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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This appeal will require the Court to interpret the requirements of § 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment in the vote-dilution context. Given the complexity of the legal issues and factual record, Appellants believe that oral argument would be of assistance to the Court in resolving these issues.

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JURISDICTIONAL STATEMENT

Appellants appeal from: (1) the Memorandum Opinion and Order dated March 5, 2018 dismissing Plaintiffs' claim that the 2011 Dallas County Commissioners Court map is an unconstitutional racial gerrymander, rejecting Plaintiffs' alternative argument that if the Voting Rights Act does not apply to all racial groups it violates equal protection, and denying summary judgment on the remaining vote-dilution claims; (2) the Memorandum Opinion dated August 23, 2018 finding in favor of Defendants following the bench trial; and (3) the Judgment dated August 23, 2018 ordering dismissal of the case against defendants with prejudice. These Orders were all entered by the Honorable Sidney A. Fitzwater in the United States District Court for the Northern District of Texas, Dallas Division. Appellants timely filed a Notice of Appeal, dated September 21, 2018.

This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. Subject matter jurisdiction over Appellants' claims exists under 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When proving liability for vote dilution under § 2 of the Voting Rights Act, a plaintiff must satisfy the threshold factors and totality of circumstances identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Beyond that, must a plaintiff prove that her proposed districts will guarantee the minority group's electoral success?
2. Must a plaintiff use the words "racial gerrymandering" in her complaint in order to plead an Equal Protection claim pursuant to *Shaw v. Reno*, 509 U.S. 630 (1993)?

STATEMENT OF THE CASE

This case arises out of the excessive use of race in the drawing of the 2011 map for electing commissioners to the Dallas County Commissioners Court.

Dallas County is governed by the Commissioners Court, comprised of four county commissioners and one county judge. The county commissioners are elected from single member districts and the county judge is elected countywide. *See* Tex. Const. art V, § 18(b). At the time of redistricting, the four commissioners were: Maurine Dickey

(Republican), Mike Cantrell (Republican), John Wiley Price (Democrat), and Elba Garcia (Democrat). The county judge was Clay Jenkins (Democrat). ROA.4645. Dickey, Cantrell, and Jenkins are Anglos; Price is African American; and Garcia is Hispanic. ROA.4645.

Demographic shifts captured by the 2010 Census meant that Dallas County needed a new map. ROA.4642-4644. Then-members of the Commissioners Court retained outside redistricting counsel to assist with its creation. ROA.4645. Counsel in turn hired Matt Angle–a Democratic political operative and expert on North Texas geography and demographics–to assist in drawing and presenting the new district maps for consideration. ROA.4645.

No single racial group composes a majority in Dallas County. In 2010, the total population of Dallas County was 33.1% Anglo, 38.3% Hispanic, and 21.95% African American. ROA.4642. The citizen voting-age population in 2010 was 47.9% Anglo, 19.9% Hispanic, and 26.4% African American. Anglo citizens are thus a minority group in Dallas County. ROA.4648.

The Commissioners Court used race throughout the redistricting process. They adopted redistricting criteria in which racial

considerations were a top priority, second only to the equal population requirement. ROA.4645-4646, 6459-6460. As they represented to the Department of Justice, the Commissioners Court set out to maintain the existing opportunity districts for Hispanic and African-American voters and create an additional Hispanic opportunity district. ROA.6461-6471, 5814-5818. When they concluded that was not possible, "[t]he [Commissioners] Court decided" instead to maintain those same existing districts and draw a "new district" to be "48.0% Hispanic and 21.2% Black." ROA.6471. The Commissioners Court decided that these "[m]inority voters," and not members of Dallas's Anglo minority, would "have the opportunity to elect their candidate of choice." ROA.6471. But there is no evidence that the Commissioners Court performed any analysis to determine if this third district was necessary or appropriate under the Voting Rights Act. The Commissioners Court did not consider the implications of their redistricting decisions for the § 2 rights of Anglo voters, for they did not consider Anglo voters to be protected by the Voting Rights Act. ROA.5572-5577.

The racial makeup of the population mattered to how Angle drew every single district. ROA.4647, 5648. On instruction from the

Commissioners Court, Angle prepared racially shaded maps showing the racial composition of each proposed district and its subunits. ROA.5570. There is some dispute as to whether and how they were used, but Angle's experience in Texas politics meant that he did not need those maps in order to achieve the racial outcomes that mattered to the Commissioners Court. ROA.5818-5819. Angle successfully drew a map that allowed for only one majority-Anglo district. ROA.5573-5576, 6504.

In addition to the primary role that race played in the map's creation, racial considerations dominated when evaluating and passing the map. Angle presented four maps to the Commissioners Court and the Commissioners Court chose one for public consideration. ROA.4964-4965. During public hearings about the redistricting, Commissioner Price indicated his approval of the map because it "reflects the demography" and the "racial makeup" of Dallas County. ROA.6476. Commissioner Garcia stated that drawing an additional district to be controlled by Hispanic and African-American voters "just made sense." ROA.6480-6481. Outside counsel said that the map best reflected "the racial and political behavior of Dallas County." ROA.6484. And when

Commissioners and members of the public voiced concern or disagreement, they were shot down, excluded, or ignored. See ROA.5433-5439 (Judge Jenkins shot down when he suggested keeping Lake Highlands together); ROA.5444-5450 (Commission did not respond to a citizen's concern that race predominated in the crafting of the new map).

This behavior is consistent with a general lack of responsiveness to concerns expressed by Anglo voters and open expressions of racial contempt for Anglos by the Dallas County Commissioners Court. For example, when Anglo citizens of both major parties raised concerns regarding the firing of the well-regarded, Anglo County Elections Administrator, members of the Commission showed "strong resistance" and "vitriol" toward anyone who challenged the decision. ROA.5482. In particular, Commissioner Price said "all of you are white, go to hell" to the room of constituents. ROA.5483-5486, 5694, 7674. In another hearing, Commissioner Price derisively dismissed his Anglo colleague Commissioner Dickey (whose district was the one redrawn from majority-Anglo to one controlled by Dallas County's joint Hispanic and African-American majority) as "Honey Boo Boo." ROA.5483-5484. In

neither instance was there any response or repercussion for this overt racial contempt. ROA.5485-5488, 5490-5491, 5698-5704.

Ultimately, the new map successfully created three districts in which Hispanic and African-American voters constituted a majority and one district with a nearly 70% supermajority of Anglo voters:

ENACTED PLAN						
District	Total Pop. (2010)	Citizen Voting-age Population 2010-14				
		Total	White	Black	Hispanic	All other
	Number					
1	609,073	328,130	140,554	82,988	85,246	19,342
2	575,556	395,945	276,285	34,996	47,677	36,987
3	569,219	373,690	112,076	195,549	53,547	12,518
4	614,291	312,410	117,466	61,063	115,934	17,947
County Total	2,368,139	1,410,175	646,381	374,596	302,404	86,794
Total deviation from ideal: 7.61%						
	Share of Total CVAP					
1		*100%*	*42.8%*	*25.3%*	*26.0%*	*5.9%*
2		*100%*	*69.8%*	*8.8%*	*12.0%*	*9.3%*
3		*100%*	*30.0%*	*52.3%*	*14.3%*	*3.3%*
4		*100%*	*37.6%*	*19.5%*	*37.1%*	*5.7%*
County Total		*100%*	*45.8%*	*26.6%*	*21.4%*	*6.2%*
Sources: 2010 Census, PL94-171 file; 2014 5-year ACS file.						

ROA.6504. Despite constituting more than 45% of the citizen voting-age population in all the relevant years, the number of majority Anglo districts was reduced from 2/4 to 1/4 seats. ROA.4664, 6504, 6470.

The map was approved by a vote of 3-1. ROA.4647. Commissioner Price, Commissioner Garcia, and Judge Jenkins voted in favor. ROA.4647. Commissioner Cantrell voted against and Commissioner Dickey, who had recently announced her retirement, did not vote. ROA.4646-4647. Since the adoption of this map, Commissioner Dickey was replaced by Theresa Daniel, a Democrat who was not the preferred candidate of her district's Anglo population. ROA.4966, 5844-5845.

Plaintiffs Anne Harding, Gregory R. Jacobs, Holly Knight Morse, and Johannes Peter Schroer are Anglo residents of Dallas County. Harding lives in District 4, Jacobs lives in District 1, Morse lives in District 2, and Schroer lives in District 3. ROA.4651. In 2015, Plaintiffs sued Dallas County and the members of the Commissioners Court for violating their rights under § 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. ROA.25-33, 228-240.

During the litigation, Plaintiffs presented a proposed remedial plan that demonstrated the possibility of creating two majority-Anglo districts while maintaining two districts with Hispanic and African-American majorities:

REMEDIAL PLAN (2018 implementation)						
District	Total Pop. (2010)	Citizen Voting-age Population 2010-14				
		Total	White	Black	Hispanic	All other
	Number					
1	575,706	293,040	111,218	56,038	110,249	15,535
2	601,102	387,620	252,720	50,447	54,635	29,818
3	597,941	365,420	81,808	207,452	67,392	8,768
4	593,390	364,095	200,635	60,659	70,128	32,673
County Total	2,368,139	1,410,175	646,381	374,596	302,404	86,794
Total deviation from ideal: 4.29%						
	Share of Total CVAP					
1		*100%*	*38.0%*	*19.1%*	*37.6%*	*5.3%*
2		*100%*	*65.2%*	*13.0%*	*14.1%*	*7.7%*
3		*100%*	*22.4%*	*56.8%*	*18.4%*	*2.4%*
4		*100%*	*55.1%*	*16.7%*	*19.3%*	*9.0%*
County Total		*100%*	*45.8%*	*26.6%*	*21.4%*	*6.2%*
Sources: 2010 Census, PL94-171 file; 2014 5-year ACS file.						

ROA.6506.

At summary judgment, the District Court applied "clearly established" circuit precedent that "the [Voting Rights Act] applies to protect any minority group, including Anglo voters when they constitute a minority." ROA.4323-4324 (citing *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009)). The District Court was thus able to dispose of Plaintiffs' argument in the alternative that if the Act does not protect voters of all races, it is unconstitutional. *Id.*

The District Court also granted summary judgment in part to Defendants because it determined that Plaintiffs had not pleaded a

racial gerrymandering claim. ROA.4319-4322. The remaining vote dilution claims proceeded to trial. ROA.4322-4323.

At the conclusion of trial, the District Court determined that Plaintiffs had standing to pursue this litigation: they proved that their injury was "capable of being redressed" by "a replacement map that contains a second Anglo-opportunity [district]." ROA.4972. However, the District Court rejected Plaintiffs' claims on the merits. ROA.4973. The District Court was willing to assume that Plaintiffs satisfied all three *Gingles* factors. ROA.4985-4986. Nevertheless, without addressing the totality of circumstances or analyzing *any* of the factors identified as most important, the District Court announced that Plaintiffs had not met their burden on the ultimate question of vote dilution. ROA.4961-4999. The District Court held that Plaintiffs failed to prove their proposed districts would perform for the Anglo candidates of choice and rejected Plaintiffs' statutory claim on this basis. *Id.* For the same reason, the court denied relief on Plaintiffs' intentional dilution claim without addressing their evidence of racial intent. ROA.4998.

Plaintiffs timely appealed. ROA.5001-5003.

SUMMARY OF THE ARGUMENT

This is a case about whether § 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment will prevent Dallas County from packing Anglo voters into a racial enclave and thus diluting their voting strength. This is a case about whether our laws and Constitution should be read to allow the creation of competitive, racially-mixed districts to remedy racial gerrymandering. The alternative is that the Voting Rights Act actually exacerbates racial tensions rather than confronting them. In one world, Anglo voters will have an incentive to work together with Hispanic and African-American voters to elect acceptable commissioners who will in turn listen to the entire community. In the other, the one we apparently live in, it is politically acceptable for a Dallas County Commissioner to tell concerned citizens, in public, "all of you are white, go to hell." Section 2 does not condemn us to the world of today, it protects us from it. But the District Court's addition to the elements and burdens in vote dilution litigation approved a map where the survival of an excessively Anglo supermajority district all but ensured Anglos living elsewhere would not be listened to.

This Court, the greatest civil rights court in this Nation's history, should stand in the way of this new type of segregation.

ARGUMENT

This Court "review[s] de novo the district court's interpretations of law. However, the district court's findings of facts regarding vote dilution are subject to the clearly erroneous standard." *Rollins v. Fort Bend Independent School Dist.*, 89 F.3d 1205, 1210 (5th Cir. 1996). A court's "ultimate finding of vote dilution" is reviewed for clear error, but this "does not inhibit an appellate court's power to correct errors of law." *See Thornburg v. Gingles*, 478 U.S. 30, 78–79 (1986) (internal quotations and citations omitted).

This Court "review[s] the grant of a motion for summary judgment de novo, applying the same standard as the district court." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (citation omitted).

I. THE DALLAS COUNTY COMMISSIONERS COURT MAP VIOLATES § 2 OF THE VOTING RIGHTS ACT.

Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure … which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A plaintiff can prove a

violation of § 2 if "based on the totality of circumstances, it is shown that the political process leading to nomination or election" is "not equally open to participation" in that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Section 2 applies to protect any racial minority, including Anglo voters when they are a minority of the relevant population. *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009).

The Supreme Court has held that § 2 applies to claims of vote dilution—that is, claims that a particular districting system or electoral mechanism "operate[s] to minimize or cancel out the voting strength of racial [minorities in] the voting population." *Gingles*, 478 U.S. at 47 (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). To make out such a claim, the minority group must be able to show: (1) that it is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that it is "politically cohesive," and (3) that the "majority votes sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Id.* at 50–51. If these threshold requirements are met, the "minority group must further demonstrate

that, under the totality of the circumstances, 'its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *LULAC v. Clements*, 986 F.2d 728, 747 (5th Cir. 1993) (internal citations omitted). Section 2 applies to claims of both "cracking" (diluting voting strength through fragmentation of minority voters) and "packing" (diluting voting strength through creation of supermajority minority districts). *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

The way that vote dilution claims are tried and adjudicated creates a moral and legal quandary. Merely stating the legal standard reveals its disconcerting premises. Claims of vote dilution force courts into the political arena as they must define what a vote should be worth. Moreover, claims of vote dilution "giv[e] credence to the view that race defines political interest," assuming that "members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representatives holding seats in elected bodies if they are to be considered represented at all." *Holder v. Hall*, 512 U.S. 874, 896–904 (1994) (Thomas, J., concurring).

But unchecked, legislatures may use vote dilution as one tool of many to prevent minority voters from exercising political power and enjoying the benefits of residence in a particular district. *E.g., United States v. Mississippi*, 444 U.S. 1050, 1056 (1980) (Marshall, J., dissenting) ("The statutory plan divides and diminishes Negro population concentrations, combines them with heavily white populations, and creates oddly shaped districts for no apparent reason other than to dilute the Negro vote."); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) ("The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee."). Regardless of intent, the use of race in redistricting is a dangerous tool that "may balkanize us into competing racial factions." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). For this reason, "race-based districting by our state [and local] legislatures demands close judicial scrutiny." *Id.*

Current § 2 caselaw walks a fine line as it attempts to remedy racial effects without "carry[ing] us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues

to aspire." *Id.* Lest we lose sight of this goal, courts and legislatures alike must be careful not to upset the careful balance.

A. Racial Segregation is the Problem, Not a Necessary Element of the Solution.

The Supreme Court's opinion in *Gingles* serves the unenviable role of defining the political and racial benchmarks from which vote dilution claims are measured. "[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in judgment). It also requires courts to decide whether minority voters are sufficiently similar in their values and preferences such that their voting rights can be adjudicated as a group, which in practice has created "a working assumption that racial groups can be conceived of largely as political interest groups" entitled to their "'just' share of seats in elected bodies throughout the Nation." *Holder*, 512 U.S. at 905 (Thomas, J., concurring).

Faced with this nearly impossible task, the Court crafted bright-line threshold requirements to accompany the totality of circumstances

analysis in order to determine when a governmental entity has illegally cracked or packed minority voters. This test attempts to strike a balance between providing a remedy and maintaining a proper judicial role. But this type of § 2 claim, especially as applied today, threatens to make the federal courts unwitting agents of increased racial balkanization.

1. A finding of liability under § 2 does not require proof of performance beyond *Gingles*.

In order to prove that vote dilution has occurred, precedent requires only that plaintiffs meet the requirements of *Gingles*. After plaintiffs satisfy the *Gingles* threshold factors and successfully support their claim based on the totality of circumstances, they have met their burden to prove liability. Further analysis of a district's performance—*i.e.*, speculation about whether the minority voters will successfully elect their candidate of choice or will influence the candidates and outcomes of future elections—is reserved for the remedial stage.

The *Gingles* threshold requirements serve as a proxy for the only "performance" that matters: opportunity. That is, they determine whether "minority voters possess the *potential* to elect representatives." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original). "Absent a

satisfactory showing on the first *Gingles* factor, minority voters cannot claim that it is the current districting system and not, for example, geographic dispersal that is the source of their disproportionately weak political strength." *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406 (5th Cir. 1996). This "bright line test" determines whether the government has illegally limited the minority's potential to elect its representatives of choice. *See Valdespino v. Alamo Heights Independent School Dist.*, 168 F.3d 848, 852 (5th Cir. 1999). But the analysis ends there, and for good reason.

After the liability phase, the burden shifts to *defendants* to propose a map that can remedy the injury or prove that no map could—the defendant is not required to adopt the plaintiffs' proposal. *Gingles*, 478 U.S. at 50 n.17; *Houston v. Lafayette Cnty.*, 56 F.3d 606, 612 (5th Cir. 1995). This Court has expressly affirmed that the "ultimate viability and effectiveness of a remedy" should properly be "considered at the remedial stage of litigation and not during analysis of the *Gingles* preconditions." *Gonzalez v. Harris Cnty.*, 601 Fed. Appx. 255, 261 (5th Cir. 2015) (affirming *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 745 (Tex. S.D. 2013)). "Section 2 does not require that minority-

preferred candidates would win some number of exogenous … elections in a proposed district." *Perez v. Abbott*, 253 F. Supp. 3d 864, 882 (W.D. Tex. 2017). It "simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to a *practical chance* to compete in a roughly proportionate number of districts." *Id.* (emphasis in original). Requiring litigants to show guaranteed success is neither required by law nor prudent. And it makes even less sense to require courts to undertake extensive predictive analysis of a proposal that may never even be considered as the ultimate remedy.

Courts regularly find § 2 liability without additional analysis to determine if a plaintiff's proposed district will in fact elect the minority candidate of choice. Specifically, although a substantial minority of Hispanic voters in Texas prefer Republicans over the so-called Hispanic candidate of choice, courts have found liability so long as the plaintiff's proposed district included a bare majority of Hispanic citizen voting-age population. *See, e.g.*, *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 728 (N.D. Tex. 2009); *Fabela v. City of Farmers Branch*, Civ. Action No. 3:10-CV-1425-D, 2012 WL 3135545 at *4–8 (N.D. Tex. Aug. 2, 2012).

The first prong of *Gingles* cannot apply differently to different minority groups.

The Supreme Court's decision in *Abbott v. Perez*, 138 S.Ct. 2305 (2018), did not overrule this precedent. In *Abbott*, the plaintiff's own expert testified that no possible, legal map could perform. *Id.* at 2332. In that situation, the Court correctly concluded that "the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Id.* But the Court did not hold that plaintiffs have the burden to prove such performance, only that its stipulated absence was problematic.

The *Gingles* factors and their bright-line measures make perfect sense in this context. Elections are inherently uncertain. To suggest that outcomes can be determined in advance from census data undermines the very idea of the popular will: the results of democratic elections are not supposed to be preordained. Minority groups might attempt to "pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), in a variety of different ways to achieve electoral success. *Gingles* itself contemplates the idea that a minority group might take advantage of cross-over

support. 478 U.S. at 56. Other times, minority groups might fail to elect their preferred candidates, but nevertheless influence the process through other mechanisms. A bright-line rule gives courts a manageable way to measure the concept of "opportunity" or "potential" in an unpredictable world.

Requiring courts to predict the exact results of future elections as part of their legal analysis is just asking for unreliable outcomes. Judicial electoral speculation undermines the predictability of the rule of law for voters as well as for the legislators who must draw district lines in compliance with the legal requirements of § 2. Further, accurate predictions of voting behavior would require an analysis of many factors other than simple partisan divide. Voter registration, turnout, the identity, strengths, and weaknesses of future candidates, and a myriad of other factors may have an outsized influence on eventual election results.

2. Further proof of performance may result in serious representational harms.

Even setting aside the difficulty of accurately predicting whether a district will perform, requiring the crafting of safer race-based districts than those that satisfy *Gingles* is likely to be counter-

productive. Safe districts are likely to further the very harms that give rise to legal recourse in this context.

The Supreme Court has explained that racial gerrymandering harms voters in two different ways. First, racial classifications inherently "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *United States v. Hays*, 515 U.S. 737, 744 (1995) (internal quotations and citations omitted). Second, racial gerrymandering causes "representational harms" because when "a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id.*

Requiring plaintiffs to prove performance by proposing a remedy in which they obtain a racial supermajority merely replaces one stigmatic and representational harm with another. This is particularly true in a community like Dallas with no single racial majority because every racial group may insist on its own ultrasafe seat. A district in which a supermajority of voters are members of the same race-based

interest group is a district in which the concerns of others can be safely ignored, indeed by telling them to "go to hell."

When people are grouped in like-minded enclaves, they are more likely to become polarized in their views. Such "[g]roup polarization has evident implications for many issues in law and politics. It suggests, for example, that like-minded jurors, judges, and administrative officials will move to extremes." Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. Legal Analysis 263, 264 (2009). Drawing districts around the racial supermajorities required to assure performance is likely to have a similar polarizing effect. Racial gerrymandering means that "antagonisms that relate to race … rather than to political issues are generated; communities seek not the best representative but the best racial … partisan." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

In contrast, a more competitive district may ease rather than exacerbate racial tensions. Even if those districts will not always perform, only rarely will any candidate get elected without a substantial share of the 51%, who will in turn have influence over candidate selection in both major parties and the positions the

candidates take. *See Georgia v. Ashcroft*, 539 U.S. 461, 482–83 (2003) (superseded by statute) (collecting scholarship regarding substantive influence and representation); *see also* Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act–Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615, 1651–54 & n.162 (1983). A more pluralistic district might help people find common ground across racial lines.

Plaintiffs seek to undo the packing and cracking of Anglo voters not so that they can *guarantee* the election of two Anglo Republican candidates, but so that racially polarized voting in Dallas County might decrease and they may share an equal opportunity to compete. The current Commissioners Court map creates a white enclave such that the majority of representatives never have to listen to the concerns of Anglo voters, and the Anglo candidate of choice never has to listen to the concerns of anyone else. Competitive districts might not always perform for the Anglo candidate of choice. But the interests of Anglo citizens will be taken seriously in each, due to the opportunity for candidates with cross-over support to build new coalitions across racial lines.

Requiring proof of guaranteed performance confuses equality of representation with winning elections. To say that a group is only represented when their candidate of choice wins the election is overly simplistic. "[T]he power to influence the political process is not limited to winning elections." *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring in judgment). Influence over multiple districts may be just as valuable as controlling a particular representative. *Georgia v. Ashcroft*, 539 U.S. at 482. For example, "candidates elected without decisive minority support" may nevertheless "take the minority's interests into account" as they court their support. *Id.* (citations omitted).

True, this Court has held that § 2 does not *require* the creation of so-called "influence districts." *Gonzalez*, 601 Fed. Appx. at 261 (citing *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1117 n.7 (5th Cir. 1991)). Courts have wisely been hesitant to expand the scope of judicial involvement in vote dilution for fear that race would infect nearly every redistricting decision. *See*, *e.g., LULAC v. Perry*, 548 U.S. 399, 445 (2006). But this Court has never said that once the *Gingles* factors are otherwise met, a minority group's ability to influence an election is

irrelevant to their opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). If anything, the District Court's additional performance requirement is likely to further entangle courts in racial politics. And if this Court can remedy the effects of vote dilution without requiring the creation of ultrasafe race-based districts, that is a virtue, not a vice.

This virtue aligns with the purpose of the Voting Rights Act. The Act seeks not to perpetuate segregated districts and racially polarized voting but rather "to foster our transformation to a society that is no longer fixated on race." *LULAC v. Perry*, 548 U.S. at 490. Courts do not advance this goal if plaintiffs must seek completely safe racial enclaves.

B. The Evidence Offered at Trial is Enough to Prove Plaintiffs' Electoral Potential Without Further Entangling Courts in Racially-Tinged Predictions.

Applying the correct legal analysis, Plaintiffs have carried their burden to prove a violation of § 2. And even on its own terms, the District Court's analysis is flawed. Defendants did not disprove the legal inference that Plaintiffs' *Gingles*-compliant proposal could perform for the Anglo candidates of choice. Far from it, Defendants offered no more than a legally defective rejoinder, providing no sound basis for

rejecting the proposed districts' ability to perform. If further performance analysis was warranted at the liability phase, it should have been considered only as a part of the totality of circumstances, weighed along with Plaintiffs' evidence of unequal opportunity and racial intent. Plaintiffs respectfully request that this Court reverse and remand so their § 2 claim may be addressed under the correct legal standard.

1. Plaintiffs have satisfied the *Gingles* threshold requirements.

First, Plaintiffs proved that the Anglo population in Dallas County is "sufficiently large and geographically compact to constitute a majority" in an additional single-member district. *LULAC v. Clements*, 986 F.2d at 742. The first prong of *Gingles* "relies on an objective, numerical test" to give "straightforward guidance to courts and to those officials charged with drawing district lines." *Bartlett*, 556 U.S. at 18 (plurality opinion). "[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Id.* at 19–20. The Fifth Circuit requires a majority of citizen voting-age population. *Valdespino*, 168 F.3d at 852–53; *Reyes v. City of Farmers Branch*, 586

F.3d 1019, 1023 (5th Cir. 2009). Here, Plaintiffs presented a proposed remedial plan in which Anglo voters constitute more than 50% of the citizen voting-age population in two districts. ROA.4979. Anglo voters would make up 65.2% of District 2 and 55.1% of District 4. *Id.* Defendants agreed that two majority-Anglo districts were "mathematically possible." ROA.4714. So did the District Court. ROA.4979, 4986-4987.

Plaintiffs' proposed alternative also satisfies the requirements of geographic compactness and comparable fidelity to traditional redistricting principals. *See Lafayette Cnty.*, 56 F.3d at 611; *LULAC v. Perry*, 548 U.S. at 433. Plaintiffs' proposed map equalizes population better than the original, is as reasonably compact as the original, and protects incumbency as well as the original. ROA.5218-5223, 6506, 6508. Plaintiffs' map is superior with regard to avoiding city splits and preserving communities of interest. ROA.5223, 5228, 6506-6508. And Plaintiffs' map fairly respects the interests of other ethnic groups within Dallas County. ROA.5223-5224, 6508. Plaintiffs clearly satisfy the first prong of *Gingles*.

Second, Plaintiffs proved that Anglo voters are "politically

cohesive" and that the non-Anglo majority "votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (citations omitted). Expert testimony revealed that there is a "clear candidate of choice for Anglo voters" in contested Dallas County elections. ROA.6683. Even the Defendants' expert admitted that, in Dallas, Anglo voters tend to prefer one set of candidates, while Hispanic and African-American voters tend to prefer another. ROA.5566-5567. Expert testimony also showed that the Anglo candidate of choice is usually defeated by a non-Anglo majority voting bloc. ROA.4982-4984, 5347-5349, 6684-6685, 7599-7604. Analyzing endogenous elections, the Anglo-preferred candidate has won only one of six contested elections in the last decade. ROA.4982. No expert reached a different conclusion on any of these elections.

Unfortunately, but perhaps not surprisingly, courts consistently find that voting in Texas is racially polarized. *E.g.*, *Perez*, 253 F. Supp. 3d at 962 (finding racially polarized voting in Dallas County); *Veasey v. Abbott*, 830 F.3d 216, 258 (5th Cir. 2016) (acknowledging the existence of racially polarized voting in 252 of 254 counties in Texas); *Benavidez*, 638 F. Supp. 2d at 726; *LULAC v. Perry*, 548 U.S. at 438. The same is

true here. Plaintiffs satisfied the second and third prongs of *Gingles*, as the District Court assumed.

These threshold requirements prove that the Anglo voters in Plaintiffs' proposed districts have the requisite potential for electoral success. With 55.1% of voters in one reasonably compact district and 65.2% of voters in another, Dallas's Anglo citizens would have that potential. Plaintiffs need not prove anything else before moving to the totality of circumstances.

2. The totality of circumstances supports a finding of vote dilution.

Plaintiffs final burden is to show that the totality of circumstances reflects that the Commissioners Court Map "impairs the ability of the minority voters to participate equally in the political process and to elect a representative of their choice." *Rodriguez*, 964 F. Supp. 2d at 699 (citations omitted). This inquiry "presents very complex political and legal issues." *Id.* But "it will only be the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Teague v. Attala Cnty.*, 92 F.3d 283, 293 (5th Cir. 1996). Plaintiffs have met their burden. The totality of circumstances confirm

that Dallas County violated their rights under § 2.

"In conducting this broader inquiry, the court should consider the objective factors set forth in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, including: (1) the history of 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; (4) the degree to which members of the minority group have been denied access to the candidate slating process; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state or

political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous." *Rodriguez*, 964 F. Supp. 2d at 699–700 (citing Senate Report at 28–29; *LULAC v. Perry*, 548 U.S. at 426). But these factors are not "comprehensive or exclusive." *Gingles*, 478 U.S. at 45. "Not every factor will be relevant in every case." *Veasey*, 830 F.3d at 246 (5th Cir. 2016) (en banc).

Plaintiffs do not seek to compare the evidence of vote dilution in this case with the history of discrimination against African Americans or Hispanics in this country—no such comparison could fairly lie. Rather, they ask this Court to conduct the "intensely local appraisal of the design and impact of the contested electoral mechanisms" required by the Supreme Court. *Gingles*, 478 U.S. at 79. The law protects against the dilution of voting strength on the basis of race, whether done on a grand societal scale or in a small corner of local government. And here, several factors support a finding of vote dilution.

First, Dallas County clearly experiences racially polarized voting. *See supra* at 28–30. The existence of racially polarized voting is one of the most important factors in the totality of circumstances. *Clark*, 88 F.3d at 1397; *Gingles*, 478 U.S. at 48 n.15. Racially polarized voting

routinely leads to the defeat of the Anglo community's candidates of choice to the Commissioners Court. At the time of trial, only one member of the Commissioners' Court was an Anglo candidate of choice. ROA.4966, 5844-5845, 6674-6683, 7601. That additional Commissioners happen to be white does not change this fact. ROA.5835-5837.

Second, there is no dispute that Dallas elections are characterized by racial appeals. ROA.5505-5511, 5519, 6068. Expert testimony explained how racial appeals in Dallas are often used to categorize and "otherize" Anglos. ROA.5503-5511, 6701-6717. Appeals to race in a racially polarized atmosphere reduce the public incentives for integration and encourage the formation of ethnic voting blocks, hastened by fear of losing political power. ROA.6715.

Third, although there is no absolute right to proportionality, it is nevertheless relevant to the totality of circumstances. *De Grandy*, 512 U.S. at 1014. Here, Anglo voters constitute over 45% of the citizen voting-age population in Dallas County but their preferred candidates hold only one seat on the Commissioners' Court. ROA.4648-4649; *see supra* at 5. This fact strongly suggests vote dilution.

Circumstantial evidence also supports a finding of vote dilution.

Because a majority of Commissioners do not depend on the support of Anglo voters, it is not at all surprising that they lack responsiveness to the concerns of Anglo citizens. For example, when Anglo citizens attempted to raise concerns about the redistricting, they were ignored, rejected, and insulted. ROA.5444-5450, 5433-5439. The Commissioners Court also did not take action in response to the concerns of Anglo citizens regarding the firing of an Anglo County Elections Administrator. ROA.5698-5704. Worse, when Commissioner Price responded to those concerns with open racial hostility, the other members of the Commissioners Court did nothing. *Id.* This treatment has the potential to chill (and has the anecdotally proven history of chilling) participation in local politics by Dallas's Anglo citizens. ROA.5449-5450.

Finally, and perhaps most importantly, the redistricting process here contains strong evidence of racial intent. In drawing the new map, the Commissioners Court deliberately classified the citizens of Dallas County by race and then purposefully crafted district lines to reduce the voting strength of Anglo citizens. Racial data was considered and used in adopting the new map. ROA.5570, 5818-5819. Because the

Commissioners Court did not perform a *Gingles* analysis in 2011, there is no explanation for the racial shading maps they requested other than the intentional use of race. ROA.5815-5819, 5428-5432, 5441-5443. As Defendants communicated to the Department of Justice, their initial goal was to create a second Hispanic opportunity district before they "decided" to settle for the preservation of the existing Hispanic and African-American districts, coupled with a new coalition district for those same populations. ROA.6461-6469, 6470-6471, 5814-5817. The evidence establishes that the Commissioners Court intended to make Anglo voters a minority that was likely to be defeated by Dallas County's non-Anglo majority in 3/4 districts.

Intent on its own carries great, perhaps even dispositive weight. But it is also probative of effect. It is difficult for courts to predict how an electoral map will perform; this is a task outside judicial expertise and at odds with the underlying assumptions of the democratic process. But map-drawers and elected politicians are experts in exactly this question. Because of this expertise, it is likely that they will achieve what they set out to do. Intent to dilute a minority's voting strength will likely translate to the actual dilution of their voting strength.

Reviewing the relevant factors, Plaintiffs have established that the Dallas County Commissioners Court Map diminishes the ability of Anglo voters to equally participate in the political process and elect their representatives of choice.

3. On its own terms, the District Court's analysis is flawed.

Even if the Court decides that a further analysis of performance is appropriate at the liability phase, the District Court erred in its application.

Cross-over votes. In determining that Plaintiffs' proposed districts would not perform, the District Court focused on the number of Anglo voters who dissent from their bloc-voting group's general preferences but largely ignored the number of non-Anglo voters who do the same. ROA.4990-4996. For example, a sizeable percentage of Hispanic voters in Dallas support Anglo-preferred candidates over the Hispanic candidate of choice (between 13–25%). ROA.4982-4984. Similarly, Dallas voters who are not Anglo, African American, or Hispanic usually offer majority support to Anglo-preferred candidates. ROA.6674-6683, 7601. The District Court also did not consider other factors that might affect the likelihood of electoral success, such as differences in voter

turnout or the identity of specific candidates. If at the liability phase the Court decides to consider performance directly (rather than opportunity as established by *Gingles*), it should consider all the available facts, not merely the partisan divide among Anglo voters.

Exogenous elections. The District Court considered expert opinion presented by Defendants that addressed how Plaintiffs' proposed map would have performed in two contests from the 2016 General Election. But two cherry-picked examples from exogenous elections in an unusual year do not prove that Plaintiffs' map will not generally perform for Dallas's Anglo community in future Commissioners Court elections. Quite the opposite.

Static data on how President Trump and Hillary Clinton performed in various sections of Dallas County provide very little information about how a candidate for the Commissioners Court would perform in the future. For one thing, it is common sense that even the most ordinary presidential election differs greatly from local politics. Using Clinton's returns falsely implies that Democrats would have won every state house seat in Dallas County in 2016. ROA.5831. For another, electoral politics are not static. Presidential elections affect

local politics, and vice versa. And unlike a state- or county-wide election, the location of district lines may dramatically change which candidates run for County Commissioner and which voters turn out to support them. For these reasons and many others, it is not surprising that Plaintiffs testified that knowing how a map performed for Hillary Clinton would not give them enough information to know whether they supported that map for the Commissions Court. ROA.5047-5049.

Given their dramatically different roles and responsibilities, Dallas County's Sheriff elections also materially differ from the County Commissioners elections. Such exogenous election returns are, at best, only minimally relevant. But here they cannot play even that role, because Defendants presented no evidence concerning whether or not Sheriff Valdez was the preferred candidate of Dallas's Anglo voters. ROA.5838. Without a foundation, the assumption that her election proves Anglo voters lacked the opportunity to elect their preferred candidate for Sheriff (let alone for Commissioners) was unwarranted.

Regardless, Defendants' predictions are so close as to prove the proposed districts have the potential to perform for the Anglo candidates of choice. Performance does not mean a sure win, it means

an opportunity. Opportunity not certainty. *See LULAC v. Perry*, 548 U.S. at 428 ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." (quoting *De Grandy*, 512 U.S. at 1014)). Opportunity is demonstrated when exogenous elections are razor thin. This is what Defendants' analysis showed. Defendants' expert concluded that in District 2 of Plaintiffs' proposed map, the Democratic candidate for Sheriff would have won 50.6% to 49.4%; in District 4, the same candidate would have won 50.8% to 49.2%. ROA.4989-4990. Such small margins tend to *prove* rather than disprove that it is possible to create two districts in which Anglo voters would have the opportunity to elect their preferred candidates.

Perhaps most telling is the evidence that Defendants' expert did *not* include in his report. Angle testified that in addition to the two elections he reported, he also analyzed the county judge race and the Texas gubernatorial race. ROA.5829-5830. The county judge race in particular is far more similar to the election at issue than those disclosed. But Angle did not include those results in his report. ROA.5830. If anything, the omission of this information creates an

inference that it shows the Anglo candidates of choice prevailing in Plaintiffs' proposed districts. Failure to report clearly relevant information about these elections renders Defendants' evidence legally insufficient to counter Plaintiffs' *Gingles*-based proof that Anglos were denied their right to an equal electoral opportunity.

At most, Defendants' evidence shows that election outcomes in Plaintiffs' proposed districts are not preordained. But the evidence presented does not preclude the possibility of two performing majority-Anglo districts.

Totality of Circumstances. If a plaintiff satisfies the threshold *Gingles* requirements, the district court "must consider and analyze each of the Senate Report factors" as part of the totality of circumstances. *Lafayette Cnty.*, 56 F.3d at 613 (citing *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 491 (5th Cir.1991)). Here, the District Court neither answered the threshold questions, nor addressed the totality of circumstances as required by *Gingles*. This is legal error.

The District Court was willing to assume that Plaintiffs had satisfied each of *Gingles*' threshold requirements. ROA.4985. The

District Court stated it had "not found any authority for the proposition that plaintiffs must prove that their proposed map will perform for the minority group in order to meet the first prong of *Gingles*," even acknowledging that the Supreme Court has said the exact opposite: the "circumstance that a group does not win elections does not resolve the issue of vote dilution." *See* ROA.4986 (citing *LULAC v. Perry*, 548 U.S. at 428). But the District Court nevertheless found that Plaintiffs failed to prove the "ultimate question" of vote dilution solely because they had not proved that Anglos will elect a Republican in these proposed districts. ROA.4985-4986. In so doing, the District Court either added a threshold requirement to *Gingles* that is directly contradicted by the Supreme Court or failed to consider "the totality of circumstances" as required by the statute. 52 U.S.C. § 10301(b). At the very least, the District Court should have considered its concerns about performance alongside the other factors relevant to the totality of circumstances.

Given the strong evidence of racially polarized voting that results in the widespread failure of Anglo voters to elect their preferred candidates, a racially charged atmosphere, and the intentional use of race in redistricting, the relatively weak evidence that two Anglo-

majority districts might be subject to competition is not enough to change the outcome of the analysis. Dallas County diluted the votes of its Anglo citizens in violation of § 2.

II. THE DALLAS COUNTY COMMISSIONERS COURT MAP IS AN UNCONSTITUTIONAL RACIAL GERRYMANDER.

Plaintiffs alleged and proved that race was the predominant factor motivating the redistricting of the Dallas County Commissioners Court. Defendants cannot meet their burden under strict scrutiny. Because Dallas County's use of race was not narrowly tailored to a compelling government interest, the Commissioners Court map violates the Equal Protection Clause, U.S. Const. Amend. XIV. *See Shaw,* 509 U.S. at 630; *Miller v. Johnson*, 515 U.S. 900 (1995).

A. Plaintiffs Pleaded A Claim of Racial Gerrymandering in Violation of the Equal Protection Clause.

The District Court dismissed Plaintiffs' gerrymandering claim because Plaintiffs' "equal protection claim is pleaded as a vote dilution claim, and nothing more." ROA.4321. But this overly narrow reading misreads the complaint as well as the governing law.

A claim of racial gerrymandering requires "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."

Miller, 515 U.S. at 916 (citations omitted). Plaintiffs pleaded exactly that. The complaint alleges that "race was the predominant factor in the Commissioners Court's crafting of the Discriminating Map as a whole and in the design of each of the Discriminating Map's component four (4) CCDs." ROA.232. Plaintiffs incorporated that allegation by reference into their claim that "the facts alleged constitute a denial of the Plaintiffs of rights guaranteed by the Equal Protection Clause of Section 1 of the 14th Amendment to the United States Constitution." ROA.237.

Even standing alone, these allegations are sufficient to plead racial gerrymandering. Indeed, the Latino Redistricting Task Force made similar allegations in a 2013 complaint. They alleged that the map "use[d] race as a predominant factor to allocate Latino voters" and incorporated that allegation by reference into their claim of "discriminat[ion] … on the basis of race and national origin in violation of the 14th Amendment." *See* ROA.4173, 4179. A three-judge district court held that these allegations "clearly pleaded a *Shaw*-type racial gerrymandering claim." *Perez,* 253 F. Supp. 3d at 933.

Here, Plaintiffs alleged even more. As the District Court noted, *see* ROA.4321, to prove racial gerrymandering, a plaintiff must show "that the legislature subordinated traditional race-neutral districting principles" to "racial considerations." *Miller*, 515 U.S. at 916. In line with these legal standards, Plaintiffs alleged that "[t]he Commissioners Court crafted" the map to achieve its racial goals "without regard to traditional, neutral redistricting principles." ROA.237. Plaintiffs also explained the content of those racial goals: "to purposefully fragment Dallas's Anglos"; "to reduce and lesson Dallas's Anglos' electoral opportunities" compared to "a map compliant with neutral principles"; and "to allow Dallas's ethnic majority coalition to dominate the Commissioners Court beyond what their voting power and geographic distribution would otherwise suggest." ROA.237-238. If these statements do not communicate Plaintiffs' allegation that Dallas County was primarily motivated by racial considerations when it sorted voters into districts, it is not clear what would.

Finally, the District Court overread the Supreme Court's statement that racial gerrymandering is "a claim 'analytically distinct' from a vote dilution claim." *Miller*, 515 U.S. at 911. It is true that racial

gerrymandering and vote dilution are not identical. In *Shaw*, the Supreme Court held that because racial classifications of any sort "pose the risk of lasting harm," a map need not be motivated by the intent to dilute the voting strength of a particular racial group in order to violate the Equal Protection Clause. 509 U.S. at 657. The Supreme Court further clarified in *Miller* that otherwise "accepted equal protection analysis" applied to redistricting cases. 515 U.S. at 913. But the fact that a map may violate equal protection without proof that the map-drawers sought to dilute minority votes does not suggest that a claim of vote dilution fails to state a racial-gerrymandering claim. It is hard to imagine how one could intentionally dilute the voting strength of a racial group without race predominating over traditional redistricting criteria. And the illicit use of race for intentional vote dilution cannot satisfy strict scrutiny.

Neither *Miller* nor *Shaw* suggests that Plaintiffs must meet a heightened pleading standard in order to allege an unconstitutional racial gerrymander. *Cf. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 ("We think that it is impossible to square the 'heightened pleading standard' applied by

the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."). The allegation of an equal protection violation coupled with facts about both vote dilution and predominance fairly sets forth both theories. Plaintiffs' complaint gave Defendants notice that they intended to argue race predominated in the creation of the Commissioners Court Map.

B. The Trial Record Reveals that Race Predominated and Dallas County Cannot Meet Strict Scrutiny.

Although Plaintiffs' racial gerrymandering claim was dismissed before trial, the parties put forth a mountain of evidence relevant to this claim. This evidence proves that race predominated. And although Defendants made relevant arguments, they cannot satisfy strict scrutiny.

The evidence submitted in support of Plaintiffs' claim of intentional vote dilution also proves "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916 (citations omitted). Race was used in crafting the map, determined the goals of the redistricting, and dominated the discussion surrounding the enactment of the map. *See supra* at 3–8, 34–35.

Defendants in turn cannot satisfy strict scrutiny. Dallas County cannot possibly have a compelling state interest in the intentional dilution of Anglo votes. *Cf. City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) ("Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race."). Even setting aside intent, the Supreme Court has only assumed that compliance with the Voting Rights Act is a compelling interest that can satisfy strict scrutiny. *Bethune-Hill v. Virginia State Bd. Of Elections*, 137 S.Ct. 788, 801 (2017). There is good reason to doubt that compliance with a statute could justify an otherwise unconstitutional use of race.

But at a minimum, "[c]ompliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Id.* at 804–05. Here, Defendants' use of § 2 as a sword is not a reasonably necessary interpretation of the statute.

There is no evidence that Dallas County performed any analysis to determine if an additional opportunity district for African American and Hispanic voters was required. In fact, it seems likely that a new district was not required by the statute, as two of the four districts lack

a racial majority. *See* ROA.6504. Although coalition districts remain an open question, § 2 does not require the creation of cross-over districts. *Bartlett*, 556 U.S. at 13–15 (plurality opinion) (distinguishing between a coalition district, in which "two minority groups form a coalition to elect the candidate of the coalition's choice" and a cross-over district, in which minority voters lack a majority but may elect their candidate of choice with the support of some members of the majority). Even if coalition districts might be required in some instances, the concept is ill-suited for a geography that lacks a single racial majority. It is an even poorer fit where the legislative majority drawing the map is supported by the same coalition that would benefit from such an additional district–the Voting Rights Act protects minorities from governmental aggression, it does not authorize majorities to cut themselves more pie.

Additionally, Defendants took no steps to protect the voting rights of the Anglo minority. ROA.5572-5577. The admitted failure to consider what § 2 actually requires makes clear that Defendants cannot satisfy strict scrutiny. The trial record presents enough evidence to prove unconstitutional racial gerrymandering.

CONCLUSION

For the foregoing reasons, 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 standard.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 20, 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 8,963 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.

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