No. 18-11256

In the United States Court of Appeals For the Fifth Circuit

ANNE HARDING; GREGORY R. JACOBS; JOHANNES PETER SCHROER; HOLLY KNIGHT MORSE,

Plaintiffs – Appellants

v.

COUNTY OF DALLAS, TEXAS; CLAY LEWIS JENKINS, in his Official Capacity as County Judge of Dallas County, Texas; THERESA DANIEL; MIKE CANTRELL; JOHN WILEY PRICE; ELBA GARCIA,

Defendants – Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division, Civ. No. 3:15-CV-131-D Honorable Sidney A. Fitzwater, Presiding

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Dallas County fails to seriously engage with Plaintiffs' primary argument: that requiring a functionality analysis beyond the requirements of *Gingles* is legally erroneous and likely to undermine the goals of the Voting Rights Act and the Fourteenth Amendment. Instead, Dallas County attempts to repackage its functionality arguments within other elements of Plaintiffs' claim. But the error is the same regardless of its label: Dallas County may not avoid liability because Plaintiffs did not propose safe, segregated, super-packed Anglo districts. This Court should reverse and remand to ensure the integrity of voting rights law in this Circuit.

I. PLAINTIFFS PROVED THEIR STANDING.

Plaintiffs satisfy the standing requirements of Article III. Plaintiffs proved that they (1) suffered an injury in fact, (2) that is fairly traceable to Dallas County's challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). In vote dilution cases, the harm "arises from the particular composition of the … district, which causes [the individual's] vote—having been packed or cracked—to carry less

weight than it would carry in another, hypothetical district." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

The District Court correctly held that Plaintiffs established these elements. Plaintiffs "*proved* that they are Anglos and that each resides in a district where, as a result of alleged 'cracking and packing,' the voting strength of the Anglo [Citizen Voting Age Population] has been diluted." ROA.4972. District 2 has "an Anglo supermajority … that is well beyond the number needed for an Anglo-preferred candidate to be elected." ROA.4970. "[T]he voting strength of Anglos" in the other three districts "is diluted" because Anglo voters are "spread[] … sufficiently thin to prevent them from ever electing their preferred candidates." *Id.* These injuries are a direct result of the Commissioners Court map drawn by Dallas County and are "capable of being redressed by the relief [the Plaintiffs] seek: a declaration that the [map] is unconstitutional and violates the VRA, and an injunction prohibiting defendants from implementing the [map] and requiring defendants or the court to create a replacement map that contains a second Anglo-opportunity [district]." ROA.4972.

Dallas County's arguments to the contrary fail. Dallas argues that Plaintiffs' demonstrative map would make them worse off. But as the District Court correctly held, this argument "goes to the *merits* of plaintiffs' claims rather than to the ability of the court to address plaintiffs' alleged injury." ROA.4972. A demonstrative map is just that: a demonstrative. It is a tool to clarify arguments regarding liability. It is not the only or even the likely remedy to be enforced by the District Court. *See Clark v. Calhoun Cnty.*, 21 F.3d 92, 95 (5th Cir. 1994) ("[P]laintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-[minority] district is feasible …. If a § 2 violation is found, the [defendant] will be given the first opportunity to develop a remedial plan.").

Regardless, Dallas County does not speak for Plaintiffs in its assessment of their preferences and misstates their testimony regarding injury. First, Morse did not testify at trial that her district was insufficiently conservative. Appellees' Br. at 22. In response to questions about how conservative she wanted her district to be, Morse consistently answered "I don't know." ROA.5257, 5259. Lack of knowledge is no basis to assert that Plaintiffs' demonstrative map

would not serve her goals or could not redress her vote-dilution injury. Even if Morse had stated that her own district should be more conservative (at the expense of the overall composition of the Commissioners Court), it is a persistent difficulty in voting-rights litigation that different voters may have conflicting preferences. Such tension may have complicated the remedial stage, but it would not have deprived her of constitutional standing.

Second, Schroer did not concede that Dallas County's map was preferable because it had fewer jagged boundaries. Appellees' Br. at 22. Schroer testified that he prefers "a smoother map" and that when a district has "fingers into areas" or where "streets that might be broken up or things like that, it's a little bothersome." ROA.5264. He then testified that the lines of Dallas County's map were "less jagged, but they have like penisulas [sic]." ROA.5266. This statement criticizing the Dallas County map cannot be fairly characterized as a concession that Plaintiffs' demonstrative map would worsen his stated injury. And Schroer is no expert on traditional redistricting criteria, so his opinion on this point is largely irrelevant.

Third, Jacobs did not concede that his injury was purely political. When asked whether he would prefer "more white members of the county commissioners court or more Republicans on the county commissioners court," Jacobs responded: "I don't care what shade of skin they have. I just want them to vote the way I appreciate them voting … I'd rather have more Republicans." ROA.5334. This statement is perfectly consistent with Plaintiffs' claim. A minority candidate of choice need not be a member of the minority. *East Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 493 (5th Cir. 1991). And Jacobs also testified that he believed the existing map discriminates against Anglo voters. ROA.5337.

Plaintiffs have been injured by the dilution of their votes on the basis of race. This injury would be remedied by a map that provides a fair opportunity for Anglo voters to elect another candidate of their choice. Plaintiffs have also been injured by Dallas County's racial classifications which "threaten to stigmatize individuals … and to incite racial hostility" and encourage "elected officials … to believe that their primary obligation is to represent only the members of that [racial] group." *United States v. Hays*, 515 U.S. 737, 744 (1995) (internal

quotations and citations omitted). This injury will be remedied when Dallas County removes its predominant racial considerations from the map-drawing process. As the District Court concluded at every stage of the litigation, Plaintiffs have standing to challenge the Dallas County Commissioners Court Map.

II. THIS COURT SHOULD REVERSE AND REMAND FOR THE DISTRICT COURT TO EVAULATE PLAINTIFFS' SECTION 2 CLAIM UNDER THE CORRECT LEGAL STANDARD.

The District Court denied Plaintiffs' § 2 claim based on a flawed functionality analysis. It improperly denied relief without addressing the governing *Gingles* standard. The court erroneously determined that Dallas County was not liable for vote dilution because Plaintiffs' demonstrative map could not guarantee the performance of its majority-minority districts. And it reached that decision on the basis of cherry-picked, exogeneous election results. In so doing, the court created a legal regime in which the only remedy for a violation of one's voting rights on the basis of race is a dramatic *increase* in racial segregation.

Because of these errors of law, the District Court did not decide whether Plaintiffs satisfied the necessary elements of a § 2 claim as set forth in *Gingles*. ROA.4985. "Section 2 vote dilution disputes are

determinations peculiarly dependent upon the facts of each case that require an intensely local appraisal of the design and impact of the contested electoral mechanism ….” *Sensley v. Albritton*, 385 F.3d 591, 595 (5th Cir. 2004) (internal quotation marks omitted). This Court should reverse and remand so the District Court can address these “complex political and legal issues,” *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 700 (S.D. Tex. 2013), in the first instance.

Plaintiffs take this opportunity, however, to further address several issues raised by Dallas County in response to this appeal.

A. *Gingles* 1: Numerosity and Geographic Compactness

To satisfy the first requirement of *Gingles* Plaintiffs must prove that the Anglo population in Dallas County is “sufficiently large and geographically compact to constitute a majority” in an additional single-member district. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). This rule “relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?” *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). The District Court found that Plaintiffs’ map contained two districts “in which Anglos

constitute a majority (65.2% and 55.1%) in two districts." ROA.4986. Plaintiffs clearly satisfied the numerosity requirement.

Dallas County argues that Plaintiffs cannot satisfy the compactness requirement because their expert was too focused on race when he prepared the demonstrative map. Appellees' Br. at 35–37. But Dallas cites no authority for the proposition that compactness requires a subjective analysis of the Plaintiffs' motives. Plaintiffs must present a "proposal [that] demonstrate[s] that a geographically compact district *could be drawn*" with a majority of minority voters. *Houston v. Lafayette Cnty.*, 56 F.3d 606, 611 (5th Cir. 1995). The whole point of a demonstrative map is to prove that the local geography could support a different racial result; it necessarily involves a focus on race. Once a violation is found, the government "'will be given the first opportunity to develop a remedial plan.'" *Id.* (quoting *Clark*, 21 F.3d at 95). Private litigants challenging racial misconduct are not held to the race-neutral standards of government actors.

Precedent defining compactness sets forth an objective, geographic test. Compactness "requires accounting for traditional districting principles such as maintaining communities of interest and traditional

boundaries." *Gonzalez v. Harris Cnty.*, 601 Fed. App'x. 255, 258 (5th Cir. 2015) (per curiam) (internal quotation marks omitted). As *Gonzalez* explains, such principles include: "compactness, contiguity, and respect for political subdivisions; avoiding contests between incumbent representatives; not disrupting preexisting electoral minority-opportunity districts; and maintaining communities of interest and traditional boundaries." *Id.* at 259 (citations omitted). For example, a district is not compact if it connects two communities 300 miles apart. *LULAC v. Perry*, 548 U.S. 399, 432–36 (2006).

Plaintiffs proved that a comparably compact district could be drawn. The districts in their demonstrative map are physically compact and contiguous, protect incumbency, maintain communities of interest and traditional boundaries by avoiding city splits,[1] protect the preexisting majority-minority districts of other ethnic groups in Dallas County, and more equitably balance the power of each Dallas citizen's

[1] In another instance of Dallas County misstating trial testimony, Plaintiffs' expert did not "admit[] at trial that he *analyzed the wrong map*." Appellees' Br. at 37 n.9. Instead he testified that although he was "still refining the analysis," he "knew where [the city splits] were on the map" and "highlighted them in [his] report." ROA.5133. "[T]he red circles outline the territory, and I would say those red circles are what one would look at on any map to discern where the splits occurred." ROA.5134. In any case, Defendants' experts agreed that the enacted plan splits more cities than does the Plaintiffs' demonstrative. ROA.5840–5844.

vote. ROA.5218–5228, 6506–6508. On remand, the District Court is likely to confirm its decision that Plaintiffs' satisfied the first requirement of *Gingles*.

B. *Gingles* 2: Political Cohesion

To satisfy the second requirement of *Gingles* Plaintiffs must prove that the Anglo population in Dallas County is "politically cohesive." 478 U.S. at 49. The parties stipulated that the Anglo vote usually breaks down to 77% Republican and 23% Democrat. ROA.4650. 77% cohesion is more than enough to satisfy the second *Gingles* requirement. Candidates may be minority "candidates of [] choice" even if they do not "represent perfection to every minority voter." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Indeed, courts have found this requirement satisfied with as little as 51% cohesion. *See Lopez v. Abbott*, 339 F. Supp. 3d 589, 609 (S.D. Tex. 2018) (itself finding cohesion with 70% consensus); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 710–11 (S.D. Tex. 2017) (51%); *Fabela v. City of Farmers Branch, Tex.*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *11 (N.D. Tex. Aug. 2, 2012) (54.1%).

Dallas County's attempt to divide Anglo Republicans into "Tea Party candidates" and "mainstream Republicans" is a nonstarter.

Appellees' Br. at 38. All communities have internal disagreements, whether it be about ideology, priority, or style. But courts do not usually dive into how those differences play out in primaries when addressing political cohesion. "Courts regularly consider general election data to demonstrate voter cohesion in traditional majority-minority districts, without any indication that such a showing is insufficient without evidence of voter cohesion in the primary as well." *Texas v. United States*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012) (citing *Gingles*, 478 U.S. at 58–59) (additional citation omitted). Indeed, internal disagreements often provide a means for minority voters to "develop their preferences" and "coalesce around a candidate." *Id.* at 175.

All the cases Dallas cites for the proposition that courts look to primary elections address minority groups seeking an exception to the numerosity requirement of *Gingles* 1, rather than a failing of *Gingles* 2. *See LULAC v. Perry*, 548 U.S. at 444–46 (analyzing a minority group comprising only 25.7% of the district); *Sessions v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (per curiam) (analyzing a potential coalition district); *Perez v. Abbott*, 274 F. Supp. 3d 624, 658 (W.D. Tex. 2017) (same). Because these groups do not have the numbers to control a

general election, the primary election takes on unique importance. In the ordinary case, the Court need no more credit the difference between "Tea Party" and "mainstream" Republicans, than the differences between "progressive" and "mainstream" Democrats.

Dallas's assertion that "Anglos are least cohesive" in Plaintiffs' demonstrative districts, Appellees' Br. at 39, misinterprets *Gingles*. The relevant question in *Gingles* 2 is whether the *current* "electoral structure thwarts distinctive minority group interests," *Gingles*, 478 U.S. at 51, not whether the demonstrative district does. Rather than address Plaintiffs' arguments head-on, Dallas relabels its functionality theory as insufficient political cohesion. The District Court rightly rejected Dallas's effort at trial to import a functionality requirement into *Gingles* 1. ROA.4985–4986. This new argument is no stronger. On remand, the District Court is likely to rule (as it previously assumed, ROA.4985) that Plaintiffs satisfied the second requirement of *Gingles*.

C. *Gingles* 3: Racially Polarized Voting

To satisfy the third requirement of *Gingles*, Plaintiffs must prove that Dallas County experiences racially polarized voting. 478 U.S. at 52. Dallas County asserts—allegedly based on this Court's decision in

LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc)—that "plaintiffs must prove that race, not politics, explains racially polarized voting." Appellees' Br. at 39. But this Court expressly stated in *Clements* that it "need not resolve" 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" between races. 999 F.2d at 860. No other court has ever applied such a rule, and the proposed rule appears directly contrary to *Gingles*.

According to the Supreme Court, "the legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races … vote in blocs for different candidates." *Gingles*, 478 U.S. at 62. "Correlation rather than causation is the test because 'the reasons black and white voters vote differently have no relevance to the central inquiry of § 2. By contrast, the correlation between race of voter and the selection of certain candidates is crucial to that inquiry.'" *Lopez*, 339 F. Supp. 3d at 609 (quoting *Gingles*, 478 U.S. at 63).

Requiring anything more would put Plaintiffs in the impossible position of proving that the voting behavior of whole communities was not just correlated with but *caused by* race, failing to acknowledge the deep entanglement of race and politics. And worse, it would require Plaintiffs to affirmatively disavow their individual judgment in order to exercise their right to an equal vote. On remand, the District Court is likely to rule (again, as it previously assumed, ROA.4985) that Plaintiffs satisfied the third requirement of *Gingles*.

D. Totality of Circumstances

To complete the *Gingles* analysis, Plaintiffs must show that the Commissioners Court Map impairs their ability to participate equally and elect a representative of their choice. *De Grandy*, 512 U.S. at 1010–11. This "searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45 (internal quotation marks omitted), should be done by the District Court in the first instance. Although the District Court must be "flexible in its totality inquiry," *Teague v. Attala County*, 92 F.3d 283, 292 (5th Cir. 1996), it must not rely on inaccuracies like those put forth by Dallas County. So when considering the proportionality of Anglo representation, the court must not change the

denominator to include non-citizen voting age population or manipulate the numerator to exclude some Anglo voters. *See* Appellees' Br. at 43. It also must not interpret the failure of certain voters to participate (in the face of participation-chilling hostility from Commissioners) as evidence that the Commissioners Court is responsive to Anglos. *See* Appellees' Br. at 44. Plaintiffs respectfully request that this Court remand to the District Court to apply the correct *Gingles* framework to their § 2 claim.

III. THIS COURT SHOULD REVERSE AND REMAND FOR THE DISTRICT COURT TO EVALUATE PLAINTIFFS' RACIAL GERRYMANDERING CLAIM.

Although Dallas County now insists that Plaintiffs failed to plead a racial gerrymandering claim, at the time the complaint was filed Dallas knew it faced allegations that race predominated in the redistricting of the Commissioners Court. Dallas complains that the complaint included a description of the purposeful fragmentation of Anglo voters and thus precludes a racial gerrymandering claim. Appellees' Br. at 49–51. But racial gerrymandering can be proven "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Plaintiffs' description of

illicit purpose alongside allegations that the Commissioners Court failed to consider "traditional, neutral redistricting principles" fairly states a racial gerrymandering claim. ROA.223.

Indeed, in its very first pleading filed in this litigation, Dallas sought to dismiss this constitutional claim. In its Rule 12(b) motion, Dallas addressed the substance of Plaintiffs' racial gerrymandering claim at length, citing *Shaw v. Reno*, 509 U.S. 630 (1993), several times. ROA.140–143. Dallas argued the claim should be dismissed because politics, not race, predominantly explained the district boundaries. *Id.* Alternatively, Dallas argued that much of its map satisfied strict scrutiny because districts "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." ROA.143.

Unsurprisingly, Plaintiffs' response to the motion to dismiss also discussed racial gerrymandering. Plaintiffs expressly argued that "[r]ace was the predominant factor in the crafting of the Discriminating Map as a whole and in the design of each of its component [districts]." ROA.167. *See also* ROA.168 ("Creating a map that allowed the 48% local minority the chance to elect only one commissioner was a decision.

The governing coalition was predominantly motived to make that decision by race." (footnotes omitted)); ROA.180 ("In a racial gerrymandering case, … the plaintiff's burden is to show, either through circumstantial evidence … or more direct evidence going to legislative purpose, that race was the predominant factor motivating the decision to place a significant number of voters within or without a particular district." (internal quotation marks omitted)). The District Court *denied* the motion to dismiss, implicitly accepting Plaintiffs' racial gerrymandering claim. ROA.201.

Not until summary judgment in December 2017, did Dallas argue that it lacked notice of the existence of the very claim it had sought to dismiss. ROA.2935. The District Court did not rule that Plaintiffs failed to allege a racial gerrymandering claim until March 2018. ROA.4319–4322. That ruling came only a month before trial, five years into litigation, and nearly six months after passage of the Court-set deadline for motions for leave to amend. ROA.971. Given the running of the clock toward the 2020 census and mootness, Plaintiffs cannot be faulted for choosing to go forward on their remaining claims and to reserve racial gerrymandering for appeal. Dallas County's late assertion that

Plaintiffs failed to plead a racial gerrymandering claim—a claim Dallas specifically attempted to dismiss—cannot exclude the denial of that claim from appellate review.

Dallas asserts that two causes of action cannot be housed under the same count. Fair enough. But intentional vote dilution and racial gerrymandering are just different methods of proving an Equal Protection violation. The cases cited by Dallas County address entirely separate causes of action. Appellees' Br. at 47–48. For example, the Family and Medical Leave Act includes separate statutory provisions addressing distinct types of illegal conduct requiring different forms of relief. *See* 29 U.S.C. § 2615. An employee bringing an interference claim seeks to vindicate his right to take up to 12 weeks of unpaid leave for serious health conditions; an employee bringing a retaliation claim seeks to protect himself from retaliation such as discharge after he has exercised his FMLA rights. *See Bell v. Dallas Cnty.*, No. 3:08-cv-1834-K, 2011 WL 3874904, at *1 (N.D. Tex. Aug. 30, 2011) (citing *Hunt v. Rapides Healthcare Sys., LLC.*, 277 F.3d 757, 763 (5th Cir. 2001)). Similarly, intentional misrepresentation and negligent misrepresentation are separate causes of action under state law,

requiring proof of distinct elements. *See Baker v. Great Northern Energy, Inc.*, 64 F. Supp. 3d 965, 977–78 (N.D. Tex. 2014). In contrast both intentional vote dilution and racial gerrymandering enforce the same Equal Protection Clause and seek the same relief: a new map drawn without unconstitutional, racial considerations.

Additionally, Plaintiffs maintain that if a government entity uses district lines to intentionally dilute the voting strength of a particular racial group, race has predominated over traditional redistricting criteria. Dallas County rejects this intuitive conclusion. But its response is both legally erroneous and morally questionable. Dallas imagines that a mapdrawer might rely on traditional criteria for "the bulk of a district's lines" but nevertheless be guilty of intentional vote dilution by "drawing a minority representative's home out of the district." Appellees' Br. at 51. But the government cannot avoid an Equal Protection violation by drawing three acceptable lines and one with racist intent. Predominance is not determined by counting the number of lines. If a government entity removes a minority representative's home out of the district with the intent to dilute the voting strength of that minority, then "race for its own sake, and not other districting

principles, was the legislature's dominant and controlling rationale in drawing its district[] lines." *Miller*, 515 U.S. at 913. Bizarreness is not necessary to establish race-based districting. *Id.* Second, Dallas asserts that "plaintiffs must do more than simply plead the most blameworthy cause of action if they wish to also allege other, less blameworthy causes of action." Appellees' Br. at 52. Plaintiffs simply do not understand what unstated reasoning leads Dallas County to consider the act of sorting its voters on the basis of race to be "less blameworthy."

Finally, Dallas County misinterprets the relief Plaintiffs seek. Plaintiffs do not ask this Court to engage in fact-finding. Plaintiffs "request that this Court reverse and remand this case for the District Court." Appellants' Br. at 49. Given the nature of the evidence presented, Plaintiffs believe the District Court can determine whether the map is an unconstitutional racial gerrymander without a new trial. But the District Court should evaluate that evidence in the first instance.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse and remand this case for the District Court to reconsider Plaintiffs' § 2 and Equal Protection claims under the correct legal standards.

May 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 10, 2019, the foregoing brief was filed electronically using the Court's CM/ECF system, which will give notice of the filing to counsel of record.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 28.1 because it contains 3,917 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and 28.1, and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 ProPlus 2016 in 14-point Century Schoolbook.

May 10, 2019

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