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; 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

Although Voting Rights Act cases before this Court are often granted oral argument, the tenuousness of this case, the poor record the Plaintiffs developed below, and the thoughtfulness of the district court's opinion are such that oral argument is not merited.

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JURISDICTIONAL STATEMENT

This case should be dismissed for lack of standing. It is indisputable that the injuries plaintiffs allege are not redressable by the relief they seek, leaving this Court without Article III jurisdiction.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs lack standing because they disclaimed any injury on the basis of their race, plaintiff Morse wants her district to be made more conservative, not less, and plaintiffs' purported injury cannot be redressed by a map that would elect additional candidates of their choice?

2. Whether the district court correctly found that plaintiffs failed to establish a violation of Section 2 of the Voting Rights Act ("VRA") because no additional districts can be drawn that would provide Dallas County Anglos an opportunity to elect their preferred candidates?

3. Whether the district court's decision should be affirmed because plaintiffs failed *Gingles* prong one by disregarding the County's preferred districting criteria to focus exclusively on race?

4. Whether the district court's decision should be affirmed because plaintiffs failed *Gingles* prong two because Dallas County Anglos are not politically cohesive, but rather split their votes among Democrats, Tea Party, and mainstream Republicans?

5. Whether the district court's decision should be affirmed because politics, not race, explains Anglo Republican voting patterns in Dallas County?

6. Whether the district court's decision should be affirmed because the totality of the circumstances preclude a finding of Section 2 liability and Anglo Republicans are proportionally represented on the Commissioners Court?

7. Whether the district court's decision should be affirmed because plaintiffs did not plead a *Shaw*/racial gerrymandering claim and never sought leave to amend to add such a claim before trial?

STATEMENT OF THE CASE

I. Factual Background

The 2010 Census revealed that the population of Dallas County increased by 6.7% from 2000. ROA.2992. But that increase was not consistent across demographic groups; while the Hispanic population increased by 243,211 persons and the African American population by 73,016 persons, the Anglo population actually decreased by 198,624 persons. ROA.2992. Anglos decreased from 44.3% of the total population to 33.1%, and fell to 45.1% of the citizen voting age population ("CVAP"). ROA.2992.

Geographically, Dallas County's Anglo population is heavily concentrated in the north, while the population growth occurred in its southern and western regions. ROA.2477; ROA.2995. Following the 2000 Census, Dallas County had two Anglo-

majority Commissioner Court Districts ("CCDs") and two majority-minority CCDs. By the end of the decade, demographic changes caused the existing plan to have only one Anglo-majority CCD and three majority-minority CCDs. ROA.1351. And even though one Anglo-majority CCD remained, it had become greatly underpopulated while the majority-minority CCDs had become overpopulated. ROA.2999.

Politically, the Democratic Party emerged as dominant in the county. ROA.2997. Anglo voters split into three political and ideological groups: about 23% vote Democratic, 42% support Tea Party candidates, and 35% support non-Tea Party Republicans. ROA.5948. Anglo Republicans constitute 24.3% of the county's total population, 28% of its voting age population ("VAP"), and 34.7% of its CVAP. *See infra* Part II.B.3.

The population shifts required the malapportioned CCDs to be redistricted in 2011. The Commissioners Court retained redistricting counsel and an expert in North Texas geography and demographics (Mr. Angle) to draw map options. ROA.5751. During an executive session, one of the two Republican Commissioners, Commissioner Dickey, shared her desire that a "conservative" or "Tea Party" district be drawn. ROA.5767. The Commissioners later unanimously adopted priority-order redistricting criteria, which were to (1) create districts of equal population, (2) satisfy the requirements of Sections 2 and 5 of the Voting Rights Act, (3) account for population increases and decreases, (4) maintain whole voting precincts where

possible and consider the effect on polling place locations, (5) draw complete map options, rather than portions of the county, (6) respect municipal and geographic boundaries where possible, and (7) draw districts that are geographically compact and contiguous where possible. ROA.5756; ROA.3502.

The Commissioners selected one map to present at three public hearings. ROA.5760. Mr. Angle first drew the majority African American and majority Hispanic districts plaintiffs agree were required by the Voting Rights Act. ROA.5781; ROA.5782-5783. He then drew the conservative Tea Party district that Commissioner Dickey had requested. ROA.5789; ROA.5780. The fourth and final district simply resulted from the territory that remained. ROA.5783-5784.

When the map came up for a vote in 2011, Commissioner Dickey had already announced her retirement. The map was modified to switch the precinct numbers so that the district with no incumbent would have its election in 2012, permitting Republican Anglo Commissioner Cantrell until 2014 before facing election in his reconstituted district. ROA.5795. The plan was enacted by a 3-1 vote, with Commissioner Dickey not voting. ROA.4965. The plan received the then-required preclearance under Section 5 by the U.S. Department of Justice. ROA.4965. Since the 2012 election, the composition of the Commissioners Court has been Dr. Theresa Daniel (CCD 1, Democrat); Commissioner Cantrell (CCD 2, Republican); Commissioner Price (CCD 3, Democrat); Commissioner Garcia (CCD 4,

Democrat); and County Judge Jenkins (Democrat). ROA.4966. Three of the five (Daniel, Cantrell, and Jenkins) are Anglo. ROA.4966.

II. Proceedings Below

A. Plaintiffs' Lawsuit

In January 2015, plaintiffs, four Anglo residents of Dallas County, filed suit alleging that the Commissioners Court districts caused discriminatory results against Anglos in violation of Section 2 and constituted intentional vote dilution of Anglo voters in violation of the Equal Protection Clause. ROA.31.

B. District Court's Dismissal of the *Shaw* and Alternative Equal Protection Claims.

Two years after filing their Amended Complain, plaintiffs moved for summary judgment on the ground that the 2011 Plan constituted an unconstitutional racial gerrymander, commonly referred to as a *Shaw* violation.[1] ROA.1186; ROA.1209. On March 5, 2018, the district court denied plaintiffs' motion for summary judgment: "[t]he court agrees with defendants that plaintiffs have not pleaded a *Shaw*-type claim. Regardless of the facts pleaded elsewhere in the second amended complaint that are adopted via ¶ 30 ('The Plaintiffs restate and incorporate by reference all allegations made in paragraphs 1-23 above.'), plaintiffs' equal protection claim is pleaded as a vote dilution claim and nothing more." ROA.4321.

[1] *See Shaw v. Reno*, 509 U.S. 630 (1993).

The district court thus ruled that "plaintiffs' racial gerrymandering claim must be dismissed because they have not pleaded such a claim." ROA.4322. The court also dismissed the third count of plaintiffs' complaint, which alleged that Section 2 was unconstitutional if unavailable to Anglos, concluding that "[i]t is clearly established in this circuit, as defendants argue in their motion, that the VRA applies to protect any minority group, including Anglo voters when they constitute a minority." ROA.4323-4324. Plaintiffs did not seek leave to amend their complaint to add a *Shaw* claim after the court's dismissal ruling, as they could have prior to trial under Rules 16(b)(4) and 15(a).

C. Trial Testimony and Evidence

The district court held a four-day bench trial in April 2018, with closing arguments in June 2018. All four plaintiffs testified. Plaintiff Morse testified that she resides in CCD 2. ROA.5253. Morse testified that she did not know who her commissioner was, ROA.5255, and that her objection to CCD 2 is that it is "insufficiently conservative," ROA.5257, notwithstanding her lawyers' argument that the district is packed with Anglos and should be made more politically competitive, *see, e.g.,* Brief of Appellants ("Br.") at 7, 23. Morse also testified that she has never experienced any discrimination, ROA.5258, offered no examples of Anglos suffering discrimination in Dallas, *id.*, and although she thinks her commissioner (Commissioner Cantrell, the Anglo Republican whom she could not

name) does not represent her values, she could not articulate what she meant by that, *id.*

Plaintiff Schroer resides in CCD 3, represented by Commissioner Price, with whom he testified he agrees on "a lot of" policy issues. ROA.5262. Schroer testified that his objection to the 2011 Plan was its "jagged edges" and that he prefers a "smoother map," ROA.5264-65, but he agreed that the 2011 Plan was actually "less jagged" than the remedial map plaintiffs proposed. ROA.5266. Schroer also testified that he has never had a problem voting, has never been the target of government-based discrimination, and has no particular recommendation for changing the 2011 Plan because he was "not sure how – demographics, how you balance it. It's a hard thing to balance." ROA.5269.

Plaintiff Jacobs resides in CCD 1, represented by Commissioner Daniel. ROA.5329. Jacobs testified that if Commissioner Daniel changed her party label to Republican, he might support her, ROA.5329, he could not identify any policy disagreements with her, ROA.5333, he found Commissioner Price to be "professional and courteous," ROA.5334, he would "rather have more Republicans" as commissioners, *id.*, and he believes the 2011 Plan was "created [ ] so that the Republicans couldn't win," *id.* Jacobs agreed that, in his view, "the motivation for creating the county commissioners court map was political," ROA.5355, and that his aim in filing the lawsuit was "to get more Republicans elected to the county

commission," ROA.5336. He could not identify any harm he personally suffered as a result of the 2011 Plan, ROA.5335, and he has never seen any racial appeals in political ads, ROA.5336.

Plaintiff Harding resides in CCD 4, which is represented by Commissioner Garcia. ROA.5040. Harding testified that she has never communicated with her Commissioner or her staff and has never asked for any services from the Commissioners Court. ROA.5044-5045; ROA.5052. She testified that she would "like to see more fair districts for the Commissioners Court where it's not a certain outcome that a Democrat will win." ROA.5051.

Plaintiffs also presented expert testimony from Dr. Peter Morrison and Dr. M.V. (Trey) Hood, III. Drs. Morrison and Hood testified that they did not conduct any analysis of plaintiffs' proposed "remedial" map to determine whether it would actually perform to provide Anglos the opportunity to elect their candidates of choice (*i.e.*, Republicans). ROA.5149 ("That's outside the scope of what I was asked to do."); ROA.5367 (Q: "Do you know [if] anybody did a functional analysis of the plaintiffs' remedial map? Do you know? A: All I can say is I didn't. I can speak for myself. . . . I don't know of anyone. Again, I wasn't asked to do that and I didn't perform that analysis."). The only evidence on that issue came from defendants' experts, who testified that plaintiffs' proposed districts were likely to result in four Democratic, and zero Republican, Commissioners. Defendants' experts Mr. Matt

Angle and Dr. Matthew Baretto analyzed election results from 2016 for the 2011 Plan as well as those results reconstituted under plaintiffs' proposed plan. The Republican candidates for president and sheriff won CCD 2 under the 2011 Plan, but those Republican candidates won *zero* districts under plaintiffs' proposed remedial plan. ROA.5804-5805; ROA.5932. Mr. Angle and Dr. Baretto explained that creating two districts with smaller Anglo majorities would not provide electoral opportunities for Republicans candidates, given the 23% of Democratic Anglos and Black and Hispanic populations included in plaintiffs' proposed Anglo majority districts. ROA.5949. To create two Anglo majority districts, they explained at trial, it was necessary to split the reliably Republican area of northern Dallas County and pull in closer Dallas suburbs with large numbers of Anglo Democrats. ROA.5768.

While plaintiffs' experts offered no testimony or evidence about the functional opportunities offered by their proposed map, they did testify as to the process by which their map was created. Dr. Morrison testified that the Commissioners' Court's unanimously approved official redistricting criteria were never considered in the creation of plaintiffs' proposed plan. ROA.5110 ("There was no need to provide those principles to [plaintiffs' mapdrawer]. I was instructing him based on my judgment as to what principles I wanted to start with and which ones I wanted to balance and respect going forward."); ROA.5152 ("I haven't reviewed [the County's] criteria. I don't recall what they were."). For example, Dr. Morrison

testified that he disregarded the adopted criterion of respecting voting precincts: "I had to dispense with all the existing precinct geography because precinct geography was too large for me to accomplish what I accomplished. That was the—basically that was subordinate—that was one of the factors that had to be subordinated in order to achieve success on all the others." ROA.5239.

Dr. Morrison clarified that "what [he] accomplished" by subordinating the preservation of existing political geography was a map in which only two factors were considered—race and total population. ROA.5096 (testifying that "racial data" was "[t]he way we have analyzed it"); ROA.5109 (testifying that "[r]ace and total population" were the two considerations in drawing plaintiffs' proposed map); ROA.5097 (testifying that "[a]ll we had available was census published data on population, eligible voters by race"). Emails between Dr. Morrison and his mapdrawer confirmed the racial predominance in plaintiffs' proposed map. ROA.5123 (Email from Dr. Morrison instructing mapdrawer to "'decant' Hispanic rich territory," to "subordinate 'clean' place boundaries" to achieve racial targets, and to "split place boundaries and also stretch the balance of [total population] to just under the 10% deviation limit if necessary"); DX84-049[2] (Email from plaintiffs' mapdrawer stating that "we got Hispanics as high as we could without egregiously

[2] "DX" refers to defendants' trial exhibits.

breaking any city boundaries," to which Dr. Morrison responded "Outstanding! . . . [S]ounds like we got a winner").

Dr. Morrison also contended that plaintiffs' proposed map had fewer city splits than the Commissioners' 2011 Plan, but at trial he acknowledged that his conclusion was based upon a review of the *wrong map*. In reaching his conclusion, he did not review the actual 2011 Plan, but rather a reconstructed version his mapdrawer created using census blocks, instead of the precincts that actually form the boundaries of the enacted plan. *See* ROA.5095 (Q: "And the way [plaintiffs' mapdrawer] went about recreating [the 2011 Plan] is he used census blocks and reconstructed the map to look as closely as he could with the map that the county had adopted. Isn't that a fact?" A: That's correct."). Given these errors, Dr. Morrison testified at trial that his criticism of the 2011 Plan's supposed city splits was "an unfinished portion of [his] analysis." ROA.5146. Mr. Angle explained that nearly half of the splits identified by Dr. Morrison were erroneous, caused by his examination of a map that does not actually exist. ROA.5773-5779.

With respect to the totality of the circumstances considerations important to Section 2 claims, Dr. Hood conceded that he had "not found a history of discrimination against Anglos in . . . Texas," ROA.5361, and plaintiffs' presentation of evidence focused on a single factor—the presence of racial appeals in political advertising. For that factor, they presented the testimony of Dr. Voth, who based his

analysis on 800 pages of newspaper articles that post-dated the 2011 redistricting and were handpicked by plaintiffs' counsel. ROA.5513. And Dr. Morrison disclaimed any opinion on the issue of intent. ROA.5139 ("I didn't say that anybody operated with a discriminatory intent.").

D. The District Court Grants Judgment for Defendants.

The district court granted judgment for defendants. The court first concluded that plaintiffs had standing because they had established that one plaintiff (Morse) lived in CCD 2, which was "packed" with Anglos and the other three plaintiffs lived in districts that had smaller, "cracked" Anglo populations. ROA.4969-4970. The court rejected defendants' argument that plaintiffs' claims were not redressable for standing purposes because their proposed map would *reduce* their ability to elect Republican commissioners. ROA.4972. This, the court ruled, was a merits argument, not a standing argument. Concluding its standing analysis, the court stated that "even if the court is in error in holding that plaintiffs have proved Article III standing, the outcome of this case is the same. Regardless of whether for lack of standing or lack of merit, plaintiffs' case must be dismissed." ROA.4973.

The district court carefully recounted the legal standard for Section 2 claims and the evidence plaintiffs had proffered in support of the three *Gingles* preconditions. ROA.4973-4991. The court explained that "[t]he purpose of the *Gingles* analysis is to 'establish that the minority [group] *has the potential to elect a*

representative of its own choice' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is submerge[ed] in a larger [majority race] voting population.'" ROA.4984 (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (emphasis and alterations in original). The court noted that, "[c]onversely, where the minority group is either too small or insufficiently compact or cohesive to have any real opportunity to elect a candidate of its choice in a possible district, there has been no violation of § 2." ROA.4984-4985.

Defendants contested whether plaintiffs satisfied the *Gingles* preconditions, but the court did not resolve those disputes. Rather, the court ruled that

> even if the court assumes that plaintiffs have satisfied each of the three *Gingles* prongs, the court still finds that they have failed to prove the 'ultimate question' of vote dilution under § 2 because they have not proved that the minority group (i.e., Anglos) 'has the potential to elect a [Republican],' which plaintiffs maintain would be the Anglo candidate of choice, in a possible second commissioner district. *See Cooper*, 137 S. Ct. at 1470. In fact, . . . the evidence as a whole demonstrates just the opposite.

ROA.4985-4986 (footnote omitted).

The court found that "[i]n drawing [ ] two Anglo opportunity districts, [ ] plaintiffs have failed to account for the undisputed facts that roughly 23% of Dallas County's Anglo population votes for Democratic candidates and that a large portion of these Anglo Democrats reside in Remedial Plan districts 2 and 4." ROA.4987. The court cited the testimony of defendants' expert Mr. Angle that plaintiffs'

proposed districts included "both Anglo and minority voting populations that may support minority-preferred Democratic candidates." ROA.4987. The court specifically analyzed the neighborhoods, noting that "rather than . . . taking in reliably Republican neighborhoods before moving south to pick up north Dallas and the Park Cities, Remedial Plan district 2 includes the Democrat neighborhoods around Love Field, south Richardson, Hamilton Park, and Oak Lawn." ROA.4987. The court noted that plaintiffs' proposed plan "removes approximately 219,258 persons from current CCD2, 46.5% of whom supported Democratic candidate Hillary Clinton . . . and 43.9% of whom supported Democrat Lupe Valdez" and replaces them with "approximately 260,209 persons . . . 67.7% of whom supported Secretary Clinton . . . and 63.3% of whom supported Sheriff Valdez." ROA.4988.

The court noted a similar pattern in plaintiffs' second proposed Anglo-majority district, which starts in Republican territory but "extends south to include nearly all of the marginally Democrat suburb of Mesquite, west to include the strongly Democrat city of Balch Springs, and westward to I-45, picking up parts of the Democrat suburbs of Wilmer and Hutchins." ROA.4988. The court explained that plaintiffs' map removed "approximately 354,831 persons . . . 49.2% [of whom] supported Secretary Clinton . . . and 44.1% [of whom] supported Sheriff Valdez" and replaced them with a population that voted 57.7% for Secretary Clinton and 57.4% for Sheriff Valdez. ROA.4988.

The court found that Mr. "Angle *persuasively explains* that districts 2 and 4 in the Remedial Plan split the neighborhoods in the northern part of Dallas county that most reliably support Republicans and add to each district neighborhoods with growing minority populations and growing Democrat strength." ROA.4988 (emphasis added). The court then cited the evidence presented by Mr. Angle and Dr. Barreto that Democrats Hillary Clinton and Sheriff Lupe Valdez would have won in all four of plaintiffs' proposed districts instead of just three of the 2011 Plan's districts. ROA.4989-4990. The court concluded that it "agrees" with defendants that "the only evidence the court has before it" demonstrates that plaintiffs' reliance on Democratic Anglo voters to create two Anglo districts "results in two districts that will likely perform for Democrats." ROA.4991

The court noted that it "does not disagree with plaintiffs' position that § 2 does not require them to *guarantee* that an Anglo candidate of choice would prevail under their Remedial Plan," rather that it required them to prove an *opportunity* to prevail. ROA.4992 (emphasis in original). Here, the court found, "[p]laintiffs have failed to make this showing because their candidate of choice is a Republican, and there are not a sufficient number of Anglo Republicans to elect a Republican candidate in more than one commissioner district." ROA.4992.

Moreover, the court also disagreed with plaintiffs' contention that Anglo cohesion exists at the commissioner court level. ROA.4993. The court noted that the

analysis of plaintiffs' expert Dr. Hood showed that in CCDs 3 and 4 (held by Commissioners Price and Garcia), Anglos were highly cohesive, with a mean of 12.7% support for Democratic candidates for Commissioners Court. But the court emphasized that in CCD 1 (held by Commissioner Daniel), which overlaps with the territory used by plaintiffs to form their second proposed Anglo-majority district, Dr. Hood found that Anglo support for Democratic commissioner candidates was a mean of 33.6%. ROA.4994. The court thus rejected plaintiffs' contention that Anglo voters were cohesive: "the election results on which Dr. Hood relies fail to take into account the geographical dispersion of Anglo Democrats and the high concentration of these types of voters in the neighborhoods plaintiffs would include in their proposed 'Anglo opportunity' districts." ROA.4994. By splitting the Anglo Republicans into two districts, and adding in Anglo Democrats, and African and Hispanic Democrats, "the 'Anglo opportunity' districts plaintiffs have created in their Remedial Plan will not, in fact, provide Republican Anglos with any meaningful opportunity to elect Republicans to the Commissioners Court. Indeed, . . . defendants' evidence proves this." ROA.4994.

The court also disagreed with plaintiffs' criticism of defendants' reliance on exogenous election results rather than Commissioners Court races. ROA.4994. The court noted its agreement that endogenous results would be preferable, but cited precedent supporting the relevance of exogenous races. ROA.4994-4995. Most

importantly, the court noted that "plaintiffs did not offer *any* evidence at trial that would show how Republican candidates would fare in commissioner elections under their Remedial Plan." The court emphasized that "[i]t is plaintiffs' burden to prove that the 2011 Map violates § 2 of the VRA. Plaintiffs have not presented evidence regarding the 'functionality' of their proposed Remedial Plan, and have failed to prove that it is even possible to create two commissioner districts in which Dallas County Anglos would have an opportunity to elect a Republican." ROA.4995. Moreover, the court concluded that "[i]n fact, if anything, the evidence shows that plaintiffs' voting power has been *strengthened*, rather than diluted, by the concentration of Anglos in CCD 2 where they can reliably elect a Republican candidate." ROA.4996 (emphasis added). In other words, the Commissioners Court drew the conservative "tea party" district that Anglo Republican Commissioner Dickey requested prior to her retirement.

Finally, the court also found that plaintiffs had failed to prove their intentional vote dilution claim. ROA.4998. The court explained that plaintiffs must prove both a discriminatory purpose and a discriminatory *effect*. ROA.4997. "Generally, this requires proof that the racial minority's voting potential has been minimized or canceled out or the political strength of such a group has been adversely affected." ROA.4997 The court concluded that plaintiffs had not offered such proof. "Although the court does not suggest that a plaintiff who is unable to prove a § 2 claim can

never prevail on a Fourteenth Amendment equal protection claim, it holds that given plaintiffs' failure in this case to prove that the 2011 Map actually diluted their voting strength, their equal protection claim must fail." ROA.4998.

Plaintiffs then filed this appeal, challenging the district court's Section 2 ruling and its dismissal of their un-pled *Shaw*/racial gerrymandering claim, but not challenging in their brief the district court's denial of their Fourteenth Amendment intentional vote dilution claim.

SUMMARY OF ARGUMENT

Although the district court should have dismissed plaintiffs' case on standing grounds, the court correctly found that plaintiffs did not meet their burden of proof to establish vote dilution because the evidence showed no alternative district could enhance their electoral opportunities. Plaintiffs' case is without merit for several reasons.

First, the Court should dismiss plaintiffs' case for lack of Article III standing. Although redistricting plaintiffs often are presumed to have standing based upon the location of their residence, in this case plaintiffs have actually testified that they suffer no race-based injury, the plaintiff who resides in the district plaintiffs' counsel claim is "packed" with Anglo Republicans testified she wishes it were *more* conservative, and no plan could redress the injury they claim by electing more Republican Commissioners.

Second, the district court correctly found that plaintiffs did not meet their burden on the "ultimate question" of vote dilution because they offered *no evidence* that their two proposed Anglo-majority districts could actually perform to elect their preferred candidates (*i.e.*, Republicans). The district court did not clearly err by finding that the only evidence available to it—offered by defendants' experts—showed that plaintiffs' proposed plan would likely result in Democratic victories in each district because plaintiffs could only draw two Anglo majority districts by relying upon a geographically concentrated group of Anglo Democrats.

Third, the district court's Section 2 ruling can be affirmed for a host of reasons supported by the record. The record shows that plaintiffs cannot satisfy *Gingles* prong one because their proposed plan is not compact—plaintiffs' expert testified he "dispensed" with the existing voting precincts preferred by the County in order to instead draw a plan based exclusively upon Census block racial data. In addition, the record shows that plaintiffs cannot satisfy *Gingles* prong two because Dallas County Anglos are not politically cohesive—they split among Democrats, Tea Party, and mainstream Republicans—and the particular Anglos plaintiffs used to draw their second district are the least cohesive in the County. Moreover, the record shows that politics, not race, explains Anglo Republican voting patterns in Dallas County and thus plaintiffs have no cognizable Section 2 claim. Finally, the record shows that the

totality of circumstances preclude a Section 2 finding, including because Anglo Republicans are already proportionally represented on the Commissioners' Court.

Fourth, the district court properly dismissed plaintiffs' purported *Shaw*/racial gerrymandering claim because plaintiffs did not plead such a claim in their complaint. And after the district court's ruling, plaintiffs never sought leave to amend their complaint to add such a claim prior to trial. The district court committed no error in precluding plaintiffs from advancing an unpled claim about which defendants lacked notice.

STANDARD OF REVIEW

The Supreme Court has explained that the clear error test applies to the districts court's factual findings as well as its conclusion regarding the ultimate question of vote dilution. "We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986). The trial court's conclusion regarding vote dilution "is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* (internal quotations marks and citations omitted). This Court has emphasized that it "owe[s] deference" to the district court's conclusions in Section 2 cases. *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004).

A district court's factual finding is only clearly erroneous if the "reviewing court is left with the definite and firm conviction that a mistake has been committed. . . . This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). Appellate courts "must affirm the court's finding so long as it is 'plausible,'" *Cooper v. Harris*, 137 S. Ct. at 1473, and must "give singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief of what is said' are lost on an appellate court later sifting through a paper record," *id.* (quoting *Anderson*, 470 U.S. at 573-74). Finally, any legal conclusions of the district court are reviewed *de novo*. *See*, *e.g.*, *Sensley*, 385 F.3d at 595.

ARGUMENT

I. This Case Should Be Dismissed for Lack of Standing.

This case should be dismissed for lack of standing. "To meet the standing requirements of Article III, '[a] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis and bracket in original). The injury must be "particularized" to the plaintiff, creating a "personal stake." *Id.* Although plaintiffs

normally satisfy standing requirements in redistricting cases by residing in the challenged districts, the testimony of plaintiffs in this case precludes a finding of an injury *or* that the relief they seek would remedy their purported harms.

Plaintiff Morse, who lives in the allegedly Anglo-packed district, does not know the identity of her commissioner, thinks (on some unidentified basis) that her commissioner (the sole Republican, Mr. Cantrell) does not represent her values, and could articulate only one complaint about her district: that it is *insufficiently conservative*. ROA.5257. Not only is this not a cognizable Section 2 injury, but plaintiffs' remedial plan makes her district *less conservative*. Her purported injury cannot possibly be redressed by the relief her attorneys seek.

Plaintiff Schroer testified he does not attend commissioner meetings and does not often contact his commissioner. ROA.5263-5264. The only harm he identified was he disliked maps with "jagged" boundaries, ROA.5264, but he agreed that the Enacted Plan was *less jagged* than plaintiffs' proposal, ROA.5266. That is not a harm cognizable under Section 2, and plaintiffs' map would *worsen* his stated injury.

Plaintiff Jacobs testified that this is all about politics, not race, to him. He might vote for Commissioner Daniel if she changed her party affiliation, ROA.5329, thinks the current plan is unfair because "it doesn't have enough Republicans elected," and was created "so that Republicans couldn't win," ROA.5334. He thinks the motivation behind the Enacted Plan was "political." ROA 5355. These are not

injuries cognizable under Section 2; plaintiffs did not plead a partisan gerrymandering claim.

Finally, plaintiff Harding has never communicated with her commissioner or her staff, has never asked for a service from the Commissioners Court, and acknowledged that her desire was to elect more Republicans. Ms. Harding identified no injuries on the basis of her race. *See supra.*

Plaintiffs have disclaimed any racial injury, and advocate for relief that is the opposite of what their counsel are seeking. Plaintiffs do not have Article III standing for a Section 2 claim.

II. Plaintiffs Failed to Prove a Section 2 Violation.

Plaintiffs did not prove a Section 2 violation. Section 2 is violated if plaintiffs prove they have "less opportunity" to "elect representatives of their choice" under the totality of the circumstances. 52 U.S.C. § 10301(b). Plaintiffs must prove three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district," (2) the that minority group "is politically cohesive," and (3) that the majority "votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51.

Plaintiffs must prove "[e]ach factor . . . before it is necessary to proceed to the totality of circumstances test." *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d

848, 852 (5th Cir. 1999). If the *Gingles* preconditions are satisfied, nine "Senate Factors" are "essential for weighing the totality of circumstances." *Fairley v. Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009); *see infra* Part II.B.4 (outlining factors). Ultimately, to prove a Section 2 violation, plaintiffs must "establish that 'the minority [group] has the *potential to elect a representative of its choice*' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is 'submerg[ed] in a larger [majority race] voting population.'" *Cooper*, 137 S. Ct. at 1470 (emphasis added) (last bracket added) (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). Plaintiffs must therefore proffer an alternative map and prove that it would provide the potential to elect their preferred candidates.

> Under *Gingles*, the ultimate question is whether a districting decision dilutes the votes of minority voters, and it is hard to see how this standard could be met if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice.

Abbott v. Perez, 138 S. Ct. 2305, 2332 (2018) (citation omitted); *see id.* ("So if Texas could *not* create two performing districts in Nueces County . . . the logical result is that Texas did not dilute the Latino vote." (emphasis in original)).

The district court correctly found that plaintiffs failed to prove that their proposed map would result in the potential to elect a second Republican commissioner, and correctly found that the evidence instead suggested Democrats

were likely to win all four CCDs if their proposal was adopted. Plaintiffs identify no clear error in any of the district court's factual findings. Nor is there any. Moreover, the court's ruling can be affirmed for a host of reasons supported by the record but that the district court did not need to reach: plaintiffs' map fails the compactness requirement of *Gingles* prong one; plaintiffs fail *Gingles* prong two because Dallas County Anglo voters are not politically cohesive; the record proves that politics, not race, explains Anglo Republican voting in Dallas County; Anglo Republicans are elected in proportion to their population share; and plaintiffs did not prove that the totality of circumstances warrant Section 2 relief.

A. The District Court Correctly Found that Plaintiffs Failed to Prove Vote Dilution Because Their Proposed Map Does Not Offer Anglo Voters the Potential to Elect an Additional Republican Commissioner.

The district court correctly ruled that plaintiffs failed to meet their burden to prove a Section 2 violation because they offered no evidence that an alternative plan could actually enhance Anglo voters' ability to elect another Republican commissioner. Indeed, as the district court determined, the evidence proffered by defendants proved that plaintiffs' proposed map would likely result in four Democratic commissioners.

In *Abbott*, the district court concluded that the State violated Section 2 by failing to draw two Latino-majority legislative districts in Nueces County, notwithstanding evidence showing that splintering the Latino vote into two bare-

majority districts would jeopardize their ability to elect their preferred candidates in *both* districts. 138 S. Ct. at 2332-33.

The Supreme Court reversed. First, the Court held that "if Texas could *not* create two performing districts in Nueces County[,] . . . the logical result is that Texas did not dilute the Latino vote." *Id.* at 2332. Second, the Court explained that the district court had "twisted the burden of proof beyond recognition. It suggested that a plaintiff might succeed on its § 2 claim because its expert failed to show that the necessary factual basis for the claim could not be established. Courts cannot find § 2 effects violations on the basis of *uncertainty*." *Id.* (emphasis in original). The Court in *Abbott* made clear that the burden rests on the plaintiff to prove that "simple [ ] majorities . . . might be sufficient to create opportunity districts," *id.* at 2333 n.27, based on evidence of reconstituted election results, and that in the absence of such proof, plaintiffs cannot succeed on a Section 2 claim.

Such is the case here. The district court found that "plaintiffs did not offer *any* evidence at trial that would show how Republican candidates would fare in commissioner elections under their Remedial Plan. In fact, plaintiffs offered no evidence or analysis of *any* election using their proposed Remedial Plan." ROA.4995 (emphasis in original). Plaintiffs' expert Dr. Morrison testified that this "would be something you'd have to look to a political scientist to do." ROA.5149-5150. But plaintiffs' political scientist expert Dr. Hood offered no evidence either.

ROA.5362 (Q: "You didn't provide any analysis in your reports of whether the candidate of choice of Anglos can usually win elections in any of the plaintiffs' remedial plan, correct?" A: "That is correct.").

This Court can end its review there. As the district court stated, "[i]t is plaintiffs' burden to prove that the 2011 Map violates § 2 of the VRA." ROA.4995. Plaintiffs offered no evidence at trial to carry their burden to show the potential for Anglo voters to enhance their preferred electoral outcomes. Nor could they, as defendants proved. The district court credited the analysis and testimony of defendants' experts, ROA.4988-4990, finding that Mr. Angle "persuasively explain[ed]" how plaintiffs' proposed map split Republican voters among two districts and relied upon Anglo Democrats to draw a second Anglo majority district, ROA.4988-4989. As a result, the evidence showed that Democratic candidates for president and sheriff in 2016 would have won both districts, carrying all four CCDs. ROA.4989. The district court "agree[d]" with defendants' experts, ROA.4991, "that the only evidence the court has before it shows that [plaintiffs' proposed Anglo-majority districts] results in two districts that will likely perform for Democrats," ROA.4991.[3]

[3] Plaintiffs object that these are exogenous elections and that the reconstituted election outcomes were close. Br. at 37-38. But they were the only results before the court—plaintiffs offered no evidence—and this Court has "repeatedly endorsed" the use of exogenous elections. *See Rodriguez v. Bexar County*, 385 F.3d 853, 860 n.5 (5th Cir. 2004). Moreover, plaintiffs did not argue before the district court that the

The court's factual conclusions were not clearly erroneous. Indeed, the court engaged in exactly the kind of "intensely local appraisal" that this Court has recognized is within the district court's "particular familiarity" and to which this Court "owe[s] deference." *Sensley*, 385 F.3d at 594. The court evaluated plaintiffs' first proposed Anglo district and concluded that it "includes the Democrat neighborhoods around Love Field, south Richardson, Hamilton Park, and Oak Lawn" rather than "extending east along the northern boundary of Dallas County, taking in reliably Republican neighborhoods before moving south to pick up north Dallas and the Park Cities." ROA.4987. The court concluded that plaintiffs' proposed second Anglo district included "nearly all of the marginally Democrat suburb of Mesquite, . . . the strongly Democrat city of Balch Springs" and extended "westward to I-45, picking up parts of the Democrat suburbs of Wilmer and Hutchins." ROA.4988. And the court examined the election results for the particular populations moved into and out of these districts, concluding that plaintiffs made both districts considerably more Democratic. ROA.4991.

The court also correctly found that plaintiffs failed to demonstrate Anglo political cohesion (*Gingles* prong two) with respect to the particular population of

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closeness of the Democratic victories demonstrated opportunities for Republican candidates. *See, e.g.*, ROA.6171-6173 (Plaintiffs' closing argument regarding functionality evidence); *LeMaire v. Louisiana Dep't of Transp.*, 480 F.3d 383, 387 (5th Cir. 2007) ("[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal.").

Anglos upon whom they relied to create two Anglo districts. The court acknowledged that plaintiffs' proffered evidence "perhaps . . . show that Anglos as a whole (or at least Anglos in CCDs 3 and 4) *do* vote cohesively," ROA.4994 (emphasis in original), but explained that Anglo support for Republican commissioner candidates was "significantly lower" in CCD 1, with a mean of 66.4%, ROA.4993. The court therefore concluded that plaintiffs' expert Dr. Hood "fail[ed] to take into account the geographical dispersion of Anglo Democrats and the high concentration of these types of voters in the neighborhoods plaintiffs would include in their proposed 'Anglo opportunity' districts." ROA.4994. This Court should defer to the district court's "particular familiarity" with the local communities and population, and its well-supported factual findings.

On appeal, plaintiffs contend that they were not required to offer any proof that their proposed alternative map would actually function to elect additional Republican commissioners—rather, they say that this issue is reserved for the remedial stage and that the burden shifts to *defendants* to prove that a functioning district cannot be formed. Br. at 17-21. But the Supreme Court expressly rejected this contention in *Abbott*. The Court held that "[u]nder *Gingles*, the ultimate question is whether a districting decision dilutes the votes of minority voters, and it is hard to see how this standard could be met if the alternatives to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their

choice." 138 S. Ct. at 2332; *id.* ("So if Texas could *not* create two performing districts in Nueces County . . . the logical result is that Texas did not dilute the Latino vote." (emphasis in original)). As the Court made clear, whether the proposed district will actually *perform* is the "ultimate question" of the liability phase under *Gingles*. It is not a post-liability, remedial phase question. "Courts cannot find § 2 effects violations on the basis of *uncertainty*." *Id.* at 2333 (emphasis in original). Yet that is exactly what plaintiffs ask this Court to do.

Plaintiffs' effort to distinguish *Abbott* is unpersuasive. Plaintiffs suggest that *Abbott*'s holding is limited to cases where "the plaintiff's own expert testified that no possible, legal map could perform" and that "the Court did not hold that plaintiffs have the burden to prove such performance, only that its stipulated absence was problematic." Br. at 20. Not so. First, plaintiffs offer no explanation for why the Court called this inquiry "the ultimate question" to be answered "[u]nder *Gingles*" if it was *actually* irrelevant to the *Gingles* liability determination. Second, the Court expressly held that plaintiffs had the burden of proof on the issue, rejecting the district court's position that a Section 2 violation could exist so long as the plaintiff has not *disproved* their claim. *Abbott*, 138 S. Ct. at 2333. The Supreme Court explained that "[t]his observation twisted the burden of proof beyond recognition. . . . Courts cannot find § 2 violations on the basis of uncertainty." *Id.*

Here, plaintiffs also "twist[ ]the burden of proof beyond recognition." *Id.* Plaintiffs presented no evidence of their own, but question why *defendants*' expert did not analyze additional election results in his report, contending that it "creates an inference" that the missing results would show a performing second district. Br. at 39-40. Unsurprisingly, plaintiffs cite no authority for this proposition. Plaintiffs have the burden to prove their case. The district court did not clearly err by crediting defendants' evidence in the absence of any evidence proffered by plaintiffs.[4]

Plaintiffs object that this is contrary to the "bright line" nature of the three *Gingles* preconditions. Br. at 20. Plaintiffs misunderstand *Gingles*. Even if the first prong operates as a mechanical numerical threshold,[5] the second prong—whether the minority group is politically cohesive—does not. The magnitude of political

[4] Plaintiffs contend that "[c]ourts regularly find § 2 liability without additional analysis to determine if a plaintiff's proposed district will in fact elect the minority candidate of choice." Br. at 19. Undoubtedly defendants in those cases had no cause to contend the districts would not perform. Regardless, *Abbott* resolved this issue.

[5] Defendants maintain that the first prong of *Gingles* requires proof that plaintiffs' proposed district would functionally perform to offer an opportunity to elect their candidates of choice. ROA.4986 at n.15. Although the district court agreed that "defendants' argument makes sense," *id.*, the court noted it "has not found any authority" to require this proof "in order to meet the *first* prong of *Gingles*," *id.* (emphasis in original). Although a bare majority is *necessary* to satisfy prong one, whether it is *sufficient* must be assessed according to an "intensely local appraisal." *Gingles*, 478 U.S. at 79 (quotation marks omitted); *see, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 427 (2006) (noting, in the context of discussing the *Gingles* prong one requirement, that "it may be possible for a citizen voting-age majority to lack real electoral opportunity").

cohesion sufficient to satisfy *Gingles* prong two must be tethered to the size of the minority group's population in the proposed district. If a minority group is insufficiently cohesive to provide the opportunity to prevail in a district in light of its population size, *Gingles* prong two is not met. The district court recognized as much here.[6] The court rejected plaintiffs' expert's testimony that Anglos were politically cohesive at the commissioner court election level, concluding that even if Anglos were cohesive "as a whole" or "at least in CCDs 3 and 4," the evidence showed the *particular Anglos* plaintiffs drew into their proposed districts were *not* cohesive. "[T]he election results on which Dr. Hood relies fail to take into account the geographical dispersion of Anglo Democrats and the *high concentration* of these types of voters in the neighborhoods plaintiffs would include in their proposed 'Anglo opportunity' districts." ROA.4994 (emphasis added). The court's factual findings preclude a conclusion that plaintiffs could satisfy *Gingles* prong two, and certainly preclude a conclusion that they could satisfy "the ultimate question" of *Gingles*. *Abbott*, 138 S. Ct. at 2332.[7]

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[6] The district court opened its analysis by noting that plaintiffs had not proved vote dilution "even if the court assumes that plaintiffs have satisfied each of the three *Gingles* prongs." ROA.4985. But the court then rejected plaintiffs' contention that they satisfied *Gingles* prong two at the commissioner court level. ROA.4986. Regardless of the stage of the analysis, the court correctly concluded plaintiffs had not shown vote dilution.

[7] The Supreme Court's decision in *Abbott* also forecloses plaintiffs' contention that the district court should have simply weighed "its concerns about performance alongside the other factors relevant to the totality of circumstances." Br. at 41; *see*

Plaintiffs also make various policy arguments to avoid their burden to show that a proposed district will actually create enhanced electoral opportunities. Br. at 20-26. These arguments are misplaced and contrary to the caselaw. First, the district court did not require "proof of guaranteed performance." *Id.* at 25. It expressly said as much. ROA.4992. Rather, the court noted that "plaintiffs [must] prove that district lines can be drawn in a way that gives them an equal *opportunity* to elect their candidate of choice." ROA.4992 (emphasis in original). Second, plaintiffs are mistaken to contend that such evidence would come in the form of "preordained" "outcomes determined in advance from census data." Br. at 20. What plaintiffs were required to show—and did not—is that their proposed map would *increase* their electoral opportunities, by demonstrating some number of successful outcomes through reconstituted prior election results in the proposed district. *See Abbott*, 138 S. Ct. at 2332-33. Because the necessary proof comes in the form of actual election results, and not simply assumption made from "census data" and "racial classification," Br. at 20, 22, plaintiffs' objections are misplaced.[8] Third, plaintiffs'

Abbott, 138 S. Ct. at 2332 (finding no vote dilution without turning to totality of circumstances).

[8] Plaintiffs contend that the district court erred by failing to account for Republican-supporting Hispanic voters. Br. at 36-37. But the court analyzed actual *election results*, and those results showed that plaintiffs' preferred candidates were likely to lose in all four districts under their plan. That analysis necessarily included the votes of Republican-supporting Hispanics.

contention that "a more competitive district may ease rather than exacerbate racial tensions," Br. at 23, has no bearing on whether the County's enacted plan is unlawful under Section 2. Finally, plaintiff's contention that "once the *Gingles* factors are otherwise met, a minority group's ability to influence an election" should be considered, even if they cannot *win* the election, is contrary to the Supreme Court's precedent. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("This Court has held that § 2 does not require the creation of influence districts."). If plaintiffs were correct, then the Supreme Court would have been required to remand *Abbott* for consideration of Nueces County Latinos' ability to *influence* elections. The Court did not because *Gingles* is not "otherwise met" if plaintiffs cannot prove that an alternative map would perform. *Abbott*, 138 S. Ct. at 2332-33.

The district court's findings of fact regarding plaintiffs' failure to prove vote dilution are well supported by the record, and plaintiffs offered *no evidence* to carry their burden of proof. The court's decision should be affirmed.

B. The District Court's Judgment Can Also Be Affirmed Because the Record Establishes Plaintiffs Do Not Satisfy the *Gingles* Preconditions, and the Totality of Circumstances Precludes a Finding of Liability.

Even if this Court disagreed that plaintiffs failed to meet their burden of proof to demonstrate their proposed districts would perform for their preferred candidates, the district court's judgment should be affirmed for a host of other reasons. This Court can "affirm for any reason supported by the record, even if not relied on by

the district court." *United States v. Gonzalez*, 592 F.3d 675, 680 (5th Cir. 2009) (*per curiam*). The record demonstrates that plaintiffs failed to meet *Gingles* prongs one and two, that Anglo Republicans are proportionally represented on the Commissioners Court, and that the totality of circumstances preclude a finding of a Section 2 violation.

1. Plaintiffs Have Not Satisfied the "Compactness" Requirement of *Gingles* Prong One Because Their Proposed Plan Disregards the County's Adopted Districting Criteria and is Based Solely on Race.

Plaintiffs have not satisfied the "compactness" requirement of *Gingles* prong one because their proposed plan disregards the County's legitimate, traditional districting criteria and instead is based solely on race. The "compactness" inquiry is not limited to the appearance of district lines, but rather explores whether plaintiffs' proposed districts respect "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Gonzalez v. Harris County*, 601 Fed. App'x 255, 258 (5th Cir. 2015) (quoting *LULAC*, 548 U.S. at 433). This is so, the Supreme Court has explained, because "[t]he recognition of nonracial communities of interest reflects the principle that a State may not assum[e]from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotation marks omitted) (bracket in original). The court must therefore determine whether

plaintiffs' proposed plan respect the locality's preferred traditional districting principles.

> [W]hen a locality adopts a redistricting plan according to certain traditional districting principles, . . . the district court must consider all such principles relied on by the locality, any opposition to such reliance by § 2 plaintiffs, and any traditional districting principles which § 2 plaintiffs incorporation into their hypothetical plan in an effort to demonstrate comparable consistency with the plan.

Gonzalez, 601 Fed. App'x at 260. Where plaintiffs' proposed plan fails to account for the locality's districting principles, the court may "justify the adopted redistricting plan" and conclude, under *Gingles* prong one, that "the minority group's proposed plan fails to comparably account for" the locality's principles. *Id.*

Plaintiffs' proposed plan does not respect the County's adopted redistricting criteria. The Commissioners' Court unanimously approved a list of redistricting criteria, including drawing lines based upon existing voting precincts and respecting municipal and other geographic boundaries. ROA.3502. Plaintiffs' expert Dr. Morrison admitted at trial that plaintiffs completely disregarded these criteria. Dr. Morrison testified that he never provided the County's adopted criteria to his mapdrawer because "[t]here was no need to provide those principles to him. I was instructing him based on *my judgment* as to what principles I wanted to start with and which ones I wanted to balance and respect going forward." ROA.5110 (emphasis added). Indeed, Dr. Morrison testified that he rejected the County's preference for respecting voting precinct boundaries. "I had to dispense with all the

existing precinct geography because precinct geography was too large for me to accomplish what I accomplished. That was . . . one of the factors that had to be subordinated in order to achieve success on all the others." ROA.5239.

The "success" to which he referred was ignoring all criteria in favor of plaintiffs' singular *race-based objective*. Dr. Morrison admitted that he used census blocks, rather than voting precincts, to draw plaintiffs' plan to rely upon racial information at the smallest geographical unit. ROA.5109 (Q: "Because what you wanted to rely upon principally is racial data, isn't that true?" A: "I wanted to rely upon census data that would allow me to measure the parameters that I needed to measure . . ." Q: "Which was race, isn't that a fact?" A: "Race and total population."); ROA.5097 ("All we had available was census published data on population, eligible voters by race.").[9]

This singular focus on race, while "dispensing" with precinct geography important to the County, falls far short of "demonstrat[ing] comparable consistency" with the County's priorities. *Gonzalez*, 601 Fed. App'x at 260. Plaintiffs' proposed plan does not satisfy *Gingles* prong one's compactness requirement.

[9] Plaintiffs split at least 42 separate precincts. ROA.5798-5799. And although plaintiffs claim their proposed map has fewer city splits, Br. at 28, Dr. Morrison admitted at trial that he *analyzed the wrong map* in reaching that conclusion and that his analysis had not been completed at the time of trial, ROA.5133-5134.

2. Plaintiffs Do Not Satisfy *Gingles* Prong Two Because Dallas County Anglos Are Not Politically Cohesive.

Plaintiffs do not satisfy *Gingles* prong two because Dallas County Anglos are not politically cohesive. The undisputed evidence shows that they split into three ideological camps and, as the district court concluded, the particular Anglos relied upon by plaintiffs to draw their Anglo-majority districts are the least cohesive in the county.

To satisfy *Gingles* prong two, plaintiffs must prove that "the minority group is politically cohesive." *Clark v. Calhoun County*, 88 F.3d 1393, 1395 (5th Cir. 1996). The purpose of this inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. Courts look to both general and primary elections for evidence regarding political cohesion. *See LULAC*, 548 U.S. at 444-46; *Sessions v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); *Perez v. Abbott*, 274 F. Supp. 3d 624, 658 (W.D. Tex. 2017), *rev'd on other grounds*, *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

The record demonstrates that Dallas County Anglos are not politically cohesive. The district court found that 23% of the County's Anglos generally supported Democrats. ROA.4987. The evidence at trial showed that Republican Anglos were split ideologically, such that 42% of Anglos support Tea Party candidates, which 35% support mainstream Republicans. ROA.5947-5948; ROA.5982-5984. Plaintiffs' expert Dr. Hood agreed that "there were divisions

between Tea Party and mainstream Republicans," ROA.5362-5363, plaintiffs' trial counsel Ms. Alvarez testified in the *Abbott* case that there were "different wings of the [R]epublican party who differ on [an] ideological basis," DX73-35, and plaintiffs' witness Jeff Turner agreed that Dallas County Anglos split three ways among Democrats, the Tea Party, and mainstream Republicans, ROA.5475.

Moreover, as the district court found, Anglos are least cohesive in the geographic area plaintiffs rely upon to create their proposed Anglo majority districts. ROA.4994 (rejecting plaintiffs' cohesion analysis and noting "the geographical dispersion of Anglo Democrats and the high concentration of these types of voters in the neighborhoods plaintiffs would include in their proposed 'Anglo opportunity' districts").

The record demonstrates that plaintiffs failed to satisfy *Gingles* prong two.

3. The Record Demonstrates that Race, Not Politics, Explains Anglo Republican Voting, Precluding Section 2 Relief.

Plaintiffs do not satisfy the *Gingles* preconditions because politics, not race, explains that voting patterns of Anglo Republicans. In *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), this Court held that plaintiffs must prove that race, not politics, explains racially polarized voting for it to be "legally significant" because Section 2's protections "extend only to defeats experienced by voters on account of race or color." *Id.* at 850 (quotation marks omitted). Were it otherwise, this Court explained, Section 2 would be removed "from its racial tether" and "illegal

vote dilution" would become fused with "political defeat." *Id*. For that reason, Section 2 is not satisfied by polarized voting attributable to "partisan affiliation, not race." *Id.*

The record in this case demonstrates that politics, not race, explains Anglo voting behavior in Dallas County. Plaintiffs' trial counsel Ms. Alvarez previously testified that Republican primary choices are "politically based," not race-based. ROA.3367. Plaintiff Jacobs testified that it was "correct" that "[t]he aim [he saw] in filing this lawsuit as a plaintiff is to ensure that [he's] able to get more Republicans elected to the county commission," ROA.5336, and that if Commissioner Daniel changed her party affiliation to Republican, he could "maybe" vote for her, ROA.5329. Jacobs likewise testified that politics, not race, explained his voting behavior: "I don't care what shade of skin they have . . . I'd rather have more Republicans." ROA.5334. Likewise, plaintiff Harding testified that the map "should have a second Republican leaning precinct" and that the Enacted Plan "was drawn to favor Democrats in Dallas County." ROA.5046-5047. Plaintiffs' perceived problem with the plan, and their voting behavior, is political not racial. For that reason, plaintiffs have failed to prove that the racially polarized voting they allege is "legally significant." *Clements*, 999 F.2d at 847.

4. Plaintiffs Do Not Satisfy the Totality of the Circumstances.

Plaintiffs also cannot show a Section 2 violation because the record reflects that the totality of the circumstances precludes a finding of vote dilution. Courts look to nine "Senate Factors" in assessing whether the totality of the circumstances supporting finding a Section 2 violation. These include (1) history of vote-related discrimination, (2) racially polarized voting, (3) use of voting practices that facilitate discrimination, (4) continuing effects of past discrimination in areas of education, employment, and health, (5) overt or subtle racial appeals in campaigns, (6) the extent the members of the minority group have been elected to office, (7) responsiveness of elected officials to needs of minority group, (8) whether the underlying electoral policy is tenuous, and (9) proportionality of electoral opportunities to population. *See LULAC*, 548 U.S. at 426.

These factors are not given equal weight. "Some of these factors are more important than others—the two most important are the extent to which members of the minority group have been elected to public office and the extent to which voting in the jurisdiction is racially polarized." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991).

The evidence at trial precludes a finding that the totality of the circumstances establish a Section 2 violation. First, plaintiffs only alleged the presence of four of these factors (Factors 1, 2, 5, and 7). ROA.223 ¶ 29. Plaintiffs did not allege—or

present any evidence supporting—the remaining five, including one of the "two most important," *Westwego*, 946 F.2d at 1120, the extent to which Anglos have been elected to public office in Dallas County (Factor 6). Indeed, the record proves the absence of these five factors. *See, e.g.*, ROA.6046-6048 (noting three of five Court members are Anglo, an overrepresentation);[10] ROA.5258 (Morse); ROA.5269 (Schroer) (testimony of plaintiffs that they have not experienced discrimination in voting on account of being Anglo); ROA.3450-3451; (admission of plaintiffs that there is no history of discrimination against Anglos in public accommodations and that Anglos do not bear the effects of past discrimination in education, employment, and health).

Moreover, the evidence demonstrates that Anglo Republicans are proportionally represented on the Court, and thus plaintiffs cannot show a lack of equal opportunity to participate in the political process redressable by Section 2. In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Supreme Court held that Hispanics who held 45% of the region's state house districts and who constituted 47% of the voting age population ("VAP") had no Section 2 right to additional seats. *Id.* at 1014-15. "Treating equal population as the focus of the enquiry, we do not see how these

[10] Plaintiffs have contended that only the Republican Anglo (Mr. Cantrell) should be considered when determining the number of elected Anglos. This makes no sense. The purpose of the analysis is to determine whether candidates are rejected because of their race, not because of their political beliefs.

district lines, apparently providing effectiveness in proportion to voting-age numbers, deny equal political opportunity. . . . [U]nder [the challenged map], Hispanics in the Dade County area would enjoy substantial proportionality." *Id.* at 1014.

Anglos constitute 31.5% of the total population of Dallas County. ROA.2540 Removing the 23% who support Democrats, ROA.4734, that means 24.3% (.77 x .315) of Dallas County's total population are Anglo Republicans, or 28% of the County's VAP—the metric used by the Supreme Court in *De Grandy*.[11] Under the Enacted Plan, Anglo Republicans hold one of the four districts, or 25%. That is nearly exactly proportional to their share of total population and VAP. Even if CVAP is used, contrary to *De Grandy* and *Evenwel*, Anglo Republicans constitute 34.1% of Dallas County CVAP (.77 x .451), which is closer to 25% than to 50%. If two of the four seats were held by Anglo Republicans, they would hold seats well above their proportion of the population, thus putting African Americans, Hispanics, and Anglo Democrats well below their proportion. Indeed, the fact that it is impossible

[11] Total population is the most appropriate metric for assessing proportionality, given that "representatives serve all residents, not just those eligible or registered to vote." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016); *cf. Fairley*, 584 F.3d at 674 (rejecting use of voter registration figures as metric for proportionality).

to draw districts that would elect two Republicans is strong evidence that Anglo Republicans are proportionally represented.[12]

Even among the totality of circumstances factors plaintiffs advanced, the evidence and trial testimony precludes a finding of vote dilution. First, the evidence shows a history of discrimination against Blacks and Latinos in Dallas County, not against Anglos. ROA.6029; DX 66-5-66-14; DX 66-33-66:34. Plaintiffs' expert Dr. Hood agreed. ROA.5361. Moreover, plaintiffs have failed to show that the voting patterns of Anglo Republicans in Dallas County are caused by race, not politics. *See supra* Part II.B.3. In addition, although plaintiffs' counsel contend that the Commissioners Court is not responsive to Anglos, *see, e.g.*, Br. at 34, the plaintiffs themselves testified otherwise. ROA.5264; ROA.5269 (testimony of plaintiff Schroer that he did not attend redistricting hearings and could only identify Commissioner Cantrell); ROA.5255 (testimony of plaintiff Morse that she does not know who her commissioner is and has never sought any service or information from Dallas County in which the County was unresponsive or unhelpful); ROA.5335; ROA.5333 (testimony of plaintiff Jacobs that he has no personal issues with any commissioners and cannot identify any issues on which he disagrees with his

[12] Because there are only four districts, a requirement of state law, it is difficult to achieve precise proportionality.

commissioner); ROA.5044-5045; ROA.5052 (testimony of plaintiff Harding that she has never contacted any commissioner).

The only factor that plaintiffs made any real effort to establish was the presence of racial appeals in campaigns (Factor 5). They relied upon the testimony of Dr. Voth, who identified racial appeals among a series of newspaper articles selected and provided by plaintiffs' counsel. ROA.5513. But even if plaintiffs established this single factor (they did not), that is insufficient as a matter of law. In *Westego*, this Court affirmed the district court's rejection of a Section 2 claim where "[t]he only factor found by the district court weighing in favor the plaintiffs was the second, namely, the existence of polarized voting . . . ." 584 F.3d at 673. In any event, even if this Court disagrees with the district court's conclusion regarding plaintiffs' failure to prove vote dilution, it would have to remand to the district court to assess the other *Gingles* factors and the totality of the circumstances.[13]

The Court should affirm the district court's Section 2 ruling.

[13] Plaintiffs' contention that there was "strong evidence of racial intent," Br. at 34-35, is foreclosed by the district court's rejection of their intent claim—a claim they have abandoned on appeal.

III. The District Court Correctly Found Plaintiffs' Complaint Did Not Plead a *Shaw*/Racial Gerrymandering Claim.

A. Plaintiffs' Complaint Did Not Plead a *Shaw*/Racial Gerrymandering Claim.

The district court correctly found that Plaintiffs' complaint did not plead a *Shaw*/racial gerrymandering claim, but rather pled a single Equal Protection claim: intentional vote dilution, ROA.4321, which plaintiffs have now dropped on appeal. A complaint must contain a "short and plain statement of the *claim* showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). Where a single, distinct claim for relief is described under a "count" in a complaint, plaintiffs cannot shoehorn a second legal claim into that count by pointing to incorporated factual allegations appearing earlier in the complaint. "Such an incorporation is not a 'short and plain statement of the claim,' which can be expected to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell v. Dallas County*, No. 3:08-CV-1834-K, 2011 WL 3874904, at *2 (N.D. Tex. Aug. 30, 2011) (quoting Fed. R. Civ. P. 8(a)(2) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). Moreover, "[a] claim which is not raised in the complaint but, rather, is raised only in . . . a motion for summary judgment is not properly before the court." *Cutrera v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005).

In *Baham v. McLane Foodservice, Inc.*, 431 Fed. App'x 345 (5th Cir. 2011), the plaintiff alleged a violation of the Family and Medical Leave Act ("FMLA"), which prohibits both retaliation and interference by an employer. *Id.* at 347 n.1. The claim for relief in the plaintiff's complaint described a retaliation claim, but the plaintiff later sought to advance an interference claim too. This Court affirmed the district court's ruling that the plaintiff had not pled an interference claim.

> The complaint does not mention a prescriptive claim, set forth claims that track the FMLA's interference provisions, or indeed give any indication that [the plaintiff] intended to allege an interference claim. As District Judge Reed O'Connor aptly observed in his well-reasoned opinion below, '[j]udges are not pigs, hunting for truffles buried in [complaints].'

Id. (third bracket added).

The *Bell court* reached the same conclusion. The court rejected the plaintiff's contention that "he adequately pleaded an interference claim when he incorporated by reference several factual allegations" from the body of the complaint that might support an interference claims. 2011 WL 3874904, at *2. "[H]is complaint does not identify an interference claim as a cause of action, nor does it track the language of the FMLA's interference provisions in his only cause of action that mentions the FMLA." *Id.* "What is most confusing is that [the plaintiff] continues to assert there are not only two separate theories of relief but two separate causes of action contained in his first amended complaint under the section entitled 'First Count.'" *Id.*

Courts have reached the same conclusion outside the FMLA context. In *Baker v. Great Northern Energy, Inc.*, 64 F. Supp. 3d 965, 977-78 (N.D. Tex. 2014), the court concluded that the plaintiff's complaint alleged only intentional misrepresentation, not negligent misrepresentation. The court rejected plaintiffs attempt to incorporate allegations of negligence into the intent count. "Generally, this sort of 'incorporated by reference' pleading—employed by plaintiffs to add claims not explicitly alleged in the complaint—does not suffice under the federal rules." *Id.*; *see also Putty v. Federal National Mortgage Ass'n*, 736 Fed. App'x 484, 485 (5th Cir. 2018) (Mem.) (affirming dismissal of federal statutory claim that was not specifically pled and rejecting argument that it was "inherent" in other claims); *Amazon Tours v. Quest Global Angling Adventures LLC*, No. Civ. A. 303CV2551M, 2004 WL 1788078, at *4 (N.D. Tex. June 30, 2004) (rejecting argument that factual incorporation could add additional unpled conspiracy claims).

This rule has been applied to *Shaw*/racial gerrymandering claims—the claim at issue in this case. The Supreme Court has explained that a *Shaw*/racial gerrymandering claim is

> analytically distinct from a vote dilution claim. Whereas a vote dilution claim alleges that the [government] has enacted a particular voting scheme as a purposeful device to maintain or cancel out the voting potential of racial or ethnic minorities, an action disadvantaging a particular race, the essence of the equal protection claim recognized in *Shaw* is that the [government] has used race as a basis for separating voters into districts.

Miller v. Johnson, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted) (emphasis added). For that reason, the three-judge court considering Texas's most recent redistricting legislation concluded that several plaintiffs' complaints failed to state *Shaw* claims. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 932 (W.D. Tex. 2017). The *Perez* court explained that the plaintiffs did not properly raise *Shaw* claims because "the racial gerrymandering language was omitted from their live complaint . . . The Fourteenth Amendment claims are couched only in terms of intentional discrimination and vote dilution." *Id.* That was so even though some plaintiffs, unlike plaintiffs here, actually used the phrase "racial gerrymander" in their complaint, albeit in the context of describing intentional discrimination. *See* MALC's 3d Am. Compl. ¶¶ 10, 51, 54, 57-59, *Perez v. Abbott*, No. 11-360 (W.D. Tex.), ECF No. 897.

Here, the district court correctly concluded that "plaintiffs' equal protection claim is pleaded as a vote dilution claim and nothing more." ROA.4321 Count II of plaintiffs' complaint included a single substantive paragraph describing their Equal Protection claim:

> The facts alleged constitute a denial to the Plaintiffs of rights guaranteed by the Equal Protection Clause of Section 1 of the 14th Amendment to the United States Constitution. The Commissioners Court crafted the Discriminating Map and each of its four (4) component CCDs to purposefully fragment Dallas's Anglos, dispersing them among the four (4) CCDs without regard to traditional, neutral redistricting principles. The Commissioners Court designed the Discriminating Map to reduce and lesson [*sic*] Dallas's Anglos

> electoral opportunities significantly below the level of opportunities that would have been available under a map compliant with neutral principles. This fragmentation provides undue voting advantages to Dallas's non-Anglo, ethnic-bloc-voting majority. The Discriminating Map was intentionally crafted to allow Dallas's ethnic majority coalition to dominate the Commissioners Court beyond what their voting power and geographic distribution would otherwise suggest and to deny Dallas's Anglos the chance to meaningfully participate in the choice of any commissioner outside of CCD 2.

ROA.223-224. This paragraph gives detailed, explicit notice of an intentional vote dilution claim, but nothing more.

Plaintiffs point this Court to a single phrase incorporated by reference into Count II of their complaint. *See* Br. at 43 (noting that complaint alleged that "race was the predominant factor" (internal quotation marks omitted)). But this is precisely the type of pleading courts have rejected as insufficient to give notice of an additional *legal claim*. *See Bell*, 2011 WL 3874904, at *2; *Baker*, 64 F. Supp. 3d at 979; *Amazon Tours*, 2004 WL 1788078, at *4. Plaintiffs' single mention of the phrase "predominant factor" outside the context of their Equal Protection claim cannot possibly have put defendants on fair notice that they *actually* meant Count II to communicate a *Shaw* claim, particularly given that the claim they actually pled would also require proof that invidious intent predominated.

Plaintiffs are also wrong to compare their complaint to the 2013 complaint of the Latino Redistricting Taskforce—the only plaintiff the *Perez* court found to have alleged a *Shaw* claim. *See* Br. at 43. First, the State did not contest whether the

Taskforce had pled a *Shaw* claim, so the *Perez* court had no occasion to examine the issue. Second, the Taskforce's complaint included seven factual allegations about race predominating in various districts. ROA.4171-4178. And its actual claim for relief was brief, merely stating that "Plans C185, H283, and the alterations made to HD 90 in Plan H358 discriminate against Plaintiffs on the basis of race and national origin in violation of the 14th Amendment to the U.S. Constitution." ROA.4179. By contrast, plaintiffs here included fifteen lines of text in Count II, all of which alleged intentional vote dilution, and nothing more. The specificity, and limited nature, of those allegations precludes plaintiffs' comparison to the Taskforce's complaint in *Perez*.

Furthermore, the Court should decline plaintiffs' invitation to view every vote dilution claim as also stating a *Shaw* claim. Plaintiffs contend that the Court should not hold that "a claim of vote dilution fails to state a racial-gerrymandering claim" because "[i]t is hard to imagine how one could intentionally dilute the voting strength of a racial group without race predominating over traditional redistricting criteria." Br. at 45. This argument is unpersuasive. First, it is easy to imagine a mapdrawer relying on traditional criteria as the predominant motivating factor for the bulk of a district's lines but racially discriminating by, for example, drawing a minority representative's home out of the district. The premise of plaintiffs' contention is thus wrong; not every intentional vote dilution violation is necessarily

also a *Shaw* violation. Second, 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. This is exactly what the *Baker* court held, consistent with the notice requirement of the Federal Rules.

B. Plaintiffs Abandoned Their *Shaw* Argument by Failing To Seek Leave to Amend Their Complaint.

Plaintiffs abandoned the *Shaw* issue by failing to seek leave to amend their complaint to add such a claim when they had the opportunity prior to trial. A plaintiff may seek leave to amend her complaint after a Scheduling Order deadline "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Upon a showing of good cause, the plaintiff's motion to amend is governed by "the more liberal standard of Rule 15(a)." *S&W Enters., LLC v. SouthTrust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003). Rule 15(a) governs amendments before trial, and provides that "[t]he court should freely grant leave when justice so requires." Fed. R. Civ. P. 15(a). Rule 15(b) governs amendments during trial, and provides that "[t]he court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." Fed. R. Civ. P. 15(b). That rule permits the court to grant a continuance of the trial to permit the defendant time to prepare a response. *Id.*

In its summary judgment ruling, the district court ruled in March 2018 that plaintiffs had not pled a *Shaw* claim. ROA.4321-4322. Plaintiffs could have sought leave to amend their complaint, and the district court could have continued the trial to alleviate the prejudice to defendants. But plaintiffs abandoned the issue in the district court rather than seeking to cure their pleading defect at the appropriate time. The district court's treatment of plaintiffs' unpled *Shaw* claim was not in error. *See Augienello v. Coast-to-Coast Financial Corp.*, 64 Fed. App'x 820, 822 (2d Cir. 2003) ("Because the plaintiffs never sought leave in the district court to amend the complaint to add such a claim, we conclude that there was no error in the district court's decision to dismiss the plaintiff's complaint for failure to state a claim."); *Putty*, 736 Fed. App'x at 485 (affirming dismissal where plaintiff "did not plead . . . [n]or sought leave to amend her complaint to add a [particular] claim").

C. Plaintiffs' Invitation for the Court of Appeals to Engage in Fact-finding on an Unpled, Untried Claim Is Improper.

The Court should decline plaintiffs' invitation to engage in fact-finding on appeal regarding their unpled *Shaw* claim. *See* Br. at 46-48. Plaintiffs cite a total of six pages from the trial record, *id.* at 48, and present two-and-a-half pages of briefing, to support their conclusion that "[t]he trial record presents enough evidence to prove unconstitutional racial gerrymandering." *Id.* Appellate courts do not make factual determinations, something that is particularly true with respect to *Shaw* claims. "A trial court [considering a *Shaw* claim] has a formidable task: It must make

'a sensitive inquiry' into all 'circumstances and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017). The district court's findings must be affirmed if they are "plausible" under the clear error standard. *Id.* (quotation marks omitted). And the court of appeals must give "singular deference to a trial court's judgments about the credibility of witnesses." *Id.* at 1474. Plaintiffs' request that this Court assess in the first instance whether a *Shaw* violation occurred is improper.

In any event, plaintiffs are wrong about the predominant factor in the mapdrawing. Plaintiffs rely upon the fact that the County's mapdrawer was already familiar with the demographic makeup of the County and thus "did not need [racial shading] maps in order to achieve the racial outcomes." Br. at 5. If this were the law, officials would be obligated to hire unfamiliar strangers to draw their maps lest they be accused of racially gerrymandering. The evidence at trial showed that the district about which plaintiffs complain—the one held by Commissioner Daniel—was the final district drawn, and its territory was what was left after drawing the two districts plaintiffs acknowledge were required by Section 5, ROA.5783-5784, and the Tea Party district that the court below found was a priority of then-Commissioner Dickey, ROA.4963. Even if plaintiffs had pled a racial gerrymandering claim, or if such a claim had been tried by the court below, it would fail.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

April 19, 2019

Respectfully submitted,

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April 19, 2019

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On April 19, 2019, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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