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

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' POST-TRIAL BRIEF

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As instructed by the Court at trial, the Plaintiffs submit the following response to the Defendants' Post-Trial Brief.[1]

I. SUMMATION

The Defendants' Post-Trial Brief makes up in brazenness what it lacks in fidelity to binding authority and the evidentiary record.

The Defendants get the law wrong on literally every issue they discuss. The Court has already ruled on the proper standard for standing; the Defendants reject that ruling and argue for another. To claim that the Plaintiffs have not met their burden under *Gingles* I,[2] the Defendants both: (a) import a functionality requirement that has never been a part of any plaintiffs' burden in redistricting litigation; and (b) disregard on-point, binding, Court-of-Appeals' authority to the contrary to fabricate a requirement that Plaintiffs must not only respect traditional redistricting criteria, but also adhere to *precisely* the criteria selected by the Defendants. To conjur a failure to meet the Plaintiffs' burden under *Gingles* II, the Defendants propose a standard for gauging primary elections never before used to assess any racial minority's preferences. Ignoring the language of the actual decision and 25-years of case-law following its announcement, the Defendants' argue that *LULAC v. Clements* imposes on the Plaintiffs a standard no court has ever read it to create.[3] They then misstate the meaning of numerous factors courts often consider in gauging, under the totality of the circumstances, whether redistricting plans deny racial minorities their statutory rights, offering: (i) a recharacterization of success at the polls as an entitlement to office-holders of particular races; (ii) an utterly novel theory that the proportionality of a racial

[1] Dkt. 135.
[2] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[3] 999 F.2d 831 (5th Cir. 1993) (*en banc*).

minority's electoral opportunities must discount their numbers to reflect the fractional dissent within the community; and (iii) a flat-out-wrong description of what case-law has found to constitute a significant lack of responsiveness. Finally, they thoroughly misstate the law concerning intentional vote dilution, seemingly contending that the Voting Rights Act (the "VRA") does not bar it.

Unsatisfied with getting all the applicable law wrong, the Defendants misstate nearly the entire record before the Court, trying to shoe-horn it into legal conclusions that do not fit. They: (a) get wrong the traditional redistricting criteria considered by the Plaintiffs' expert Dr. Morrison in crafting an alternative plan for the Plaintiffs; (b) ignore Dr. Morrison's clear, largely undisputed, conclusion that the map he crafted does as good a job as the enacted plan, or better, in meeting both those criteria and in meeting nearly all those preferred by the Defendant*s*; (c) ignore the uniform, endogenous and near-endogenous data, preferring to claim that the only evidence of Anglo cohesiveness is their set of cherry-picked, exogenous elections; (d) ignore the admissions by *all* of their *own experts* that Dallas Anglos have cohesive preferences; (e) misstate both: (i) the number of factors courts have recognized as relevant to the "totality of the circumstance[;]"[4] and (ii) the number of "totality" factors proven in the record;[5] and (f) conflate the absence of opinion testimony from an "intent expert" with the absence of proof of intent.

On only one subject are the Defendants' clearly right: as the analysis below (coupled with that in the Plaintiffs' Post-Trial Closing Brief[6]) makes abundantly clear, "[t]his is not a close case."

[4] There are ten (10), not nine (9).
[5] There are seven (7), not four (4) (as they claim the Plaintiffs pled) or one (1) (that they claim, alone, was supported by evidence at trial.
[6] Dkt. 134.

II. ARGUMENT

The Defendants misstate settled law in four (4) different areas. They argue for erroneous standards concerning: (a) the Plaintiffs' standing; (b) the Plaintiffs' burden under the first *Gingles* precondition; (c) the Plaintiffs' burden under the second *Gingles* precondition; and (d) the meaning and impact of *Clements*.[7]

A. CORRECTION OF DEFENDANTS' ERRORS OF LAW

1. Established Standard for Plaintiff Standing

The Plaintiffs have previously briefed, and the Court has previously rejected, the Defendants' novel proposed standard for the standing of Plaintiffs asserting statutory claims under Section 2 of the VRA.[8] The Court has specifically ruled that standing "requires that a litigant establish three elements: (1) injury-in-fact that is concrete and actual or imminent, not hypothetical; (2) a fairly traceable causal link between the injury and the defendant's actions; and (3) that the injury will likely be redressed by a favorable decision."[9] The Court held that, in the VRA § 2 context, this standard is satisfied where "the manipulation of districting lines fragments politically cohesive minority voters among several districts . . . and thereby dilutes the voting strength of members of the minority population."[10] More specifically, the Court held that "a vote dilution plaintiff" has standing if that plaintiff "show[s] that he or she (1) is registered to vote and resides in the district where the discriminatory dilution occurred; and (2) is a member of the minority group whose voting strength was diluted."

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[7] *Clements*, 999 F.2d 831.
[8] Plaintiffs' Briefing at: Dkt. 89, 98, and 102; Defendants' Briefing at: Dkt. 92, 93, and 95; Court's Ruling at Dkt. 106.
[9] Dkt. 106 (citing *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009)).
[10] *Shaw v. Hunt*, 517 U.S. 899, 914 (1996).

Ignoring this ruling, the Defendants nonetheless argue that the Plaintiffs lack standing, because they suffered no *additional* harm, beyond Dallas's intentional dilution of their community's voting strength. The law of the case has been established to the contrary and their arguments are now moot.

2. *Gingles* I Means Only What it Says

a. No Functionality Component

The first *Gingles* pre-condition requires plaintiffs to show that their minority group is "sufficiently large and geographically compact to constitute a majority in a[n additional] single-member district[.]"[11]

Despite the Defendants' insistence, nowhere does it require plaintiffs to reconstitute elections to predict what would happen in such a district. Indeed, the Fifth Circuit has specifically held that "the ultimate viability and effectiveness of a remedy is considered at the remedial stage of litigation and not during analysis of the *Gingles* preconditions."[12] More, the most recent three-judge panel to address this issue specifically "reject[ed the] position that a district provides opportunity only if the district would allow minority voters to elect their candidate of choice more than 50% of the time in an exogenous election index. Section 2 does not require that minority-preferred candidates would win some number of exogenous … elections in a proposed district."[13]

These directives from higher courts are flatly incompatible with the Defendants' assertion that *Gingles* I requires § 2 plaintiffs to demonstrate the "functionality" of their proposed

[11] *Sensley v. Albritton*, 385 F.3d 591, 595 (5th Cir. 2004) (quoting *Clark v. Calhoun Cnty., Miss.*, 21 F.3d 92, 94-95 (5th Cir. 1994)).
[12] *Gonzalez v. Harris County*, 601 Fed. Appx. 255, 261 (5th Cir. 2015) (citing *Rodriguez v. Harris County*, 964 F.Supp.2d 686, 745 (Tex. S.D. 2013), in holding that lower "court's analysis conforms with the requisite approach.").
[13] *Perez v. Abbott*, 253 F. Supp. 3d 864, 882 (W.D. Tex. 2017).

opportunity districts.

b. Actual Place of Traditional Redistricting Criteria

The Fifth Circuit has held that the *Gingles* I language requiring plaintiffs to show that their group is "sufficiently … geographically compact to constitute a majority in a[n additional] single-member district" requires courts to "account for traditional redistricting principles" and assure that "plaintiffs … present an illustrative plan adhering to comparably consistent principles – not necessarily principles identical, or subjugated, to a locality's exact prioritization, but simply those within the confines of a 'well-developed, legally-adequate plan that can be adjusted' at the remedial stage."[14] The Fifth Circuit specifically upheld a district court's rejection of the position advanced by the Defendants in this case, instead accepting that "it would be unfair to require Plaintiffs to draw maps in strict accordance with the County's priorities[.]"[15]

Under binding authority, the Defendants are wrong. If the Plaintiffs show that their illustrative map is comparably consistent with traditional redistricting criteria, they satisfy this embedded component of compactness.

3. *Gingles* II: Actual Meaning of Bloc-Voting

The second *Gingles* precondition requires plaintiffs to show that their minority group is "politically cohesive[.]"[16] This Court has previously observed that "racially polarized voting, i.e., 'where there is a consistent relationship between [the] race of the voter and the way in which the voter votes,' … tends to prove that the 'minority group members constitute a politically cohesive unit,' under the second *Gingles* prong[.]"[17] That's all that the precondition requires: a showing

[14] *Gonzalez*, 601 Fed. Appx. at 260 (citing *Fairley v. Hattiesburg*, 584 F.3d 660, 661 n.14 (5th Cir. 2009)).
[15] *Gonzalez*, 601 Fed. Appx. at 261.
[16] *Sensley v. Albritton*, 385 F.3d at 595 (quoting *Calhoun Cnty.*, 21 F.3d at 94-95).
[17] *Benavides v. Irving I.S.D.*, 2014 U.S. Dist. LEXIS 113239, *31-*32 (N.D. Tex. 2014) (internal citations omitted).

that "there is a consistent relationship between [the] race of the voter and the way in which the voter votes."

The Defendants would like the prong to require more. They would like it to require unanimity across racial minorities in primary elections. But that is not the law. No court has ever held that the existence of contested primaries is sufficient to disprove group cohesion. The Defendants' contention to that effect is pure fiction, relying on misplaced references to judicial recognition of differences between the consistent preferences of *different* racial minorities.[18] The Court should not be fooled by this rhetorical sleight of hand.

4. No Court Has Ever Ruled as the Defendants Read *Clements* – Not Even the *Clements* Court

According to the Defendants, *Clements* requires plaintiffs to demonstrate "that the voting choices" of Dallas's Anglo minority and ruling majority "are caused by race, rather than politics, in order for polarized voting to be 'legally significant.'"[19] But that's not what *Clements* says – the *Clements* court expressly held that it "need not resolve … today" whether "the racial bloc voting inquiry" requires "a determination whether or not divergent voting patterns are attributable to partisan differences or an underlying divergence in interests [that] best captures the mandate of § 2."[20] Instead, it "recognize[d] that even partisan affiliation may serve as a proxy for illegitimate racial considerations[.]"[21]

Perhaps for this reason, despite the dozens of intervening, successful, vote-dilution cases litigated within the Fifth Circuit since 1993, ***no*** trial court has ***ever*** imposed the burden the

[18] Dkt. 135, p. 21.
[19] Dkt. 135, p. 25 (citing *Clements*, 999 F.2d 831 (5th Cir. 1993 (*en banc*)).
[20] *Id.* at 860.
[21] *Id*. at 860-61.

Defendants today argue the Plaintiffs must meet. Indeed, the Defendants' exact position has been repeatedly rejected.[22]

The Defendants' misreading of *Clements* is simply bad law. The Plaintiffs had no such burden and *Clements* provides no barrier to the Court finding that the Plaintiffs have satisfied *Gingles'* second and third preconditions.

5. Miscontrued "Totality-of-the-Circumstances" Factors

Finally, for the Court's assessment of whether, under the totality of the circumstances, Dallas's enacted plan denies its Anglo minority an equal opportunity to participate in the political process and elect their preferred Commissioners, the Defendants utterly misconstrue the meaning of several relevant factors. They argue for a definition of electoral success that wars with both the language of the statute and binding case law. They present a version of proportionality of opportunities totally foreign to American law. And they thoroughly misrepresent what Courts have found to constitute a "significant lack of responsiveness" to minority races.

a. Success at the Polls Looks to Success of Minority Voters, not at Success of Candidates That Look Like Them

The Defendants correctly note that there are a number of factors courts traditionally consider in determining whether dilutive maps deny plaintiffs' racial minorities an equal opportunity to participate in the electoral process and elect their preferred candidates. But they

[22] *Terrebonne Parish Branch NAACP v. Jindal*, 2017 U.S. Dist. LEXIS 135194, *48-*49 (M.D. La. 2017) (following *Clements* in holding that "a plaintiff does not need to bring forward 'conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus.' By introducing sufficient statistical evidence of [racial bloc voting], the plaintiff effectively shows that race played a role at the polls. Once this showing is made, the burden then shifts to a defendant to show that race did not play a role in these elections and that other race-neutral factors explain the voting outcomes."); *Perez*, 253 F. Supp. 3d at 906 n. 56 (recognizing that the parties – including the plaintiffs represented *by all 3 lawyers for the Defendants in this case* – "vigorously dispute the application of *Clements* and whether the role of partisanship must be disproved as a cause of racial voting behavior" before declining to "address this dispute[.]").

immediately invert the meaning of one of those factors, turning it into something expressly forbidden by Congress in the VRA and at odds with binding precedent stretching back all the way to the *Gingles* decision itself.

The Defendants describe the factor dealing with the electoral success of minority races, one of the two most important under a whole line of cases,[23] as "the extent to which members of the minority group have been elected to public office."[24] But that reading of the factor would put it directly at odds with the actual language of the VRA, which expressly focuses on the "opportunity" afforded minority races "to participate in the political process and to elect representatives of their choice[,]" while specifically stating that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion of the population."[25] More, it would put it at odds with binding authority reaching back to the *Gingles* decision, in which the Supreme Court clarified that this factor focuses on the ability of minority voters to *elect* their preferred candidates, not the ability of minority candidates to prevail.[26] As the Supreme Court put it, "unless minority group members experience substantial difficulty *electing* representatives of their choice, they cannot prove that a challenged mechanism impairs their ability 'to elect….' By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that ¶ 2 plaintiffs prove their claim before they may be awarded relief." (emphasis added). Later precedent, repeatedly, came to the same conclusion.[27]

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[23] See, for example, *Westwego Citizens v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991); *Fabela v. Farmers Branch*, 2012 WL 3135545, at *13 (N.D. Tex. Aug. 2, 2012).
[24] Dkt. 135, p. 27.
[25] 52 U.S.C. § 10301(b).
[26] *Gingles*, 478 U.S. at 48 n.15.
[27] *LULAC v. Perry*, 548 U.S. 399, 436-42 (2006) (holding VRA §2 to forbid drawing of district to protect a Hispanic incumbent from Hispanic voter opposition); *see* also, *Sanchez v. Colorado*, 97 F.3d 1303, 1320-21 (10th Cir. 1996), (recognizing that while the "*Gingles* majority" "concluded [that] the candidate's race is never irrelevant[,]" it "is 'of less significance than the race of the voter[,]" before announcing that "the VRA ensures members of a protected class equal opportunity 'to elect representatives of their choice,' not 'necessarily members of their class.'") and

Even if the Court agrees to consider the race of office holders as an additional detail potentially relevant to the totality of the circumstances, these binding authorities would require it to consider (and weigh as one (1) of the two (2) most important factors) the success that Dallas's Anglo community has achieved or failed to achieve in electing its preferred candidates to the Commissioners Court.

b. Proportionality Looks to Opportunities Afforded Minority Group *as a Whole* to Elect Its Preferred Candidates, Without Discount

The Defendants further misconstrue the same factor, by seeking to reframe the Plaintiffs' diluted minority as "Anglo Republicans" rather than Anglos.[28] Through this sleight of hand, they talk around the stipulated fact that Anglos constitute 45% of Dallas's CVAP (a figure facially disproportionate to the 25% of the Commissioners districts in which the enacted plan allows Anglos any opportunity at all to elect their preferred candidates), to argue that the Anglo population, once discounted to its bloc-voting portion's numbers, is proportionately represented.

While novel and interesting, this theory of proportionality has never been applied by any Court in gauging the totality of the circumstances. For example, when the Supreme Court has considered "the proportionality inquiry," it has "compar[ed] the percentage of total districts that are … opportunity districts with the [relevant minority's] share of the citizen voting-age population[;]"[29] the Supreme Court did not discount that CVAP percentage to reflect the degree of division within the bloc-voting racial minority.[30]

Perez, 253 F.Supp.3d at 881 (recognizing that "the Fifth Circuit [has] directed courts to consider whether voting is polarized along racial lines and … the inability ***of the protected class to elect***[,]" rather than an inability to candidates from that class to win election) (emphasis added) (citing *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1547 (5th Cir. 1992).

[28] Dkt. 135, p. 29.

[29] *Perry*, 548 U.S. at 436.

[30] *Id.* at 436-38.

c. Actual Meaning of "Significant Lack of Responsiveness"

While rightly acknowledging that courts traditionally consider "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[,]"[31] the Defendants dramatically misinterpret how case-law defines that term. According to the Defendants, "successful VRA plaintiffs are able to point to specific instances where the elected body voted against their specific interests."[32] They are simply, totally wrong to maintain that this is the sole basis on which courts have held governments to have demonstrated a significant lack of responsiveness.

In 2005, as Congress considered renewing the VRA's pre-clearance mechanism, Ellen Katz oversaw a comprehensive analysis of every § 2 case litigated since the 1982 amendments to the VRA.[33] In it, she catalogued 106 cases in which a significant lack of responsiveness had been at issue, including 19 in which it was found (13 of which ended favorably for plaintiffs).[34] Courts had found a significant lack of responsiveness based on many kinds of evidence other than that the Defendants acknowledge, including those described below.

By that time, "numerous courts" had "held that evidence of affirmative discrimination directed at the minority group (including employment discrimination) established a lack of responsiveness to that community."[35] Another court had found that "evinc[ing] hostility to the

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[31] *Rodriguez*, 964 F.Supp.2d at 699 (citing *Gingles*, 478 U.S. at 45 (quoting S.Rep. No. 417, 97th Cong., 2d. Sess., (1982), reprinted in 1982 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N.")).

[32] Dkt. 135, p. 34.

[33] ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982, http://www.votingreport.org (Dec. 2005), reprinted in 39 U.MICH. J.L.REFORM (2006).

[34] *Id.* at p. 44.

[35] *Id.* at p. 45 (citing, among others, *Political Civil Voters Organ v. City of Terrell*, 565 F. Supp. 338, 343 (N.D. Tex. 1983); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1561 (11th Cir. 1987) ("[T]he lack of black teachers in the Carroll County school system was a factor bearing on unresponsiveness."); and *Goosby v. Town Board of Hempstead, NY*, 180 F.3d 476, 487 (2d Cir. 1999) (considering employment discrimination)).

desires of the minority community" established a significant lack of responsiveness.[36] Or the same for "ignoring minority requests or complaints."[37] Or where elected officials "were unable to identify any concerns particular to their constituent minority communities."[38] Or where elected officials were not dependent for election on the support of minority voters.[39] Indeed, even a jurisdiction's decision to crack and pack a minority community in the map under challenge has served as considerable evidence of a significant lack of responsiveness.[40] And that is without considering the intervening 13 years of additional cases to the same effect.

To say the least, the Defendants' effort to limit "responsiveness" to a single mold is at odds with the lion's share of case-law on the subject.

6. Place of Intent in This Litigation

Finally, the Defendants address the Plaintiffs' assertions concerning intent. The Defendants discuss intent solely as the basis for a claim that the enacted plan is unconstitutional.[41] While intent goes to constitutionality, it also plays a material role in the *statutory* claims at issue in this case. The 5th Circuit has held both that: (a) VRA §2 forbids government actions born of "an intent to discriminate" in addition to those with "discriminatory results[;]" and

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[36] *Id.* at p. 46 (citing *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1044 (D.S.D. 2004)).

[37] *Id.* at p. 47 (citing, among others, *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 477 (8th Cir.1986); and *Little Rock School Dist. V. Pulaski Cty. Sp. School Dist. No. 1*, 831 F. Supp. 1453, 1461 (E.D. Ark. 1993).

[38] *Id*. at 47 (citing *McDaniels v. Mehfoud*, 702 F. Supp. 588, 595 (E.D. Va. 1988) ("[N]one of the five sitting members of the [elected body] could identify a single issue of unique concern to the [plaintiff's] communit…. In fact, two of the five Supervisors had no idea what percentage of their constituencies are [in the relevant community]."); see also *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313 (D. Mass. 2004) (plaintiffs provided testimony that officials were unaware of their concerns).

[39] *Armour v. Ohio*, 775 F. Supp. 1044, 1058 (N.D. Ohio 1991) (noting that when minority race overwhelmingly supports a single party, no candidate needs to be responsive to their concerns); cf. *Clark v. Calhoun County*, 813 F. Supp. 1189, 1201 (N.D. Miss. 1993) (finding that officials' need for minority vote to win elections required them to be responsive).

[40] *Nixon v. County of Kent*, 790 F. Supp. 738, 749 (W.D. Mich. 1992) (noting that "serious concerns about responsiveness" were raised by districting plan that heavily concentrated minority population into a single district and left them with little voice in others).

[41] Dkt. 135, pp. 37-45.

(b) "discriminatory intent of itself will normally render a plan illegal."[42]

Given this binding authority, the cases cited to by the Defendants (addressing whether the Court can find the enacted plan *unconstitutional*, due to its intentional dilution of the Plaintiffs' race) are moot; regardless of whether the Defendants are right, those cases say nothing about what the Plaintiffs must show to prevail on their *statutory* intentional dilution claims. Whether the Court views intentional vote dilution as a separate kind of statutory dilution claim or as an overriding *Gingles*-totality-of-the-circumstances factor, once proven, it is cause determinative.

B. CORRECTION OF DEFENDANTS' MISSTATEMENT OF TRIAL RECORD

The Defendants' assessment of the trial record is similarly utterly at odds with the evidence actually presented to the Court. Their inaccurate representations go to the evidence relevant to *Gingles* I, *Gingles* II, and the totality of the circumstances.

1. Correction of Defendants' Errors Concerning Trial Record for *Gingles* I

a. Traditional Redistricting Factors Considered by Dr. Morrison in Demonstrating That *Gingles* I Could be Met

The Defendants contend that when Dr. Morrison crafted the Plaintiffs' illustrative map, he "completely disregard[ed the County's ordered] criteria[, with] the sole motivating factor behind [his] plan [being] race, and not any non-racial, traditional redistricting criteria."[43]

They make this assertion despite Dr. Morrison's uncontroverted testimony that he and his team considered each of the following traditional redistricting criteria while preparing the Plaintiffs' illustrative alternative: (i) equalization of total population;[44] (ii) equalization of citizen

[42] *U.S. v. Brown*, 561 F.3d 420, 432-33 (5th Cir. 2009) (citing *McMillan v. Escambia County*, 748 F.2d 1037, 1046 (Former 5th Cir. 1984); U.S. Code Cong. & Admin. News. 1982, 177, 205; and *Seastrunk v. Burns*, 772 F.2d 143, 149 n.15 (5th Cir. 1985)); *see* also *Perez*, 253 F.Supp.3d at 944 ("when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects.").
[43] Dkt. 135, p. 16.
[44] Tr. II 187:17-24 (Morrison).

voting age population ("CVAP") and, with it, the value of each potential vote cast within a district;[45] (iii) contiguity and reasonable geographic compactness of the crafted districts;[46] (iv) incumbency protection;[47] (v) avoiding splitting communities of interest (as expressed by the boundaries of census-defined places within Dallas County);[48] (v) following constitutional and statutory directives against diluting Dallas's out-of-step, Anglo racial minority;[49] and (vi) respect for the interests and voting-power of other ethnic groups within Dallas County.[50]

Wishing it away isn't an argument and it isn't evidence. Nothing in the record contradicts Dr. Morrison's testimony of having considered each of these factors while crafting the Plaintiffs' illustrative map.

b. Superiority of Dr. Morrison's Map in Complying with Traditional Redistricting Factors

More, nothing in the record contradicts Dr. Morrison's testimony that his map equals or exceeds the degree to which the enacted plan respects both: (a) each of these traditional redistricting factors; and (b) all-but-one (1) of the redistricting criteria nominally adopted by Dallas County in 2011. Dr. Morrison testified that:

- the Plaintiffs' demonstrative map equalizes total population better than the enacted plan;[51] the Defendants offered no contradictory evidence;

[45] Tr. II 187: 25 – 188:12 (Morrison).
[46] For Continguity, see Tr. II 207:18-24 (Morrison); for compactness, see Tr. II 188:13-18 (Morrison); Tr. II 22:14 – 201:11 (Morrison); Tr. II 208:2-3 (Morrison).
[47] Tr. II 188:19 - 190:7 (Morrison).
[48] Tr. II 199:8-18 (Morrison); Tr. II 195:6-8 (Morrison).
[49] Tr. II 204:19 – 205:13 (Morrison).
[50] Tr. II 199:19 - 190:11 (Morrison).
[51] Tr. II 187:17-24 (Morrison); Tr. II 200:11-13 (Morrison); Tr. II 204:14-18 (Morrison).

- the Plaintiffs' demonstrative map is comparable to the enacted plan in its allocation of CVAP between districts, so minimizing disparities between the value of votes cast in different districts;[52] the Defendants offered no contradictory evidence;
- the Plaintiffs' demonstrative map is composed of contiguous districts;[53] the Defendants offered no contradictory evidence;
- the Plaintiffs' demonstrative map's districts are at least as reasonably compact as those in the enacted plan;[54] the Defendants offered no contradictory evidence;
- the Plaintiffs' demonstrative map protects incumbency as well as did the enacted plan;[55] the Defendants offered no contradictory evidence;
- the Plaintiffs' demonstrative map incorporates fewer city splits than the enacted plan and better preserves communities of interest;[56] the Defendants not only offered no contradictory evidence, their own expert admitted that there are at least nine (9) city splits in the enacted plan,[57] only eight (8) in Dr. Morrison's alternative, and that the fractured territory resulting from one of those eight (8) contained no population;[58]
- the Plaintiffs' demonstrative map is entirely superior to the enacted plan in its adherence to constitutional and statutory directives to protect the voting rights of

[52] Tr. II 187: 25 – 188:12 (Morrison).
[53] Tr. II 207:18-24 (Morrison).
[54] Tr. II 188:13-18 (Morrison); Tr. II 22:14 – 201:11 (Morrison); Tr. II 208:2-3 (Morrison).
[55] Tr. II 188:19 - 190:7 (Morrison).
[56] Tr. II 199:8-18 (Morrison); Tr, 201:13 – 204:22 (Morrison); Tr. 206:24 – 207:17 (Morrison).
[57] Tr. IV 209:10 - 210:23 (Angle).
[58] Tr. IV 211:21 - 213:15 (Angle).

Dallas's out-of-step, Anglo racial minority;[59] the Defendants' so-called counter-evidence is discussed in a separate portion of this brief, below;

- the Plaintiffs' demonstrative map fairly respects the interests of other ethnic groups within Dallas County;[60] the Defendants offered no counter-evidence;
- the Plaintiffs' demonstrative map includes boundaries for all four (4) districts, exactly as the enacted plan does;[61] the Defendants offered no counter-evidence;

This all-but uncontested evidence firmly establishes that the Plaintiffs' illustrative map "adher[es] to comparably consistent [traditional redistricting] principles" to that enacted by Dallas. Whether or not gauged pursuant to the "identical" principles selected by the County, the illustrative plan clearly qualifies as a 'well-developed, legally-adequate plan."

2. Correction of Defendants' Errors Concerning Trial Record for *Gingles* II

a. Uncontested that Endogonous and Near-Endogonous Elections Establish Anglo Cohesion in Elections to the Commissioners Court

Dr. Hood testified that in every endogenous and near-endogonous election conducted over a decade there was a clearly identifiable Anglo-preferred candidate.[62] The Defendants offered no evidence to the contrary. While they groused about the data sets he analyzed, they contested *none* of Dr. Hood's conclusions about *any* election; indeed, they failed to identify *any* endogenous or near-endogonous election to the Commissioners Court in which Anglos have materially split their support among multiple candidates, whether on the basis of ideology or on any other score. The

[59] Tr. II 204:19 – 205:13 (Morrison) ("If you refer just to the [rights of African Americans and Hispanics], my remedial plan is superior. If you were to take account of the white population and consider it to be the population in question here, I would say that there is no comparison between the two plans. It's a binary choice. The plan that I formulated cures a problem that is endemic in the plan that was enacted.")

[60] Tr. II 199:19 - 190:11 (Morrison); see also Tr. II 195:2-8 (Morrison) (testifying that Dr. Morrison sought to "preserv[e] the opportunities of another community[,]" which is another "traditional redistricting criteria.").

[61] Tr. II 206:17-23 (Morrison).

[62] Tr. III 22:5 - 23:8 (Hood); 24:1-6 (Hood).

record is clear and undisputed that, at this level of government, Dallas's Anglos uniformly demonstrate cohesion in their voting preferences.

b. Admissions by *All* of Defendants' Experts of Anglo Cohesion

Indeed, while they fight the necessary conclusion that the Plaintiffs' have satisfied *Gingles* II, *all* of the Defendants' experts admitted Anglo cohesion. Matt Angle, conceded that Anglos tend to prefer the same candidates as each other, and different candidates than Dallas's ethnic-bloc-voting majority.[63] Dr. Lichtman conceded that racially polarized voting was evident in Dallas County,[64] indicating "I don't think any expert disputes" its existence.[65] Meanwhile, Dr. Barreto admitted that the Anglo community usually bloc-votes 77% for Republican candidates, with only 23% dissenting from the group's preferences;[66] that is a degree of uniformity surpassing thresholds long universally held to constitute "cohesion."[67]

c. *Gingles* II Clearly Satisfied

The actual record is uncontested and clear: Dallas's Anglo community demonstrates uniform bloc-voting preferences across all relevant elections.

3. Correction of Defendants' Errors Concerning Trial Record for "Totality of the Circumstances" – Seven (7) of Ten (10) Factors Typically Recognized as Relevant (Including the Three (3) Described as Most

[63] Tr. III 241:3 - 242:22 (Angle).
[64] Tr. V 103:3-5; 140:18-24 (Lichtman).
[65] Tr. V 154:25 (Lichtman).
[66] Pre-Trial Order, Dkt #126, Stipulated Facts #54-55.
[67] "Social science literature relied on by the Supreme Court in a variety of civil rights contexts, including voting rights, provides no consensus for specifying a minimum level of cohesive minority voting. But the social science literature does point to a threshold above which the minority group's political cohesion would be established beyond dispute. That threshold would be one at which, based on American political history, voting reaches landslide proportions: a majority of about 60 percent or greater in a contest for a single position. Over time, usual minority support for [a shared set of] candidates at or above the 60 percent level should be sufficient proof of minority group cohesion." ALLAN J. LICHTMAN AND J. GERALD HEBERT, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 5 (2015).

Important) Favor Finding That Enacted Plan Denies Anglos Equal Opportunity to Elect Commissioners of Their Choice

The Defendants assert that the Plaintiffs have pled only four (4) and provided evidence of only one (1) factor relevant to the Court's totality-of-the-circumstances analysis. Their calculations are badly off.

Courts typically consider ten (10) factors in assessing whether, under the totality of the circumstances, redistricting plans deny racial minorities their statutory rights. These include the following factors clearly established by the record: (i) intent;[68, 69] (ii) racial polarization;[70] (iii) the extent of minority electoral success;[71, 72] (iv) the presence of racial appeals;[73] (v) a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;[74, 75, 76, 77, 78] (vi) tenuousness of any legally cognizable policy served by the enacted

[68] *Brown*, 561 F.3d at 432-33 (citing *Escambia County*, 748 F.2d at 1046 ; U.S. Code Cong. & Admin. News. 1982, 177, 205; and *Seastrunk v. Burns*, 772 F.2d 143, 149 n.15 (5th Cir. 1985)); *see* also *Perez*, 253 F.Supp.3d at 944 ("when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects.").

[69] See Section II.B.4., below.

[70] See Sections II.B.2 and II.B.3, supra.

[71] See Section II.A.5.a., supra.

[72] Tr. III 22:5 - 23:8 (Hood); Tr. III 24:1-6 (Hood); Tr. III 241:3 - 242:22 (Angle); Tr. III 78:1 - 81:20 (Hood); Tr. III 74:17 - 77:25 (Hood); and Tr. III 85:22 - 86:8 (Hood); Tr. V 80:9-15 (Barreto); TR. V 81:14 - 82:8 (Barreto); Tr. V 155:18 - 156:4 (Lichtman). *See also* Pls.' Ex. #69, Hood Report, *and* Pls.' Ex. #72, Hood Supplemental Report.

[73] Tr. III 180:15 - 186:6 (Voth); 194:14-21 (Voth); Tr. III 186:7-15 (Voth). *See also* Pls.' Ex. #70.

[74] For lack of responsiveness through employment discrimination, see Tr. III 222:7-14 (Graham); Tr. III 205:22 - 235:1 (Graham). *See also* Pls.' Ex. #25, HR Policy; Pls.' Ex. #26 Dallas County Administrative Code Section 86-1044; Pls.' Ex. #27, Actual Employment Numbers, Dallas County; and Pls.' Ex. #27-C, Corrected Employment Numbers, Dallas County.

[75] For lack of responsiveness through open hostility and ignoring minority complaints, see Tr. III 155:21 - 169:15 (Lovell); Tr. III 124:20 - 125:16 (Turner); Tr. IV 67:4 - 73:7 (Love); Tr. IV 61:16 - 67:4 (Love); Tr. III 155:21 - 169:15 (Lovell); Tr. III 174:11 - 175:17 (Lovell); Tr. III 172:18-22 (Lovell); Tr. III 121:17 - 122:15 (Turner). *See also* Pls. Ex. #79.

[76] For lack of responsiveness through Commissioners' inability to identify any concerns particular to their constituent Anglo minority, see the Defendants' Discovery Responses: Pls.' Ex. #55, Interrogatory Responses, ROG #4; Pls.' Ex. #56, Interrogatory Responses, ROG #4; Pls.' Ex. #57, Interrogatory Responses, ROG #3; Pls.' Ex. #58, Interrogatory Responses, ROG #3; Pls.' Ex. #59 Interrogatory Responses, ROG #3; Pls.' Ex. #60, Interrogatory Responses, ROG #3; Pls.' Ex. #61, Interrogatory Responses, ROG #3; Pls.' Ex. #73, Interrogatory Responses, ROG #3; and Pls.' Ex. #74, Interrogatory Responses, ROG #3.

[77] For lack of responsiveness through lack of dependence on Anglo votes for election, see Footnotes 68-70, supra.

[78] For lack of responsiveness through demonstrated cracking and packing of Anglo minority, see Tr. II 28:10-16;

plan;[79] and (vii) lack of opportunity to elect a proportional share of officials.[80] The Plaintiffs pled each of these factors established at trial.[81]

As agreed by the parties' briefs, the second and third are usually scored as the most important; one – the presence of bloc voting – is entirely uncontested, while the other – lack of Anglo electoral success – the Defendants' contest only through the error of law described above. Binding case law makes intent equally important, but it is addressed separately, below.

The rest of the established factors are either uncontested or only nominally contested. Despite the Defendants' ongoing dissatisfaction with Dr. Voth's methodology, their own expert agreed with his conclusion that Dallas politics are rife with racial appeals.[82] The Defendants have not meaningfully contested *any* of the evidence establishing a lack of responsiveness, preferring to: (a) pretend not to hear racial slurs recorded at a hearing contemporaneous with the preparation of the enacted plan; (b) ignore the racial animus heaped by the sponsor of the enacted plan on constituents and colleagues alike in the same period; and (c) brush aside the Commissioners Court's systematic disregard for Anglo input, testified to by Mr. Lovell and Mr. Turner at trial. The Defendants hardly even tried to identify a policy aim of the enacted plan other than racial

31:15-22 (Morrison) (packing in District 2); and Tr. II 28:10-16; 32:11-13 (Morrison) (cracking of Anglos across remaining districts). *See also* Pls. #68, Morrison Report; *and* Pre-Trial Order, Dkt. 126, Stipulated Fact #45 (Anglos a minority in 3 of the 4 current Commissioners Court districts).

[79] Tr. V 148:2–9; Tr. V 1494-15.

[80] Tr. II 37:9-23 (Morrison) ; Tr. V 80:9-15 (Asserting that Commissioner Mike Cantrell is an Anglo candidate of choice) (Barreto); Tr. IV 214:6-8 (Commissioner Teresa Daniels is not an Anglo candidate of choice) (Angle); 11:24 - 12:2 (Commissioner John Wiley Price is not an Anglo candidate of choice) (Angle); and 12:3-6 (Commissioner Elba Garcia is not an Anglo candidate of choice) (Angle). *See also* Pre-Trial Order, Dkt. #126, Stipulated Facts #44; #47; and Pls.' Ex. #68, Morrison Report.

[81] For intent, see Dkt. 31, ¶¶ 16, 18, 23, and 26. For racial polarization, see Dkt. 31, ¶¶ 15 and 31. For extent of Anglo electoral success, *Id*. For the presence of racial appeals, *Id.*, ¶ 16. For lack of responsiveness, *Id.* For tenuousness of any legally cognizable policy served, see *Id.*, ¶¶ 20 and 22-24. For disproportionality, *Id.* ¶ 22.

[82] Tr. V 153:15-22 (Lichtman). He also failed to employ the methodology he now maintains is the only way to assess the presence of racial appeals, either in this case or in any of the dozens of others where he has opined on the subject. Tr. V 151:22 – 152:23.

gerrymandering, and to the extent they did, their efforts are not credible: their citation to partisan aims is foreclosed by the criteria the Commissioners Court adopted; their citation to Commissioner Dickey's alleged preference for a packed district is unsupported by any contemporaneous record and smacks of post-hoc justification. Their argument for the enacted plan's provision of a proportional opportunity for Anglo Republicans to elect their preferred candidates is a legal error, rather than a factual contention.

Simply put, seven (7) of the ten (10) relevant factors, including all the most important ones, were firmly established at trial. There is no legitimate question whether, under the totality of the circumstances, the enacted plan affords Anglos an equal opportunity to participate in the political process and to elect their preferred candidates. It does not.

4. Correction of Defendants' Errors Concerning Trial Record and Evidence of Intentional Dilution of Anglo Voting Strength

Finally, the Plaintiffs separately take up the Defendants' strident insistence that the record includes *no* evidence that Dallas acted to intentionally dilute its Anglo minority. The contention is laughable, ignoring voluminous affirmative admissions and confusing an absence of expert testimony on intent with an absence of evidence of intent.

On behalf of Dallas, Mr. Hebert contemporaneously admitted that the Commissioners Court intended exactly the dilutive result their map achieved.[83] This admission is consistent with the order he drafted for the Commissioners Court (establishing the criteria with which all proposed maps must comply);[84] as well as with his statements at the redistricting hearings conducted in 2011,[85] and the parallel statements of the Commissioners Court majority that enacted the existing

[83] Pls.' Ex. #17, Department of Justice Submission.
[84] Pls.' Ex. #15, Criteria Order. *See also* Pre-Trial Conference, Dkt. #126, Stipulated Fact #26.
[85] Tr. III 103:19 - 106:16 (Turner); Tr. III 109:13 - 110:23 (Turner). *See also* Pls.' Ex. #18, Recording of May 10,

map.[86] It is consistent with the contemporaneous explanation of the enacted plan's motivations offered by the lone Commissioner who voted against its passage.[87] It is consistent with almost all the testimony offered by Matt Angle, explaining his actions in drawing the enacted map,[88] with the sole exception being the incredible, post-hoc "correction" of Mr. Angle's sworn testimony (concocted after his deposition).[89] That reversal doesn't even square with the rest of his testimony at trial.

Taken against this avalanche of direct evidence of racial intent, the Defendants do little more than to grouse that the Plaintiffs didn't retain an expert to analyze less direct evidence pursuant to *Arlington Heights*. No such expert is required for the Court to reach a conclusion, even if it chooses to employ *Arlington Heights* to guide its analysis:

- The Court can gauge for itself "whether [the enacted plan] bears more heavily on [Anglos] than" on other races. Dr. Hood's testimony concerning the result of Commissioners Court elections before and after the passage of the current map provide the evidence the Court would need to find that it does.
- The Court needs no expert to determine whether the "historical background of the decision" to pass the enacted plan "reveals a series of official acts taken for

2011 Meeting; Pls.' Ex. #19, Transcript of Recording of May 10, 2011 Meeting; Pls.' Ex. #22, Recording of May 21, 2011 Meeting; *and* Pls.' Ex. #23, Transcript of Recording of May 10, 2011 Meeting.

[86] Tr. III 98:10 - 99:5 (Turner); Tr. III 99:7 - 102: 21 (Turner); Tr. III 102:22 - 103:18 (Turner); Tr. III 109:13 - 110:23 (Turner); Tr. III 108:19 - 109:9 (Turner); and Tr. III 110:24 –114:11 (Turner). *See also* Pls. Ex. #18, Recording of May 10, 2011 Meeting; Pls. Ex. #19, Transcript of Recording of May 10, 2011 Meeting; Pls. Ex. #22, Recording of May 21, 2011 Meeting; *and* Pls. Ex. #23, Transcript of Recording of May 10, 2011 Meeting

[87] Pls.' Ex. #24, Cantrell Statement.

[88] Tr. IV 21:4 - 21:10 (Angle); Tr. IV 5:14 - 7:10 (Angle); Tr. IV 25:10-28:4 (Angle); Tr. iV 17:9-23 (Angle). *See also* Pre-Trial Order, Dkt. # 126, Stipulated Fact #38; Tr. IV 183:7-11 (Angle); Tr. IV 184:12 - 187:6 (Angle).

[89] Mr. Angle reversed this testimony before trial and continued to repeat the reversal on the stand. 7:11 - 9:15 (Angle). His reversed testimony is not credible. It requires the Court to accept that he understood the word "require" – when repeated three (3) times in a minute – to mean "result in[,]" and then proceeded to answer the same question, without objection, twice in a minute.

invidious purposes[.]" The Defendants' admissions, and the Commissioners Court's contemporaneous passage of a racially discriminatory recruitment policy provide the evidence the Court would need to find that it did.

- In analyzing "the specific sequence of events leading up to" the map's passage, the Court needs no historian's opinion. Mr. Love's testimony concerning the toxic environment that developed at Commissioners Court hearings over the period leading up to the passage of the enacted plan, coupled with the Defendants' admissions and the testimony of Mr. Turner and Reverend Lovell, provide the foundation for the Court to determine that the sequence was indicative of racial animus.
- In gauging what "departures from the normal procedural sequence" are material, the Court needs no help from an expert. The Court can decide for itself what to make of the Commissioners Court disclosing the new, final map on the day of the vote on enactment, with no hearings, no prior disclosure to the minority (or even to the elected officials supported by the minority), and no production in this litigation of the correspondence accompanying the finalization of that new map*, despite this Court's express order requiring such production*.[90]
- In assessing the legislative history (as represented in the of-record admissions of Mr. Hebert, Judge Jenkins, Commissioner Price, and Commissioner Garcia), the Court is fully capable of reaching the conclusion that the contemporaneous statements of and made for the Defendants leave no doubt as to motivation.

[90] Dkt. 60. Tr. IV 219:23 – 222:3.

The evidence is clear and ample. Dr. Lichtman's testimony to the contrary is entitled to little-to-no weight, as nearly all the opinions he expressed on these subjects were: (a) based on undisclosed, only partially disclosed, or irrelevant data;[91] or (b) reached with no discernable or defensible methodology.[92] The Court can and should find that Dallas intentionally diluted its Anglo minority and invalidate the enacted plan on that basis.

IV. CONCLUSION AND PRAYER

As previously briefed, the Plaintiffs' have conclusively met their burden of proof on all elements of their statutory, § 2 vote dilution claim. As explained above, absolutely nothing in the Defendants' Post-Trial Brief alters that fact. When the Court considers the actual record established at trial, under the actual legal standards applicable to this case, it should determine that the Plaintiffs are entitled to judgment that the Commissioners Court map enacted by Dallas in 2011 violates the VRA and must be replaced.

[91] For assessment of Commissioners Court's history of discrimination against Anglos on basis of actions by other actors, see Tr. V. 126:15 – 127:11 (Lichtman). For failure to disclose materials reviewed in assessing presence of procedural deviations, see Tr. V. 132:3-14 (Lichtman). For failure to review entire record or to disclose what in the record had been reviewed before opining on the contemporaneous statements of officeholders, see Tr. V 132:19 - 136:1 (Lichtman).

[92] For determining discriminatory impact by counting the races of office holders, see Tr. V 126:5-14 (Lichtman). For absence of methodology to assess whether officeholders' contemporaneous statements reflect an intent to discriminate, see Tr. V 136:4 – 137:25.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 25, 2018, I served a copy of this Response to Defendants' Post-Trial Brief on all other counsel of record by electronic filing through the Court's CM/ECF system.

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