," and the repacking of African American voters in District 3. DX 59-16 (Angle Rebuttal Report); Vol. 4 Tr. at 166:16-167:10 (Mr. Angle testifying that plaintiffs' proposed plan repacked African Americans in District 3); *id.* at 167:11-168:1 (Mr. Angle testifying that plaintiffs' disregarded County's criteria for respecting precinct boundaries and unnecessarily split precincts by relying instead upon census blocks); *id.* at 168:2-8 (Mr. Angle testifying about unnecessary splits of small cities). Dr. Morrison later detailed that several of the County's traditional districting criteria were not respected in plaintiffs' proposed plan. For example, Dr. Morrison dismissed the third criteria

[1] Dr. Morrison then indicated that Mr. Bryan was unaware he was complying with *Dr. Morrison's* preferred districting principles by virtue of following his instructions, *id.* at 79:15-80:16, but later confirmed that whatever those principles were, they were not the County's adopted criteria, because he was unfamiliar with them, *id.* at 119:21-120:21 (Q: "And to be fair, that's also one of the factors that the Commissioners Court adopted in its criteria, is it not?" A: I haven't reviewed their criteria. I don't recall what they were." . . . Q: "I thought it was your testimony before lunch that you knew what the county's redistricting criteria were and because you had knowledge you were able to make sure that Mr. Bryan followed it in his various eight versions of reports." A: My recollection is that I said I recalled seeing that list of the criteria, but I did not study it carefully, nor did I rely on its exclusively. I do recall there being a list of the criteria.").

[2] Mr. Bryan, in the deposition testimony submitted to the Court as an offer of proof, further confirmed that the only things he considered in crafting the map were race and city boundaries and, at the end of the day, he sacrificed city boundaries to meet his racial targets. Vol. 4 Tr. at 109:1-10; *id.* at 110:15-18; *id.* at 113:14-17

as "totally extraneous," Vol. 2 Tr. at 205:14-206:1, and testified that plaintiffs' proposed map did not comply with the County's fourth priority, respecting voting precincts.

> Q: Okay. The fourth is "[t]o the extent possible, commissioner precincts should be comprised of whole voting precincts." Did you do that?
>
> A: No.
>
> Q: Why? I think we've covered this, but let's be clear.
>
> A: I would say that was one of the trade-offs that had to be made in order to preserve the existing established communicates of interest. I had to dispense with all the existing precinct geography because precinct geography was too large for me to accomplish what I accomplished. That was the – basically that was subordinate – that was one of the factors that had to be subordinated in order to achieve success on all the others.

Id. at 206:8-16.

When Dr. Morrison testified he had to "dispense with the existing precinct geography" in order for him to "accomplish what [he] accomplished," *id.*, he meant that this important County redistricting criteria had to be ignored in order to achieve his *race-based objectives*. As Dr. Morrison testified, plaintiffs used census blocks, rather than voting precincts, to draw their plan because that the only data available at that granular level is racial data, and thus using census blocks aided their singular racial objective.

> Q: There are advantages and disadvantages to each depending upon your motivation, wouldn't you agree?
>
> A: There's only one advantage for me which is the census block is the favored unit of analysis and precincts would be composed of census blocks. If you wanted to know anything about its demographic make-up, a block is the smallest unit of analysis.
>
> Q: That's my point. When you work from census blocks, what that does is it gives you data on the census block level; is that right?
>
> A: The way we analyzed it, yes.

Q: And that data is racial data; isn't that true?

A: The way we have analyzed it, yes.

Vol. 2 Tr. at 63:7-19. Indeed, Dr. Morrison testified that the only two parameters that had any bearing on the construction of plaintiffs' proposed plan were race and total population. *See, e.g.*, *id.* at 76:14-21 (Q: "Because what you want to rely upon principally is racial data; isn't that true?" A: "I wanted to rely upon census data that would allow me to measure the parameters that I needed to measure on each map and each successive refinement to a map that I was trying to create." Q: "Which was race, isn't that a fact?" A: "Race and total population."); *id.* at 49:6-21 (same); *id.* at 64:23-25 (Q: "So in terms of data all you had available was race?" A: "All we had available was census published data on population, eligible voters by race."); DX 84-051 (Email from Dr. Morrison instructing Mr. Bryan to "'decant' Hispanic rich territory," that he can "subordinate 'clean' place boundaries" to achieve various racial targets, and that he can "split place boundaries and also stretch the balance of [total population] to just under the 10% deviation limit if necessary"); DX 84-049 (Email from Mr. Bryan stating that "we got Hispanics as high as we could without egregiously breaking any city boundaries," to which Dr. Morrison replied "Oustanding! . . . [S]ounds like we got a winner); *see also* Vol 4 Tr. at 168:9-22 (Mr. Angle testifying that "it's apparent that they did use race in order to construct their map, but it's obvious also because they – there's no evidence – there's no indication that they used anything else").

The County's adopted criteria of respecting voting precinct boundaries is precisely the sort of traditional redistricting criteria for which it is entitled deference and to which plaintiffs seeking to demonstrate *Gingles* prong one compactness must adhere. *See, e.g.*, *LULAC*, 548 U.S. at 433 (stating that compactness requirement includes "maintaining . . . traditional boundaries (quotation

marks omitted)); *Gonzalez*, 601 F. App'x at 262 (noting that failure to "respect [ ] traditional boundaries" "weighs heavily in favor of finding plaintiffs failed to accord due deference to traditional districting principles" at *Gingles* step one). Although plaintiffs need not show "strict accordance" with the county's particular priorities, *id.* at 260-61, any divergence must "demonstrate comparable consistency" with those priorities, *id.* at 260. Plaintiffs have not done so here. Rather, the *sole* criteria used by plaintiffs—and the sole reason they abandoned existing voting precincts—was to permit race-based line drawing. This is constitutionally impermissible, *see Shaw v. Reno*, 509 U.S. 630 (1993), and undermines the entire purpose of respecting traditional redistricting criteria: to ensure adoption of non-racial criteria in order to avoid pernicious race-based assumptions to infect the line-drawing, *see LULAC*, 548 U.S. at 433.

Because plaintiffs ignored the County's adopted districting criteria, and did so with the express, singular purpose to achieving racial objectives, they have failed to satisfy their burden to meet the compactness requirement of *Gingles* prong one.

B. Plaintiffs Have Not Satisfied *Gingles* Prong 2 Because Dallas County Anglo Voters Are Not Politically Cohesive.

Plaintiffs have not satisfied their burden to establish *Gingles* prong two because they have not shown that Dallas County Anglos are politically cohesive—indeed, the evidence shows that not only are they split into three ideological groups countywide, but in fact the specific Anglos upon whom plaintiffs rely to draw their second Anglo majority CVAP district are the *least* cohesive, with substantial support for Democratic candidates.

To satisfy *Gingles* prong two, plaintiffs must prove that "the minority group is politically cohesive." *Clark*, 88 F.3d at 1395. The purpose of the *Gingles* prong two inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. "A

showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56. In addition to examining data from general elections, courts look to primary election results to determine minority political cohesion. In *Sessions v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected a Section 2 claim in Dallas-Fort Worth brought by African American and Latino voters, concluding that there was "no serious dispute that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." On appeal, in determining whether African Americans could control the general election outcome, the Supreme Court looked to primary election results. *See LULAC v. Perry*, 548 U.S. 399, 444-46 (2006). Similarly, as the district court considering Texas's congressional redistricting recently concluded, "*LULAC* . . . indicates that primaries can aid courts in determining voters' candidates of choice" and "the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant" to assessing political cohesion under *Gingles* prong two. *Perez v. Abbott*, 274 F. Supp. 3d 624, No. 11-cv-360, 2017 WL 3495922, at *23 (W.D. Tex. Aug. 15, 2017), *stayed pending appeal*, 138 S. Ct. 1 (U.S. 2017) (Mem.).

General and primary elections in Dallas County prove that Anglo voters are not politically cohesive and thus fail to satisfy *Gingles* prong two. Statistical analysis of primary and general election results shows that 23% of Dallas County Anglo voters support Democratic candidates, DX 62-7 (Barreto Report), and although 77% support Republican candidates, the Anglo Republican voters are nearly evenly split between Tea Party affiliated candidates and more mainstream Republican candidates, with an average of 54.4% supporting Tea Party candidates and 45.6% supporting

mainstream Republican candidates, DX 62-9 (Baretto Report). Together, this means that 23% of Dallas County Anglos support Democrats, 35% support mainstream Republicans, and 42% support Tea-Party affiliated candidates. DX 62-7 (Baretto Report); *see also* Vol 5 Tr. at 19:10-22:24 (Dr. Barreto testifying as to split among Dallas County Anglos, explaining conclusion that "[t]hey're not a cohesive political community. They're fractured"); *id.* at 56:15-60:20 (same). Plaintiffs' expert Dr. Hood concurred that there was a divide between Tea Party members and mainstream Republicans in the south, including Texas, and that the divide was over political priorities:

> Q: Okay. Another article you coauthored with Quinton Kidd and Irwin Morris in 2016 entitled "Tea Leaves and Southern Politics," explaining party support in the region. That article was about Tea Party and mainstream Republicans in the South, correct?
>
> A: That's correct.
>
> Q: All right. And that includes Texas?
>
> A: Texas is part of the South by our definitions.
>
> Q: And you indicated that there were divisions between Tea Party and mainstream Republicans, correct?
>
> A: Correct.
>
> Q: What would you – how would you define a mainstream Republican and a Tea Party Republican, the difference between those two, just –
>
> A: Well, to be honest I haven't read that article recently. I think one of the main findings we determined from that research project, which was based on survey data, is that Tea Party Republicans versus sort of what we might call establishment Republicans tended to want more urge and drastic action on things like the federal debt. So they really were galvanized to want to take action for some of these issues. That's one of the things I remember. I haven't looked at the article recently again.

Vol. 3 Tr. at 37:13-38:10.

Lay witness testimony confirms that Dallas County Anglos are not politically cohesive. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (noting relevance of both statistical and lay witness evidence). Elizabeth Alvarez, one of plaintiffs' attorneys in this case, testified recently in Texas's congressional redistricting case that there was an ideological divide among Dallas County Republicans between Tea Party affiliated voters and those who do not support Tea Party candidates. DX 73-34, 73-35 (acknowledging that it "says something" about political cohesiveness among Dallas County Republicans that there are "ideological lines" and that "there is a Tea Party coalition and a non-Tea Party coalition"); DX 73-35 (Ms. Alvarez testifying that her loss for party chair was "an example of different wings of the [R]epublican party who differ on [an] ideological basis," and that those differences were "politically based"); DX 73-36 (Ms. Alvarez testifying that Republican primary voters "chose to oscillate with Tea Party individuals in [a certain years'] primary. Just an ideological preference").[3] Plaintiff Gregory Jacobs acknowledged knowing a number of "[w]hite Democrats," Vol. 3 Tr. at 11:9-18, and plaintiffs' witness Jeff Turner confirmed the split among Democratic, Tea Party, and mainstream Republican Anglo voters in Dallas County:

> Q: Mr. Turner, just one area I meant to ask you about at your deposition. We talked to you about individuals who voted and the Anglo community which you were familiar with. And you agreed in deposition that Anglos in Dallas County, some vote for tea party candidates, some vote for what I think we referred to as mainstream Republicans and some voted for Democrats. Is that true?

[3] Ms. Alvarez's deposition testimony is admissible. At the time she gave the testimony, she was an agent of the plaintiffs in this case, by virtue of her status as a Board Member of the Equal Voting Rights Institute, which is counsel for plaintiffs in this case. *See* Fed. R. Civ. P. 32(a)(8) (permitting use of deposition taken in earlier action to the extent permitted by the Federal Rules of Evidence); Fed. R. Evid. 801(d)(2)(D) (statements by opposing party's agent admissible and not hearsay). As plaintiffs' agent, Ms. Alvarez's deposition testimony is plainly admissible. Moreover, plaintiffs should not be permitted to shield her admissions from being part of the record in this case by belatedly having her enter an appearance as counsel in this case.

> A: I believe that's a fair assessment of the voting pattern in Dallas County among Anglos.

Vol. 3 Tr. at 150:7-16.

The largest faction—Tea Party affiliated voters—constitutes merely 42% of Dallas County Anglo voters. Given the fractured Anglo vote, and the admissions of plaintiffs' own attorney and witness that Dallas County Republicans are divided ideologically, the undisputed facts in this case support only one conclusion: Dallas County Anglo voters do not "constitute a politically cohesive unit," *Gingles*, 478 U.S. at 56, and thus plaintiffs cannot satisfy *Gingles* prong 2.

Moreover, the absence of Anglo political cohesion is particularly acute among the specific Anglo voters plaintiffs propose to newly add to their proposed remedial Precinct 1 (who are not currently in the Enacted Plan's Anglo-majority Precinct 2). Of the approximately 260,609 new people that plaintiffs added to Precinct 1—with an Anglo-majority CVAP of 53.1%—Democrat Hillary Clinton received 67.7% support in the 2016 general election, while Democratic Sheriff Lupe Valdez received 63.3% support. DX 59-19 (Angle Rebuttal Report). Indeed, despite containing majority Anglo CVAPs, Ms. Clinton and Ms. Valdez carried *both* of the precincts plaintiffs contend are required by Section 2 to elect Anglos' candidates of choice (*i.e.*, Republican candidates). DX 59-24 (Angle Rebuttal Report). Plaintiffs' demonstration plan thus creates a second Anglo-majority precinct only by grouping together the *least cohesive* set of Dallas County Anglos—by including in it the geographic area where Dallas County's *Democratic* Anglo voters are concentrated. Plaintiffs cannot satisfy *Gingles* prong two in this manner—by demonstrating potential Section 2 districts in which Anglo voters are not cohesive and their preferred candidates do not even prevail. The undisputed evidence requires judgment be granted in favor of defendants on plaintiffs' Section 2 claim.

C. Plaintiffs Have Not Met their Burden to Show that Race, Not Politics, Explains the Racially Polarized Voting in Dallas County.

Plaintiffs have not established the *Gingles* preconditions for another reason: although the data show that voting in Dallas County is racially polarized, racially polarized voting is only legally significant for purposes of Section 2 if race, not politics, is the cause. In *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993 (*en banc*), the Fifth Circuit held that it was insufficient for plaintiffs to merely establish the presence of racially polarized voting for Section 2 claims, but rather plaintiffs must show that the voting choices are caused by race, rather than politics, in order for polarized voting to be "legally significant." "The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color.'" *Clements*, 999 F.2d at 850. The Fifth Circuit explained that, were it otherwise, Section 2 would be removed "from its racial tether" and "illegal vote dilution" would become fused with "political defeat." *Id.* Because there is "a clean divide between actionable vote dilution and 'political defeat at the polls," *id.* (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), Section 2 is not satisfied by polarized voting attributable to "partisan affiliation, not race," *id.*

The evidence shows that partisanship and ideology, not race, explains Anglo voting behavior in Dallas County. Plaintiffs' counsel Ms. Alvarez testified that Republican primary choice differences are "politically based," and not race-based. DX 73-35. Plaintiffs Gregory Jacobs testified that it was "correct" that "[t]he aim [he saw] in filing this lawsuit as a plaintiff is to ensure that [he's] able to get more Republicans elected to the county commission," Vol. 3 Tr. at 11:19-23, and that if Commissioner Daniel changed her party affiliation to Republican, he could "maybe" vote for her, *id.* at 4:16-19. Mr. Jacobs likewise testified that politics, not race, explains his voting behavior:

> Q: Now, it's your testimony, I believe, or your position, that you want – if you had a choice between more white members of the county commissioners court or more Republicans on the county commissioners court your preference is for more Republicans?
>
> A: I don't care what shade of skin they have. I just want them to vote the way I appreciate them voting.
>
> Q: That's a little different than the question I asked. Let me see if I can rephrase it for you.
>
> A: I can answer it. I'd rather have more Republicans, yes.
>
> Q: So when you consider the current redistricting plan to be unfair, you think it's unfair because it doesn't have enough Republicans elected. Is that correct?
>
> A: Yes sir. They created it so that the Republican's couldn't win.

Id. at 9:8-23. Likewise, Plaintiff Anne Harding testified that "the redistricting plan for the Dallas County Commissioners Court should have a second Republican leaning precinct," and that the Enacted Plan "was drawn to favor Democrats in Dallas County." Vol. 2 Tr. at 14:1-9. It is clear that plaintiffs' perceived problem with the current plan is political not racial.

Because the evidence shows that politics, not race, drives racially polarized voting in Dallas County, plaintiffs fail to establish legally significant racially polarized voting, as required under the *Gingles* preconditions.

D. Plaintiffs Have Not Met their Burden to Prove that the Totality of the Circumstances Demonstrates a Section 2 Violation.

The totality of the circumstances do not establish a Section 2 violation and plaintiffs have not even meaningfully tried to prove the necessary factors. Nine factors, known as the "Senate Factors," are "essential for weighing the totality of circumstances." *Fairley v. Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009). They are (1) "the history of voting-related discrimination in the State or political subdivision," (2) "the extent to which voting in the elections in the State or political

subdivision is racially polarized," (3) "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," (4) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," (5) "the use of overt or subtle racial appeals in political campaigns," (6) "the extent to which members of the minority group have been elected to public office in the jurisdiction," (7) "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group," (8) "[evidence] that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous," and (9) "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *Id.* at 672-73 (quoting *LULAC*, 548 U.S. at 426 (bracket in original)).

These factors are not given equal weight. "Some of these factors are more important than others—the two most important are the extent to which members of the minority group have been elected to public office and the extent to which voting in the jurisdiction is racially polarized." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991); *Fabela v. Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *13 (N.D. Tex. Aug. 2, 2012) ("It is well established that the existence of racially polarized voting and the extent to which minority group members have been elected to public office are the most important factors to be considered in a totality determination.").

Plaintiffs do not come close to meeting their burden of demonstrating their entitlement to Section 2 relief under the totality of the circumstances. At the outset, plaintiffs only allege the

presence of *four* of these nine factors in their complaint: Factor 1 (history of voting-related discrimination), Factor 2 (racially polarized voting), Factor 5 (overt or subtle racial appeals), and Factor 7 (unresponsiveness to minority group). *See* 2d Am. Compl. ¶ 29, ECF No. 31.[4] Plaintiffs did not even allege—or attempt to present evidence supporting—the remaining five factors, including one of "the two most important," *Westwego*, 946 F.2d at 1120, the extent to which Anglos have been elected to public office in Dallas County (Factor 6). And for good reason—the record proves these factors not only fail to support plaintiffs' Section 2 claim, they actually contradict their Section 2 claim. *See, e.g.*, Vol. 5 Tr. at 120:25-122:1; DX 66-16 (Lichtman Report) (noting three of five Court members (60%) are Anglo, an overrepresentation of their share of the population); Vol. 2 Tr. at 224:22-225:11 (Morse); 235:25-236:7 (Schroer) (testimony of plaintiffs that they have not experienced discrimination in voting on account of being Anglo); DX 75-4; 75-5 (admission of plaintiffs that there is no history of discrimination against Anglos in public accommodations and Anglos do not bear the effects of past discrimination in education, employment, and health); DX 58-88 (map was drawn pursuant to adopted Redistricting Criteria).

Moreover, the evidence demonstrates that Anglos are proportionally represented on the Court, and thus plaintiffs cannot show a lack of equal opportunity to participate in the political process redressable by Section 2. *See De Grandy*, 512 U.S. at 1014-15. In *De Grandy*, Hispanics constituted 47% of the VAP in the Dade County, Florida area and had an effective majority in 45% of the state house seats at issue. *Id.* at 1014. Given these figures, the Supreme Court held plaintiffs

[4] Plaintiffs include in their Senate Factor list "the Anglo minority's proven inability over an extended period to elect its preferred candidates to office (barring exceptional circumstances)," 2d Am. Compl. ¶ 29, ECF No. 31, but that is not one of the Senate Factors, but rather merely a restatement of *Gingles* prong 3—a precondition to consideration of the totality of the circumstances.

had no Section 2 rights to more state house districts. "Treating equal political opportunity as the focus of the enquiry, we do not see how these district lines, apparently providing effectiveness in proportion to voting-age numbers, deny equal political opportunity. . . . [U]nder [the challenged map], Hispanics in the Dade County area would enjoy substantial proportionality." *Id.* This fact, the Court concluded, overcame the strong evidence of historic and current racial strife in the region targeting Hispanics:

> On this evidence, we think that the State's scheme would thwart the historical tendency to exclude Hispanics, not encourage or perpetuate it. Thus in spite of that history and its legacy, including the racial cleavages that characterize Dade County politics today, we see no grounds for holding in these cases that [the challenged plan's] district lines diluted the votes cast by Hispanic voters.

Id. at 1014-15.

De Grandy requires entry of judgment for defendants on plaintiffs' Section 2 claim. Anglos constitute only 31.5% of the total population in Dallas County and 36.3% of the VAP. DX 66-17 (Lichtman Report). In assessing proportionality, however, these figures must be reduced to account for the approximately 23% of Dallas County Anglos who crossover to support black and Hispanic voters' candidates of choice, *i.e.*, Democratic candidates, DX 62-17 (Baretto Report), and who are therefore *not* part of the "minority" (*i.e.*, Anglo Republicans) for whom plaintiffs seek relief. *See, e.g.*, Vol. 3 Tr. at 9:8-18 (testimony of plaintiff Jacobs that he desires more Republicans, rather than more Anglos, on the Court). Republican-supporting Anglos constitute just 24.3% of Dallas County's total population (.77 x .315) and 28.0% of Dallas County's VAP (.77 x .363).[5] *See also* DX 62-20 (Dr.

[5] Total population is the most appropriate metric for considering proportionality of representation. The Supreme Court last year held that total population was an appropriate metric for ensuring compliance with the one-person, one-vote principle of the Equal Protection Clause. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered

Barreto Report, explaining that "[c]ountywide, only about 25 percent of the population can be said to identify as White and Republican. At just 25 percent there is no scenario in which obtaining 50 percent of the four commissioner districts is fair representation"). Under the Enacted Plan, Anglo-supporting Republicans hold one of the four precincts—25%.[6] So Anglo Republican voters hold .7% *more* of the commissioner seats than their share of total population, and just 3% fewer than their share of VAP. In *De Grandy*, Hispanic voters held 2% fewer seats than their share of VAP, a result the Supreme Court considered "substantial proportionality." 512 U.S. at 1014. The figures

---

to vote." *Id.* This principle is all the more salient in assessing proportionality of representation under Section 2, enacted pursuant to the authority granted by those same Framers. *Cf. Fairley*, 584 F.3d at 674 (rejecting use of voter registration figures as metric for proportionality analysis).

Nevertheless, the evidence reflects proportionality for Dallas County Anglos regardless of the metric used. As discussed above, Anglo Republican VAP figures in Dallas County show nearly the exact same proportionality the Supreme Court found for Hispanic VAP in *De Grandy*. And to the extent CVAP is considered—which would be contrary to both *Evenwel* and *De Grandy*—the result is the same. Anglos (including Anglo Democrats) constitute 45.1% of Dallas County's CVAP, DX 66-17, and Anglo Republicans constitute 34.7% (.77 x .451). That number is closer to their current share of the precincts (25%) than the number they seek (50%); using CVAP, the Enacted Plan is only 9% off precise proportionality, versus a 15% difference under plaintiffs' proposed plan. To the extent plaintiffs complain that a more precise proportionality is not attainable, their quarrel is with the provision of the Texas Constitution mandating that each county have only four commissioner precincts, *see* Tex. Const. art. V, § 18(b), which necessarily results in 25-point interval jumps. It would be ironic, to say the least, to conclude that the Voting Rights Act mandates that African American and Latino voters be underrepresented at *15% below* their proportional share of the population in order to prevent White voters from being underrepresented at *9% below* their proportional share.

[6] Plaintiffs count Anglo Democrats in claiming they lack proportional representation as a matter of their share of the population in Dallas County, but fail to count the elected Anglo Democrats on the defendant governing body, where three of the five representatives are Anglo. For purposes of assessing proportionality, Democratic Anglos must be treated consistently on both sides of the scale. If, contrary to the discussion above, they are counted as part of the equation, then elected Democratic Anglos must also be counted. Otherwise, the proportionality assessment does not compare apples to apples, and the resulting analysis is skewed. If Anglo Democrats are included in the assessment, Anglos control 50% of the districted commissioner seats, as well as the countywide-elected Judge seat. Vol. 5 Tr. at 120:25-122:1; DX 66-16 (Lichtman Report).

for Dallas County Anglos are indistinguishable. Moreover, in *De Grandy*, the substantial proportionality defeated a Section 2 claim in spite of the existence of historic and ongoing discrimination against Hispanics. Here, there is substantial proportionality *and* no discriminatory background against Anglos. *De Grandy* controls and requires entry of judgment for defendants on plaintiffs' Section 2 claim.

Even among the factors plaintiffs cite in their complaint, the evidence and trial testimony precludes a finding that the totality of the circumstances establishes a Section 2 violation. First, the evidence shows that while there is a history of voting-related discrimination against Blacks and Latinos in Dallas County, there is no such history against Anglos. *See, e.g.*, DX 66-5 – 66-14; DX 66-33 – 66:34. Plaintiffs' expert Dr. Hood concurred:

> Q: Okay. You haven't analyzed in either of your reports – your main report or your rebuttal report – any previous discrimination against Anglos or lingering effects of past discrimination against Anglos, have you?
>
> A: That's correct.
>
> Q: Okay. In fact, you would agree with me, would you not, that based on your scholarship and your teaching and what you've read, that in southern politics, of which Texas is a part, there's been a substantial and extensive history of discrimination against Blacks and Hispanics, correct?
>
> A: I can't argue with that.
>
> Q: Okay. And, in fact, in the course of your teaching or your scholarship and academic work, you have not found a history of discrimination against Anglos in the south or in Texas, correct?
>
> A: No sir.
>
> Q: In fact, I think you testified at your deposition, "We don't usually talk about it from that perspective"? Correct?
>
> A: I think I could repeat the same thing here in court today. Yes, sir.

Vol. 3 Tr. at 36:4-24; Vol. 5 Tr. at 102:25-103:14 (Lichtman testimony that lingering effects of history of discrimination affects Blacks and Latinos, not Anglos).

Because the totality of the circumstances inquiry is specific to the racial group seeking relief, plaintiffs cannot piggyback on Blacks and Latinos' history of enduring voting-related discrimination in Dallas County. *See LULAC*, 548 U.S. at 425-26 ("[T]he statutory text directs us to consider the 'totality of circumstances' to determine whether members of *a racial group* have less opportunity than do *other* members of the electorate." (emphasis added)). Plaintiffs have not established the presence of Factor 1.

Second, plaintiffs did not meet their burden to show the extreme polarization typically present in cases where plaintiffs prevail. For one, plaintiffs' evidence from Dr. Hood as to racially polarized voting is based upon flawed data sets provided by Dr. Morrison. Defendants demonstrated in cross-examination of Dr. Morrison that individual voting precincts were dropped out of these data sets with no rhyme or reason. Vol. 2. Tr. at 62:24-63.6; *id.* at 64:8-22. Also, Dr. Morrison expected his data to be quality controlled by Dr. Hood, as much is noted in the data set itself, but Dr. Hood did not perform this quality control. Vol. 2 Tr. 118:13-17; *id.* at 146:25-147:8; *See also* Vol. 3. Tr. at 51:15-52:3. The sloppiness of plaintiffs' racially polarized voting evidence, the only such evidence before the Court, prevents the Court from weighing the severity of the polarization. Although defendants' experts did not dispute the existence of racial polarization in Dallas County, plaintiffs did not meet their burden to prove the severity necessary to establish this totality of circumstances factor, one of the two most important.

Also, plaintiffs cannot meet this factor for the same reason plaintiffs' fail at *Gingles* prong two, the evidence proves that to the extent Anglos bloc vote in Dallas County, partisanship, not race,

explains their decision. *See* DX 73-35 (testimony of plaintiffs' attorney Elizabeth Alvarez that split in Republican primary is along ideological, not racial, lines); Vol. 2 Tr. at 224:4-16 (testimony of plaintiff Morse that her complaint against her commissioner is that he is insufficiently conservative); Vol. 3 Tr. at 4:16-19; 8:13-22; 9:8-23; 14:16-24 (testimony of plaintiff Jacobs that he wants more Republicans, rather than more Anglos, on Court; that he has no issue disagreement with his commissioner and would maybe support her if she were a Republican, that he has no problem being placed in Commissioner Price's district under plaintiff's proposal, and that his vote for commissioner is based upon party label and nothing else).[7]

Third, plaintiffs' allegation in their complaint of "the Commissioners Court's demonstrated unresponsiveness to its Anglo minority," 2d Am. Compl. ¶ 29, ECF No. 31, runs headlong into plaintiffs' own contrary testimony at trial. *See* Vol. 2 Tr. at 230:21-231:4; 236:8-11 (testimony of plaintiff Schroer that he did not attend redistricting hearings and was unaware of other commissioners' identities aside from Commissioner Cantrell); Vol. 2 Tr. at 221:17-222:16; 223:2-16; 224:17-225:16 (testimony of plaintiff Morse that she is unsure who her commissioner is, has never contacted him or her, believes her commissioner does not represent her values, but cannot identify any of those values; and has never sought any service or information from Dallas County in

[7] Moreover, the evidence shows that the two Anglo-majority districts plaintiffs advocate do not exhibit significant racial polarization; both were won by Democratic presidential and sheriff candidates despite strong Anglo majorities (55.1% and 65.2%). DX 59-19, DX 59-24 (Angle Rebuttal Report); Vol. 5 Tr. at 16:6-15 (testimony of Dr. Baretto that performance analysis of plaintiffs' proposed Anglo majority CVAP districts shows they would not perform to elect Anglos candidate of choice); *id.* at 20:4-7 (testimony of Dr. Baretto that "a fairly sizable number – and it's actually growing – of Anglos in North Dallas also vote Democrat.). The victory by the Black and Hispanic voters' candidates of choice in plaintiffs' proposed Anglo-majority precincts illustrates the lack of political cohesion among the specific Anglo voters plaintiffs include in them, and thus the absence of racially polarized voting in the precise geographic area plaintiffs' contend Section 2 requires Anglo opportunity districts be drawn.

which the County was unresponsive or unhelpful); Vol. 3 Tr. at 8:3-22; 10:11-17 (testimony of plaintiff Jacobs that he has no personal issue with any commissioners and cannot identify any issues with which he disagrees with Commissioner Daniel's votes); Vol. 2 Tr. at 10:22-11:12 (testimony of plaintiff Harding that she has never contacted any commissioner).

In Section 2 cases where responsiveness of the elected body is at issue, successful VRA plaintiffs are able to point to specific instances where the elected body voted against their specific interests. These plaintiffs have offered no such evidence. Two of plaintiffs' witnesses complained that a white elections administrator, with a disputed performance history, chose to resign shortly after the Democratic majority was sworn into the Commissioners Court. None of the plaintiffs expressed any concerns about this issue at trial. And the evidence on this issue was weak at best, and hardly would support a finding that the Commissioners' Court has been unresponsive. Indeed, a number of plaintiffs could not identify any issue or vote the commissioners took on which they disagreed. Contrary to plaintiffs' allegation, their own testimony at trial is that the Court has been fully responsive to their requests for information or service (to the extent they had any), displaying no discrimination on account of their status as Anglos. The evidence certainly precludes a finding that Factor 7 favors plaintiffs.

Indeed, the only factor that plaintiffs made any real effort to establish was the presence of overt or subtle racial appeals (Factor 5). Plaintiffs evidence on this factor—the expert report and testimony of Dr. Voth—is unreliable and methodologically unsound. The sole basis for Dr. Voth's conclusion that there are racial appeals in Dallas County elections is his application of the Toulmin "methodology" to "ascertain and assess arguments" premised upon racial appeals among 800 pages

of material *handpicked by plaintiffs' counsel* and an internet search at SMU library. On cross examination, Dr. Voth testified:

> Q: So let me get the universe of data that you used to reach these conclusions?
>
> A: Okay.
>
> Q: Number one was the 800 pages that were supplied to you by your attorney, Dan Morenoff, is that correct?
>
> A: That's correct.
>
> Q: That's one of the sources?
>
> A: That's right.
>
> Q: And then another source was apparently you used the library at SMU?
>
> A: That's correct.
>
> Q: Where you put in the key words – what were the key words that you put in there to get the articles that you needed?
>
> A: Race terms and election.
>
> Q: Okay. So your whole analysis was based on those two groups of data; is that correct?
>
> A: Yes. Those two studies, right.

Vol. 3 Tr. at 188:6-23. With respect to the 800 pages provided by plaintiffs' counsel, Dr. Voth testified that he "did not know how it was gathered," had "no idea" as to "the basis of those 800 articles," and acknowledged the articles occurred after the 2011 redistricting. *Id.* at 189:3-14; 200:15-21. Likewise, Dr. Voth testified that he was "not aware of any federal court cases on voting rights that have used the Toulmin model." *Id.* at 191:12-17.

As Dr. Baretto explained in his report, DX 63-12 – 63-19 (Baretto Rebuttal Report), and in his trial testimony, Dr. Voth's methodology should be rejected. Dr. Baretto testified that Dr. Voth

provided little analysis of county commissioner races, provided no methodology to determine whether he obtained a representative sample, and noted that "[h]e has to tell us whether or not the events were characterized by racial appeals which suggests some inference or some rate, and none of that was done." Vol. 5 Tr. at 32:13-25. Moreover, Dr. Baretto noted that Dr. Voth had not "answer[ed] how typical or atypical these events are," but rather "just gives us account of some statements that were made by some reporters or others. And so in no way would we consider this from a political science perspective an analysis of campaign events." *Id.* at 33:1-6. Moreover, Dr. Baretto explained that social scientists have developed an extensive published methodology for how these content analyses should be performed and Dr. Voth had not followed any of the "very detailed methodology of how these studies should be done." *Id.* at 33:9-34:1.

Dr. Voth's analysis is plainly unreliable, and should not be credited. But in any event, even if it was due any weight, the presence of a *single* factor—out of nine—is insufficient, as a matter of law, to establish that the totality of the circumstances supports imposition of Section 2 liability. Indeed, in *Fairley*, the Fifth Circuit affirmed the district court's rejection of a Section 2 claim where "[t]he only factor found by the district court weighing in favor of the plaintiffs was the second, namely, the existence of polarized voting . . . ." 584 F.3d at 673. If it is insufficient for a Section 2 claim if the single factor favoring plaintiffs is one of "the two most important," *Westwego*, 946 F.2d at 1120, then plaintiffs have not met their burden of proof when the only factor claimed to be established is *not* one of the two most important.

Plaintiffs provided little or no evidence for all but one of the nine relevant factors for assessing the totality of the circumstances, and their only evidence for the remaining factor is a biased and methodologically unsound study using an approach never before credited by a federal court in

a voting rights case. Plaintiffs have fallen far short of showing, by a preponderance of the evidence, that the totality of the circumstances warrants finding a Section 2 violation.[8]

Plaintiffs have not met their burden of proof to establish *Gingles* prongs 1 or 2, and have not established entitlement to relief under the totality of the circumstances. Defendants are entitled to judgment in their favor on plaintiffs' Section 2 claim.

III. Plaintiffs Have Not Met Their Burden to Prove Intentional Vote Dilution.

Plaintiffs have not met their burden to prove that the Enacted Plan was the product of intentional, racial discrimination aimed at diluting the voting strength of Dallas County Anglo voters. Redistricting legislation constitutes unconstitutional intentional vote dilution (through cracking and/or packing) in violation of the Fourteenth Amendment's Equal Protection Clause if it is "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotation marks omitted). Plaintiffs must prove "racially motivated discrimination" to prevail on a Fourteenth Amendment vote dilution claim. *Perez*, 2017 WL 3495922, at *10. "'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). It is not enough for plaintiffs to show that the governing body was aware of race while drawing district lines, because "'the legislature always is *aware* of race when it draws district lines,'

[8] Indeed, as Dr. Lichtman has explained, the Senate Factors all point to a history of discrimination against Blacks and Latinos in Dallas County, not against Anglos. DX 66-23 – 66-34 (Lichtman Report).

just as it is aware of a variety of demographic factors." *Perez v. Abbott*, 253 F. Supp. 3d 864, 941 (W.D. Tex. 2017) (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993). Thus, "[p]roving the motivation behind official action is often a problematic task," *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), and plaintiff must present evidence sufficient to permit the Court to undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Vill. of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

In assessing "whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking," *Perez*, 2017 WL 3495922, at *10, courts look to the factors set forth in *Arlington Heights*. The "important starting point" for the *Arlington Heights* analysis is "the impact of the official action whether it bears more heavily on one race than another." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997) (quoting *Arlington Heights*, 429 U.S. at 266). The other factors include "historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes," "the specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and "[t]he legislative . . . history[,] . . . especially where there are contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 267-68.

Finally, if plaintiffs prove discriminatory intent, they must also show some discriminatory effect on the members of the targeted racial group. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 942 (W.D. Tex. 2017) ("To prove intentional vote dilution under the Fourteenth Amendment, plaintiffs must show both discriminatory purpose and discriminatory effect.").

Texas's 2011 congressional redistricting plan in the Dallas-Fort Worth ("DFW") area provides an illustrative example of the kind of evidence and analysis a plaintiff must provide for the Court to make a finding of intentional vote dilution. In *Perez*, plaintiffs put on evidence that the legislature had a "hostility to minority districts," 253 F. Supp. 3d at 950, the mapdrawer testified that they were "always conscious of the [race] numbers, and so we would look at them throughout the process before moving forward with the map," *id.* (quotations marks omitted), and the mapdrawers exchanged emails proposing a "nudge factor" designed to "manipulate districts to increase Hispanic population metrics while keeping [Spanish Surname Voter Registration] and Hispanic turnout low." *id.* Moreover, the existing African American opportunity district was only slightly overpopulated and no additional black population was needed for VRA compliance, yet the district was "changed significantly," with 31 split precincts on its borders that "were generally unexplained by . . . any defense witness." *Id.* at 951. The mapdrawers used data "below the precinct level" to draw the map, for which "accurate racial data is available . . . [and] accurate political data is not . . . suggesting that many precinct splits have a racial basis." *Id.* at 952. The *Perez* plaintiffs also proved that "the bizarre shapes of the districts and the numerous split precincts, which indicate the use of racial data, support an inference that the mapdrawers intentionally used racial criteria to split the minority population." *Id.* at 953. The evidence showed that "most of the district lines in Dallas County do not appear to particularly follow city boundaries or have obvious non-racial bases." *Id.* n. 121. "More importantly," the court noted, "the map looked as though mapdrawers started out with the district they wanted to avoid, and then carved it up into pieces," as demonstrated by "the progression of the maps." *Id.* at 954. Altogether, this evidence, plus the presence of the *Arlington Heights* factors, led the court to conclude "that mapdrawers intentionally packed and cracked on the

basis of race (using race as a proxy for voting behavior) with the intent to dilute minority voting strength." *Id.* at 955.

This case is nothing like *Perez*. In stark contrast to the *Perez* plaintiffs' substantial showing of discriminatory intent with respect to linedrawing in the 2011 congressional map in DFW, and the *Perez* plaintiffs showing under the *Arlington Heights* framework, here plaintiffs' intentional vote dilution claim fails for a fundamental reason: *they offered no evidence to support it*. Plaintiffs' expert Dr. Morrison provided an analysis of a reconstructed version of the Enacted Plan, suggesting that various city splits he identified provided indicia of an intent to crack and pack Anglo voters, but he analyzed the wrong map. DX 59-1 – 59-9 (Angle Rebuttal Report). Rather than use precinct boundaries to construct the map (as the County had), plaintiffs used census blocks. Vol. 2 Tr. at 62 (Q: "And the way he went about recreating that map is he used census blocks and reconstructed the map to look as closely as he could with the map that the county had adopted. Isn't that a fact?" A: "That's correct."); *id.* at 70:18-23 (use of census blocks possible factor in differences between actual Enacted Plan plaintiffs' reconstruction of it). Analyzing the wrong map, Dr. Morrison opined that the Enacted Plan had sixteen city splits, but a number of those do not actually exist in the real Enacted Plan, and the evidence shows the others are split for race-neutral reasons. *See* DX 59-6 (Angle Rebuttal Report); Vol. 4 Tr. at 142:24-148:25 (testimony of Mr. Angle that splits identified by Dr. Morrison in Coppell, Balch Springs, Grand Prairie, and Cedar Hill do not exist, and other splits, such as in Irving, were necessary because of size of city or reflected decisions about race-neutral factors, such as the inclusion of a Road and Bridge office at Commissioner Dickey's request).

Testifying about his city split analysis, Dr. Morrison explained at trial that his analysis *was not finished yet*.

> Q: All right. If the court ultimately determines nearly half of the city splits that you've identified are actually not split at all in the 2011 plan, I guess then it's your testimony that still doesn't matter?
>
> A: Oh, it does matter. It would – it would correct the total counts, and I would then want to look at whether there still remain instances of offsetting boundary splits where territory was added at one place and subtracted at another. So, as I say, this is a – an unfinished portion of my analysis.

Vol. 2 Tr. at 113:16-25. Subsequently, Dr. Morrison explained that the city splits were not the key to proving intent, but rather merely the number of Anglos in district 2. *Id.* at 115:20-116:5 ("[I]t doesn't have anything to do with these splits. It has to do with the simple tabulation of demographic data that are shown in the table that demonstrate without a doubt – without any question and having nothing to do with these maps. It is beyond any question that the boundaries have been drawn in such a way that whites are excessively concentrated which is known as packing, and they are scattered among the other districts which is known as cracking."). Dr. Morrison was clear, however, that his "packing" conclusion was not premised on any evidence of racially discriminatory intent and he even disavowed that Dallas county's Enacted Plan was drawn with discriminatory intent:

> Q: I want to transition and talk about an intent analysis, because what you did when you were with Mr. Morenoff earlier is indicate that you see from the statistics intent; is that right?
>
> A: I didn't s[ay] I saw intent. I said there are patterns that would be consistent with a single-minded purpose.
>
> Q: You would need to see the other factors in order to make that judgment as a matter of fact that the Commissioners Court operated with a discriminatory intent, wouldn't you agree?
>
> A: I – I didn't say that anybody operated with a discriminatory intent. I said it was simply that it is consistent with a single-minded purpose, which was to pack whites in a single district.

Vol. 2 Tr. at 106:10-23. So this supposed "single-minded purpose" conclusion derives merely from the top-line demographic statistics of the districts, *and nothing else*. It hardly bears saying, however, that plaintiffs cannot prove discriminatory intent by merely introducing the demographic statistics for the challenged districts. *See* Vol. 5 Tr. at 113:19-115:21 (testimony of Dr. Lichtman explaining that demographic analysis alone does not show packing and cracking, but rather political analysis is necessary and the votes-to-seats ratio shows that Anglos fare much better in Dallas County than do Blacks and Latinos in surrounding counties, despite being similarly situated demographically). Plaintiffs' burden is to prove that the actual *reason* for those numbers was an invidious, racially discriminatory intent. They have not even attempted to do so here.

Dr. Morrison also disclaimed any view of whether the *Arlington Heights* factors indicated a discriminatory purpose. In fact, he had never heard of *Arlington Heights*, *id.* at 107:17-22, and testified he had done no such analysis:

> Q: You haven't viewed any of the recordings of the Commissioner Court in this case; is that true?
>
> A: Correct.
>
> Q: You haven't reviewed any of the testimony of people who showed up and spoke at the public meetings, have you?
>
> A: No I have not.
>
> Q: You haven't reviewed any of the documents or materials that the county produced to Mr. Morenoff and the plaintiffs concerning the redistricting process, other than the maps and the data, isn't that true?
>
> A: That's true.
>
> Q: And you'd agree with me that if somebody was going to have the opinion that a plan was adopted with a discriminatory intent, somebody would have to look at all those things too, would they not?

> A: If they wanted to establish firmly what the intent was. I can say what the effect was and I can say it seems to derive from a single-minded purpose.

Vol. 2 Tr. at 108:3-20. As Dr. Lichtman testified, plaintiffs offered no evidence of intent at all. *See* Vol. 5 Tr. at 92:13-18 (Q: "Did any of the expert witness reports for the plaintiffs provide any analysis of discriminatory intent or critique your analysis of intent?" A: The answer on both grounds is no. In fact, the word 'intent' does not appear in either the text or tables of any initial or response reports by experts for plaintiffs.").

Although plaintiffs provided the Court with no *Arlington Heights* analysis, Dr. Lichtman analyzed those intent factors and found that none of them indicated a discriminatory intent. *See* DX 66-5 – 66-23. Indeed, the only procedural departure Dr. Lichtman identified—the swapping of precinct numbers in the final Enacted Plan—resulted from a dispute between two Anglo Republican members of the Commissioners Court, and was designed to assist Commissioner Cantrell (one of the Anglo Republican incumbents) in preparing for his next election. DX 66-23; Vol. 5 Tr. at 96:3-21 (testimony of Dr. Lichtman that precinct switch "involved a quarrel between the two Anglo Republicans on the Commissioners court" and was "very beneficial for the Anglo Republican to have a couple of years before his first election to get to know and familiarize himself with the new district").

Plaintiffs have offered no evidence whatsoever on intent, and their claim fails without even considering the contrary evidence provided by defendants. But that evidence underscores that permissible, neutral factors motivated the creation of the Enacted Plan. The Commissioners unanimously adopted lawful and neutral redistricting criteria, DX 58-88, to guide the drawing process. Mr. Angle testified that he never turned on the racial shading when he was drawing the map, but rather only after he had completed his work to ensure that the plan complied with the

VRA obligations to retain an African American and a Latino opportunity district. Vol. 4 Tr. at 153:12-18; 153:25-154:10. Rather, during the mapdrawing process, Mr. Angle "used political data and geographic data, [and] population data." *Id.* at 153:19-22.

Mr. Angle explained the process by which he drew the plan and his motivation for the linedrawing choices. He started with heavily overpopulated Precinct 4 to reduce its population, maintain its geographic core, and retained its ability to elect Hispanic voters' candidates of choice (and thus prevent Section 5 retrogression). DX 58-9; Vol. 4 Tr. at 150:14-22. Next, he worked to increase Precinct 1's (later renumbered Precinct 2) population and to create a strongly conservative "Tea Party" precinct in accord with Anglo Commissioner Dickey's (R) request. DX 58-10; Vol. 4 Tr. at 158:11-24. Then he worked to decrease Precinct 3's population, maintain its geographic core, and address concerns the district had become packed with racial and language minority voters—a Voting Rights Act concern, and retained its ability to elect black voters' candidates of choice (and thus prevent Section 5 retrogression). DX 58-10; Vol. 4 Tr. at 151:7-152:17. Finally, he worked to retain much of Precinct 2's core territory while uniting neighborhoods in east Dallas and other more urban communities. DX 58-10; Vol. 4 Tr. at 152:18-153:11 (testimony of Mr. Angle that this was the "last district drawn" and "[a]fter [he] had drawn districts 4 and 1 and 3, then this was largely unassigned area at that point").

Nothing about this process is conceivably discriminatory. Rather, the mapdrawing followed neutral criteria, and the district about which plaintiffs complain was drawn at the specific request of Commissioner Dickey in order to preserve a strongly conservative, Tea Party district. Moreover, even if plaintiffs had offered an iota of evidence of discriminatory intent, the evidence is clear that the Enacted Plan has no discriminatory effects. Plaintiffs have not offered any evidence of

disagreements with the decisions of the Commissioners Court or of unresponsiveness to their needs on account of being Anglo. *See supra*. Plaintiffs' intentional vote dilution claim fails.

* * *

Plaintiffs bore the burden of proof at trial to prove, by a preponderance of the evidence, each element of their Section 2 and intentional vote dilution claims. They have fallen far short of that burden, and defendants are entitled to judgment on all of plaintiffs' claims.

CONCLUSION

For the foregoing reasons, the Court should enter judgment against plaintiffs and in favor of defendants.

Dated this 11th day of May 2018.

Respectfully submitted,

BRAZIL & DUNN
/s/ Chad W. Dunn

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

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

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

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

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2018, a true and correct copy of the foregoing was served by the Court's Electronic Case Filing System on all counsel of record.

By: */s/ Chad W. Dunn*