

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, §

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

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR
FIRST AMENDED MOTION TO DISMISS

BRAZIL & DUNN
Chad W. Dunn - 24036507
K. Scott Brazil - 02934050
4201 Cypress Creek Parkway, Suite 530
Houston, Texas 77068
Telephone: (281) 580-6310
chad@brazilanddunn.com

J. GERALD HEBERT
(*Pro Hac Vice* Motion Forthcoming)
Virginia Bar No. 38432
J. Gerald Hebert, P.C.
191 Somerville Street, #405
Alexandria, VA 22304
Telephone (703) 628-4673
hebert@voterlaw.com

ROLANDO L. RIOS & ASSOCIATES
Rolando L. Rios - 16935900
115 E. Travis, Suite 1645
San Antonio, TX 78205
Ph : (210) 222-2102
Fax: (210) 222-2898
rrios@rolandorioslaw.com

Attorneys for Defendants

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 Reply Brief in Support of their First Amended Motion to Dismiss and would respectfully show the Court as follows:

I. ARGUMENT

A. Plaintiffs have failed to explain how the Complaint, if accepted as true, entitles the Anglo Plaintiffs to proportional representation on the Commissioners Court.

The court must ultimately determine in this case whether, under the “totality of circumstances,” the minority group [Anglos in this case] has less opportunity than other citizens in Dallas County to participate in the political process and to elect representatives of its choice. *Johnson v. De Grandy*, 512 U.S. 997 (1994). Plaintiffs fail to make this precise allegation in the Complaint. Instead, Plaintiffs actually negate this essential element with other allegations made in the Complaint.

Several of Plaintiffs' allegations are insufficient as a matter of law for their ability to bring a Section 2 Complaint. First, it is undisputable that three of the five

elected representatives on Commissioners Court are Anglo.¹ Also, Plaintiffs plead that Anglos make up less than half of the population in Dallas County while simultaneously asking for the Court to impose a district plan that would deliver to them an even number of the district seats with the majority population. See Am. Compl. ¶ 13. Plaintiffs also do not plead that all of the incumbents except one are not Anglo candidates of choice – a critical and fatal defect in the Amended Complaint. Plaintiffs completely ignore this argument in the Response. Plaintiffs seem to confuse the race of the officeholder with the careful analysis required to determine whether an elected candidate is the group’s candidate of choice. As Section 2 of the Voting Rights Act expressly states: “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” The Amended Complaint does not come close to meeting the threshold necessary to negate proportionality under *De Grandy*.

Plaintiffs’ main argument against this point is that it is inappropriate at this stage of pleading for the Court to “balance factors.” See Resp. at p. 14. Plaintiffs then go on to summarize their pleading contents concerning 48% Anglo population and other general allegations of underrepresentation. *Id.* Yet, Defendants are not

¹ Plaintiffs try to avoid this issue by claiming there are no facts at all in the Complaint about the race of the incumbents. See Resp. at p. 16. Yet that only reveals further the substantive defects in the Amended Complaint. It is Plaintiffs’ duty to plead facts that, if true, establish or state their claim. Plaintiffs’ failure to address the proportionality element of their claim, in the Amended Complaint, is their defect alone.

asking the Court to weigh factors at this stage of litigation, because it is unnecessary to do so to dispose of this case. Defendants are asking the Court to require Plaintiffs to plead the facts necessary to support their claims.

Plaintiffs have failed to plead that all the other district representatives on the Commissioner Court, save and except one, are not candidates of choice of the Anglo community.² This failure is critical, for absent some allegation to the contrary, it is theoretically possible that all 5 members of the Commissioners' Court are the candidates of choice of Anglo voters. The issue as to which incumbents are candidates of choice for the Anglo population, should Plaintiffs be permitted to proceed on their defective pleading, is expected to be hotly contested in this case. Plaintiffs should be required to affirmatively make this allegation in their pleading and under Rule 11 have a reasonable factual basis for doing so. Obviously, Plaintiffs do not need to prove this point at this stage of the litigation, but a fair investigation must be made before the allegations can be reasonably asserted. Lack of proportionality is a required element of Plaintiffs' claim under *De Grandy* and Plaintiffs have utterly failed to adequately plead facts to support this necessary element.

² Plaintiffs reciting of a few Amended Complaint allegations that are in the neighborhood of this point is insufficient. See Resp. at p. 15.

Plaintiffs smoke screen their pleading failure by asserting that by creating Districts 3 and 4 to comply with the Voting Rights Act (VRA), Defendants have somehow conceded that the incumbents in these districts are not preferred by Anglo voters. See Resp. at p. 16. Defendants have made no such concession and the Court should not accept Plaintiffs' invitation to find "embedded assumption[s]" in the Complaint. *Id.* The existence of districts originally created under the VRA, and the candidates elected in those districts, does not also necessarily mean that those same elected candidates are not also Anglo candidates of choice (in addition to being the choice of minority voters). Plaintiffs must plead and be able to prove that a proportional number of incumbents are not candidates of choice for the Anglo community (as well as all the other evidence needed in a Section 2 case (see, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986)), and Plaintiffs refuse or are unable to do so.

B. Plaintiffs have also failed to adequately plead factors under the totality of circumstances.

The Amended Complaint must adequately plead facts as to whether, under the totality of the circumstances, the district plan impairs the ability of the minority voters to participate equally in the political process and to elect a representative of their choice. See *De Grandy*, 512 U.S. at 1011; see also *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009). As the Supreme Court noted in *Thornburg v. Gingles*, 478 U.S. at 36, "[t]he Senate Judiciary Committee majority Report accompanying the bill that

amended 2 elaborates on the circumstances that might be probative of a 2 violation, noting the following “typical factors”:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of 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, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29. Plaintiffs must plead, and later prove at least some of these Senate Factors.³

Plaintiffs have failed to plead facts that establish the totality of circumstances. There is no history of discrimination against Anglo voters in Dallas County, Texas. In fact, the evidence of historical discrimination shows that blacks and Latinos have been the victims of official discrimination. Nor have Plaintiffs alleged, for example, that Anglos bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the

³ “The Senate Report which accompanied the 1982 amendments elaborates on the nature of 2 violations and on the proof required to establish these violations.” *Thornburg v. Gingles*, 478 U.S. at 43.

political process. Plaintiffs' Amended Complaint fails to allege many of these Section 2 Senate factors for an obvious reason: these factors were crafted into Section 2 cases to remedy past pervasive discrimination against black and Latino voters. "The essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, *supra*, at 47. This is no small point and Plaintiffs have made no attempt to plead facts stating a claim that such conditions exist in Dallas County to the detriment of Anglos.

Defendants do not yet ask this Court to weigh these factors as Plaintiffs protest (Resp. at p. 13); Defendants respectfully submit that Plaintiffs be required to state a claim that puts on fair notice those facts which Plaintiffs contend will prove the totality of circumstances requirement. Plaintiffs thus far have failed to state any claim that Anglos in Dallas County have had their voting rights violated under Section 2 of the Voting Rights Act. Such discrimination against Anglos has not and does not exist in Dallas County. This reality explains why Plaintiffs are unwilling or unable to plead facts supporting such a claim or sufficient to continue with this litigation.

C. Plaintiffs have failed to plead facts to support their Constitutional Claims.

In the 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 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. These allegations made by Plaintiffs are insufficient to support their constitutional claim and in fact are detrimental to it. The law in this circuit is 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)). Plaintiffs’ pleadings do not rise to the level, nor are they specific enough, to establish a constitutional violation.⁴

Contrary to Plaintiffs’ Response, the Defendants also challenge the sufficiency of the pleadings as they relate to an Equal Protection claim. *See Resp.* at p. 19. Plaintiffs plead no facts that would support their Equal Protection claim and they fail to highlight such pleadings in their Response.

⁴ Plaintiffs offer contradictory allegations with regard to intent. On the one hand, they allege racially discriminatory intent. Districts drawn to comply with the Voting Rights Act do not constitute unconstitutional discriminatory intent. On the other hand, they contend the lines were drawn for partisan purposes. Lines drawn for political purposes do not violate the Fourteenth Amendment. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

D. The Court's only remedy is to dismiss

Addressing Plaintiffs' alternative remedial request for repleader, there is no possible repleading that could remedy the defects in Plaintiffs' Amended Complaint. Opportunity to amend is granted when there are specific procedural defects that are generally curable. Even if the Court were to grant Plaintiffs leave to amend, it would not cure the defects.

No set of facts Plaintiffs have presented or could present would entitle them to this relief. Plaintiffs have failed to suggest any way in which they could replead their claim that would make it legally sufficient to survive a motion to dismiss. Therefore, any amendment would be futile and, if granted, would not withstand a motion to dismiss. *National Wrestling Coaches Ass'n v. Department of Education*, 366 F.3d 930, 945 (D.C. Cir. 2004). An amendment would be futile if it would not survive a motion to dismiss for failure to state a claim under FRCP 12(b)(6). *Great W. Mining & Mineral Co. v. Fax Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010); *Sweeney v. Ada Cty.*, 119 F.3d 1385, 1393 (9th Cir. 1997). In making this determination, the Court must decide whether the factual allegations in Plaintiffs' complaint plausibly state a claim for relief. See *Great W. Mining & Mineral*, 615 F.3d at 175-176. As shown above, the affirmative pleadings actual negate the existence of claims and therefore cannot be repaired by yet another amended complaint.

IV. PRAYER

The Amended Complaint should be dismissed with prejudice.

Dated this 21st day of May, 2015.

Respectfully submitted,

BRAZIL & DUNN

/s/ Chad W. Dunn

Chad W. Dunn - 24036507

K. Scott Brazil - 02934050

4201 Cypress Creek Pkwy., Suite 530

Houston, Texas 77068

Telephone: (281) 580-6310

Facsimile: (281) 580-6362

chad@brazilanddunn.com

scott@brazilanddunn.com

J. Gerald Hebert (*Pro Hac Vice*)

Virginia Bar No. 38432

191 Somerville Street, #405

Alexandria, Virginia 22304

Telephone (703) 628-4673

hebert@voterlaw.com

Peter L. Harlan

SBN: 09011300

Dallas County District Attorney's
Office

Frank Crowley Courts Building

133 N. Riverfront Blvd., 11th Floor

Suite C4-2 LB 19

Dallas Texas 75207

Telephone: (214) 653-3690

Facsimile: (214) 653-2899

pharlan@dallascounty.org

Rolando Leo Rios
SBN: 16935900
Law Office of Rolando L. Rios
San Antonio, Texas 78205
Ph: (210) 222-2102
Fax: (210) 222-2898
SBN: 16935900
rrios@rolandorioslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May 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