

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

ANNE HARDING, RAY §  
HUEBNER, GREGORY R. §  
JACOBS, MORGAN §  
MCCOMB, AND JOHANNES §  
PETER SCHROER §  
Plaintiffs, §

V. §  
§  
COUNTY OF DALLAS, TEXAS §  
CLAY LEWIS JENKINS, in his §  
official Capacity as County Judge §  
of Dallas County, et al., §  
Defendants, §

C.A. NO. 3:15-CV-00131-D

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MEMORANDUM IN SUPPORT OF DEFENDANTS'  
FIRST AMENDED MOTION TO DISMISS

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendants, County of Dallas, Texas, Clay Lewis Jenkins, in his capacity as County Judge of Dallas County, Texas, and Theresa Daniel, Mike Cantrell, John Wiley Price, and Elba Garcia, in their capacity as County Commissioners (hereinafter collectively referred to as “Defendants”) and file this their Brief in Support of their First Amended Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and would respectfully show the Court as follows:

I. INTRODUCTION

Plaintiffs are five (5) Anglo registered voters in Dallas County who allege that their voting rights are being violated by defendants when the Dallas County Commissioner Precincts<sup>1</sup> were reapportioned after the release of the 2010 census data. Though they acknowledge that Dallas County is a majority-minority county, Am. Compl. at 1, they contend that the plan for electing the Dallas County Commissioners’ Court does not fairly reflect Anglo voting strength, because the election plan prevents the minority Anglo population from being able to elect a candidate to half of the districted offices. Am. Compl. at ¶ 26.

By Plaintiffs’ own amended complaint, Anglo voters are a voting majority in

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<sup>1</sup> The words “precincts” and “districts” are used interchangeably in this motion; Dallas County has four “Commissioner Precincts” that are essentially single member “districts” See generally Am. Compl. Commissioner precincts are larger than, and contain many, voting precincts.

one of the four Commissioner Precincts; comprise a substantial proportion of the three remaining Commissioner Precincts; and they comprise a substantial proportion of the entire County, which elects the fifth member of the County Commissioners' Court countywide—the county judge. Am. Compl. at ¶ 18.

Plaintiffs attempt to plead claims under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301<sup>2</sup> and the equal protection clause of the United States Constitution. Plaintiffs maintain that the defendants drew the commissioner precincts in violation of the “rights of Dallas’s Anglo minority”. *See generally* Am. Compl. at ¶ 14. Notably, however, there is no allegation that the individually named plaintiffs were in any way prohibited from exercising their individual right to vote or suffered any personalized injury in this respect; they purportedly bring this action on behalf of the Anglo “minority” community. *See generally* Am. Compl.

Plaintiffs contend that Anglos are underrepresented as a racial group on the Dallas County Commissioners' Court, though they concede, as they must, that three members of the Commissioners' Court are Anglo. As explained below, their amended complaint fails to state a claim for relief under either the Voting Rights

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<sup>2</sup> Effective September 1, 2014, the Voting Rights Act was transferred from Chapter 42 of the United States Code, The Public Health and Welfare, to Chapter 52, Voting and Elections. A comprehensive table of conversion for the new codification can be found at [http://uscode.house.gov/editorialreclassification/t52/Reclassifications\\_Title\\_52.html](http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html) (last accessed April 13, 2015).

Act or the Constitution, because they have not pleaded a cause of action under Section 2 of the Voting Rights Act, 52 U.S.C. §10301 or the Fourteenth and Fifteenth Amendments to the United States Constitution.

## II. STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' Original Amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In reviewing this motion, this Court must accept all material allegations of the amended complaint as true and construe them in the light most favorable to the nonmoving party. *Garrett v. Commonwealth Mortgage Corp.*, 938 F. 2d 591, 593 (5<sup>th</sup> Cir. 1991). The motion should be granted if the plaintiffs can prove no set of facts that would entitle them to relief. *Id.*

Rule 12(b)(1) permits dismissal of a claim for lack of subject matter jurisdiction. Because failure to establish a recognizable justiciable claim deprives federal courts of jurisdiction to hear the suit, a motion to dismiss for lack of constitutional standing is properly addressed under FED. R.CIV. P. 12(b)(1). *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5<sup>th</sup> Cir. 2011). "The party asserting jurisdiction bears the burden of proof for a 12(b)(1) motion to dismiss." *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5<sup>th</sup> Cir. 2012). A court

may find that subject matter jurisdiction is lacking based on the *amended complaint alone*. *Id.* [emphasis added]

Rule 12(b)(6) permits dismissal of an amended complaint when its allegations “fail to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). To avoid dismissal, the plaintiff must have provided both fair notice of the nature of the claim and plausible factual allegations to support the claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (stating that plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense”). The plaintiff’s amended complaint must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Factual allegations “must make relief plausible, not merely conceivable, when taken as true.” *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 186 (5th Cir. 2009) (citing *Twombly*, 550 U.S. 544); *United States ex rel. Hebert v. Disney*, 295 F. App’x 717, 721 (5th Cir. 2008) (“Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the amended complaint are true (even if doubtful in fact).” (quoting *Twombly*, 550 U.S. at 555)). The court should “not strain to find inferences favorable to the plaintiff.” *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (internal quotation marks omitted).

Taking all the alleged facts in the Complaint as true and in a light most favorable to the plaintiffs, this amended complaint does not remotely approach establishing a violation of federal law.

### III. ARGUMENT

#### A. Plaintiffs' Amended Complaint Fails to State a Claim Under Section 2 of the Voting Rights Act

##### 1. Standards for Section 2 claims

Section 2 prohibits what is referred to as “minority vote dilution”—the minimization or canceling out of minority voting strength. Section 2(a) of the Act prohibits any electoral practice or procedure that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color [or membership in a language minority group]. 52 U.S.C. § 10302. Section 2 (b) specifies that the right to vote has been abridged or denied if,

based on a totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.

*Id.* § 10303. Section 2, thus prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a protected minority group to elect its candidates of choice on an equal basis with other voters.

In 1986, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court articulated the Section 2 framework. Under the *Gingles* test, the first step in determining whether a majority-minority district is mandated by Section 2 is to ask the following three questions:

(1) Is the minority group “sufficiently large and geographically compact to constitute a majority” in a single-member district?<sup>3</sup>

(2) Is the minority group “politically cohesive”?

(3) Does the white majority vote “sufficiently as a bloc to enable it—in the absence of special circumstances...—usually to defeat the minority’s preferred candidate”?<sup>4</sup>

If the answer to any of these questions is “No,” then Section 2 does not require the creation of a majority-minority district.

A negative answer to the first prong of the *Gingles* test means that a minority group could not have constituted an effective voting majority in any reasonably drawn alternative district, and therefore the minority’s voting preferences could not be satisfied under *any* plan.

Even if the answer to all three *Gingles* questions is “Yes,” the court must still

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<sup>3</sup> The test enunciated in *Gingles* originally applied only to challenges brought against multi-member districting plans. In 1993, however, the Court made clear that the three-pronged *Gingles* test applies to single-member districting schemes as well. See *Growe v. Emison*, 507 U.S. 25, 40 (1993).

<sup>4</sup> *Gingles*, 478 U.S. at 50-51.

determine whether, under the “totality of circumstances,” the minority group has less opportunity than whites to participate in the political process and to elect representatives of its choice. *Johnson v. De Grandy*, 512 U.S. 997 (1994). Only when all these conditions are met, must a majority-minority district be created.

Although courts have considered a variety of circumstances in making this determination, one factor is particularly important: the “proportionality” or lack thereof, between the number of majority-minority districts and the minority’s share of the State’s relevant population. It would be very difficult, for example, for a minority group to win a Section 2 case if it constituted 20% of the population but effectively controlled 30% of the districts.

The Supreme Court analyzed the proportionality factor in *Johnson v. DeGrandy*, *supra*. The Court assumed for the purposes of deciding *DeGrandy* that all three of the *Gingles* factors were satisfied, yet it rejected the plaintiffs’ Section 2 claim. As the Court explained, the totality of circumstances did not support a finding of dilution, because the “minority groups constitute effective voting majorities in a number of districts substantially proportional to their share in the population.” *Id.* at 1024.<sup>5</sup>

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<sup>5</sup> Although rough proportionality does not automatically protect a State from liability under Section 2, it is a strong “indication that minority voters have an equal opportunity, in spite of racial polarization, ‘to participate in the political process and to elect representatives of their choice.’” *Id.* at 1020 (citing Voting Rights Act, 52 U.S.C. § 10301).

**2. Plaintiffs fail to adequately plead lack of proportionality under *DeGrandy***

Plaintiffs' amended complaint states that "Anglos are a minority in Dallas County[.]" Am. Compl. at ¶ 13. Their amended complaint states that as a result of the redistricting plan enacted by the Defendants, the "Anglo Minority" cannot elect a candidate to a second district. But Section 2 of the Voting Rights Act is not a racial entitlement for any racial or ethnic group. Indeed, Section 2 expressly states that the statute does not confer a right to proportional representation for any racial or ethnic group. See 52 U.S.C. §10301 ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

Plaintiffs' amended complaint fails to allege or demonstrate how the currently elected County Commissioners are not the candidate of choice of Anglo voters. Even if the five commissioners are the candidates of choice of African-American and Latino voters, that fact does not preclude those Commissioners from also being the candidates of choice of Anglo voters.

Also, Plaintiffs' amended complaint indicates that Anglos already have achieved or exceeded proportional representation. *DeGrandy* makes clear that where "minority groups constitute effective voting majorities in a number of districts substantially proportional to their share in the population," a Section 2 challenge

will fail. Plaintiffs' amended complaint acknowledges that Anglos are a minority of Dallas County's population, but claims that the current redistricting plan deprives them of a right to gain an equal number of the district offices as the majority population.

Like any minority group, Anglos are not entitled under Section 2 to an election plan that provides them an opportunity to elect an equal number of districted offices as the majority. Under that theory, any minority group could state a claim under Section 2 by simply alleging that a redistricting plan fails to provide them with an opportunity to control an equal number of the seats as the majority groups controls. To the extent Plaintiffs' amended complaint in this case is framed in this manner, it fails to state a claim under Section 2 of the Voting Rights Act.

**3. Plaintiffs fail to adequately plead facts to meet the totality of circumstances requirement.**

Even were the amended complaint sufficient relating to the *Gingles* preconditions, the amended complaint must adequately plead facts as to whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process and to elect a representative of their choice. *De Grandy*, 512 U.S. at 1011; see also *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009).

Plaintiffs' amended complaint merely states, "the Discriminating Map, under the totality of the circumstances, provides Dallas's Anglo minority a less-than-equal opportunity to participate in the political process and to elect commissioners of its choice." Am. Compl. at ¶ 28. The amended complaint fails to reference any facts to support a finding under the totality of the circumstances. The closest Plaintiffs come is this: "Dallas has seen consistent, overt and subtle racial appeals in its local elections held after 2004, including elections to Commissioners Court." Am. Compl. at ¶ 15. Yet, even this allegation falls far short of the mark. Racial appeals are just one factor under the totality of circumstances under Section 2. Moreover, on information and belief, to the extent that there have been racial appeals in campaigns in Dallas County, they have been employed by white candidates against minority candidates. Furthermore, plaintiffs fail to plead facts under any of the other Senate Factors<sup>6</sup> (such as a history of discrimination against whites in Dallas County or in Texas, or that whites suffer depressed socio-economic conditions compared to minorities), other than to observe the racial makeup of the incumbents.

It is also worth noting that Plaintiffs have not pleaded, nor could they show, that the Anglo Plaintiffs have been subjected to such pervasive and discriminatory practices in voting, housing, education and the like for an extended period of time

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<sup>6</sup> *Gingles*, 478 U.S. at 45 (quoting S.Rep. No. 417, 97th Cong., 2d. Sess., (1982) at 30, reprinted in 1982 U.S.Code Cong. & Admin. News ("U.S.C.C.A.N.") 177 at 208).

such that federal intrusion into the redistricting affairs on Dallas County, Texas is constitutionally warranted. Plaintiffs simply have not pleaded sufficient facts to the totality of circumstance inquiry for a Section 2 claim.

**B. Plaintiffs’ Amended Complaint Fails to State a Claim Under the Fourteenth and Fifteenth Amendments to the United States Constitution**

Though their amended complaint begins with indignant rhetoric couched in racial terms, at the end of the day Plaintiffs’ amended complaint is a plain and simple political gerrymandering claim masquerading as a claim based on race. Consequently, the amended complaint melds claims of discrimination based on race with allegations of political gerrymandering and discrimination. For example, the plaintiffs note on the one hand that Defendants rejected the impulse to create four Democratic districts by fragmenting Republican voters, (Am. Compl. at ¶ 17), but they complain that Defendants then drew a map less offensive to Anglos by creating only one district (District 2) with a super-concentration of Anglos (Am. Compl. at ¶ 20). Similarly, they allege that Dallas County voters vote in “polarized racial blocs” but their contention to substantiate this allegation is that African Americans and Latinos support Democratic candidates and Anglo voters support Republican candidates. *See* Am. Compl. at ¶s 11-14.

The amended complaint, however, fails to state a claim of political gerrymandering. Under the Supreme Court’s two most recent decisions involving

claims of political gerrymandering, (*Vieth v. Jubilerer* 541 U.S. 267 (2004) and *LULAC v. Perry*, 548 U.S. 399 (2006)) redistricters may draw district lines to pursue partisan advantage. Indeed, in *LULAC v. Perry*, where there were allegations that Texas legislators “packed” or “cracked” Democratic voters, ignored traditional districting criteria, created exceedingly safe districts for incumbents, and even redrew lines in the middle of a decade, the Supreme Court refused to find such political gerrymandering violative of the Constitution. *LULAC*, 548 U.S. at 405.

Similarly, there is no constitutional requirement of proportional representation; it is simply legally irrelevant that a group may receive a much higher or lower share of seats than its share of the countywide vote. Here the Plaintiffs’ amended complaint contains no identifiable or cognizable claim of political gerrymandering. Nor does the amended complaint allege facts supporting a political gerrymander claim. Perhaps the amended complaint omits these key allegations because Plaintiffs are aware that the Supreme Court has yet to articulate a cogent, workable standard for judging the constitutionality of political gerrymanders. In any event, Plaintiffs fail to state a political gerrymandering claim.

Plaintiffs’ conclusory allegations are plainly insufficient to state a claim. See, e.g., *Iqbal*, 556 U.S. at 678-79 (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the amended complaint

has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”) (quoting FED. R. CIV. P. 8(a)(2)). Moreover, because Plaintiffs’ amended complaint fails to articulate any applicable legal standard, Plaintiffs’ political gerrymandering claim must be dismissed as well.

To the extent Plaintiffs purport to make a racial gerrymandering claim, they also fail to state a claim under the Fourteenth or Fifteenth Amendments. The amended complaint drops the Fifteenth Amendment claim but Plaintiffs are also without recourse under the Fourteenth Amendment claim. In 1993, in *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court recognized a new constraint on the redistricting process, declaring that the excessive and unjustified use of race in redistricting is prohibited by the Equal Protection Clause of the Fourteenth Amendment. But, in *Easley v. Cromartie*, 532 U.S. 234, 243 (2001), the Court reaffirmed that a district may be invalidated pursuant to a *Shaw* claim only if “race rather than politics predominantly explains” the district’s boundaries. (emphasis added).

In Plaintiffs’ amended complaint, the Plaintiffs allege that Defendants drew the district boundaries with political intent (Am. Compl. ¶s 17 and 18). They seemingly concede that Districts 1 and 2 were drawn for political purposes, while simultaneously claiming Districts 3 and 4 were drawn to provide African-American

and Hispanic voters, respectively, an effective opportunity to elect their preferred candidates. *Id.*, at ¶s 17, 18, and 20. Plaintiffs' amended complaint at ¶ 18, for example, contends that one alleged defect of the Commissioners' Court plan is that it protects African-American and Hispanic voters in Districts 3 and 4. *Id.* Of course, if the Defendants had failed to draw a district that provided African-American or Latino voters with an effective opportunity to elect their preferred candidates, they would have faced legal liability under Section 2 of the Voting Rights Act. Thus, even assuming Plaintiffs' allegations regarding Districts 3 and 4 are true, Districts 3 and 4 were drawn to avoid a Section 2 violation. Even were there no potential section 2 violation, Defendants were still entitled to consider race, at least to some degree, in drawing protected districts to comply with the Voting Rights Act. See *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. \_\_\_, 22-23 (March 25, 2015) (slip op.).

In *Prejean v. Foster*, 227 F.3d 504, 512 (2000), the Fifth Circuit stated that the Supreme Court's decision in *Bush v. Vera*, 517 U.S. 952, 994 (1996) "grants that the state [or local government] has a compelling interest in complying with the results test of Section 2 of the Voting Rights Act, which may lead it to create a majority-minority district only when it has a 'strong basis in evidence' for concluding, or a 'reasonable fear' that, otherwise, it would be vulnerable to a vote dilution claim."

Thus, avoiding liability under Section 2 or drawing a district to ensure compliance with Section 2 of the Voting Rights Act provides a compelling state interest that justifies the predominate use of race in drawing districts.<sup>7</sup> Since the case law establishes that Dallas County could create Districts 3 and 4 as majority-minority districts to avoid Section 2 liability, Plaintiffs' amended complaint that Defendants allowed race to predominate the creation of these two districts fails to state a racial gerrymandering claim.

Nor does the amended complaint in this case allege that Defendants drew either District 1 or 2 predominantly along racial lines. As to District 1, Plaintiffs' amended complaint attacks this district because it was created as a "Democratic Opportunity District." (Am. Compl. at ¶ 18). That hardly smacks of a claim that the district was drawn with an excessive reliance on race. Similarly, District 2 was drawn, the amended complaint alleges, to avoid fragmenting Anglos among all four districts and creating four Democratic districts (Am. Compl. at ¶ 17). Again, the amended complaint here is that Defendants acted with political intent. Creating a district in which Anglos are the predominate group to avoid an all Democratic Commissioners' Court again does not on its face suggest an excessive use of race in

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<sup>7</sup> The Fifth Circuit has also stated that "*Bush [v. Vera]* makes clear, '[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . . Nor does it apply to all cases of intentional creation of majority-minority districts.'" *Prejean v. Foster*, 227 F.3d 504 (2000) (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)).

drawing District 1.

In sum, Plaintiffs' amended complaint concedes two districts were drawn for political reasons (Districts 1 and 2) and two districts (Districts 3 and 4) were drawn to create majority-minority districts and avoid a Section 2 violation, which is a justified use of race under *Shaw v. Reno* and its progeny. Such allegations as set forth in Plaintiffs' amended complaint fail to state a claim of racial or political gerrymandering under the Constitution.

#### IV. PRAYER

Because Plaintiffs fail to allege legally cognizable harm, Plaintiffs lack standing to assert any of the claims alleged, the amended complaint should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(1). Additionally, Plaintiffs fail to state any claims against Defendants. Therefore, the amended complaint should be dismissed with prejudice under Federal Rule of Civil Procedure 12(b)(6).

Dated this 16<sup>th</sup> day of April, 2015.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of April 2015, 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  
Chad W. Dunn