UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DICKINSON BAY AREA BRANCH NAACP, et al., *Plaintiffs*, v. GALVESTON COUNTY, TEXAS, et al., *Defendants*.	§ § § § § § § § § §	Civil Action No. 3:22-cv-117- JVB
TERRY PETTEWAY, et al., *Plaintiffs*, v. GALVESTON COUNTY, TEXAS, et al., *Defendants.*	§ § § § § § § § § §	Civil Action No. 3:22-cv-57-JVB [Lead Consolidated Case]
UNITED STATES OF AMERICA, *Plaintiff*, v. GALVESTON COUNTY, TEXAS, et al., *Defendants*.	§ § § § § § § § § §	Civil Action No. 3:22-cv-93-JVB

NAACP/LULAC PLAINTIFFS' CLOSING STATEMENT

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I. INTRODUCTION

There are a surprising number of agreements among the parties here. For one, NAACP/LULAC Plaintiffs ("Plaintiffs") agree with Defendants that "we shouldn't be here" because this "should have been resolved through simple discussion through a legislative body." Trial Tr. vol. 10, 284:13–16 (Defendants' Mot.). Plaintiffs, however, are not members of a legislative body. Defendants remain free to unilaterally resolve this matter whenever they wish by adopting any of the panoply of possible maps presented that satisfy their purported criteria while preserving an opportunity for the minority community to elect its chosen representative. The fact Defendants have taken no steps to do so speaks volumes about their true intent in passing the Enacted Plan.

Plaintiffs also agree with Judge Mark Henry that he could not confer privately with Commissioner Stephen Holmes about the configuration of new precincts because to do so would have constituted a violation of the Texas Open Meetings Act ("TOMA"). *See* Trial Tr. vol. 7, 306:6–18 (Henry). Yet Judge Henry and Commissioners Apffel and Giusti had no TOMA hesitations when it came to making a "final" map they knew eliminated the sole majority-minority precinct behind Commissioner Holmes' back. The TOMA violation is clear: (1) Judge Henry had already met with Commissioner Darrell Apffel in September to discuss map preferences before (2) talking to Commissioner Giusti about whether he agreed with the proposed "coastal" precinct; (3) Judge Henry also met again with Commissioner Apffel after draft maps were available, while (4) Commissioner Apffel also met with Commissioner Clark to work out the details of Map 2; and throughout, (5) Judge Henry "popped" in and out of a "series of meetings" with these commissioners. Trial Tr.

vol. 8, 88:6−8, 194:14−197:19 (Oldham); *see also* PFOF ¶¶ 320−32; *cf.* Tex. Gov. Code § 551.143 (Prohibited Series of Communications). At base, what Defendants blame on Commissioner Holmes's "failure to politic," *see* Trial Tr. vol. 1, 48:2–6 (Opening), is more accurately described as his compliance with Texas law. Had the rest of the commissioners court discussed their reasons for supporting Map 2 in public meetings, as required by law and with the requisite opportunity for public testimony, *see* Tex. Gov. Code § 551.007, the results may have been different. The fact that they chose not to not only undermines Defendants' central trial theme of blaming Commissioner Holmes and further shines light on their intent.

Additionally, Plaintiffs agree with Defendants' opening mantra: "local knowledge for local needs." Trial Tr. vol. 1, 30:16−17 (Opening). But true local knowledge must include knowledge from the 38% of the Galveston County population that is Latino and/or Black. *See* Stipulated Facts ¶ 6. This Court heard about the unique local knowledge and life experiences of Galveston's minority community through the testimony of 12 fact witnesses called by Plaintiffs. Unfortunately, those experiences of discrimination and inequity do not live up to the aspirations most Americans have for an equal society. But because of those experiences, Judge Henry's local knowledge of League City is different than Ms. Lucretia Henderson-Lofton's. Commissioner Giusti's knowledge of Santa Fe is different than Mr. Robert Quintero's or Ms. Edna Courville's. In this instance, Defendants acted to silence Galveston's historically resilient minority community by systematically discounting their local knowledge and needs in a manner that violates the Voting Rights Act ("VRA") and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Indeed, Defendants do not dispute that, as a statistical matter, the Enacted Plan eliminates Latino and Black voters' ability to elect a candidate of choice in any commissioner precinct.

Given Defendants' power to resolve this litigation at any point in the last year-and-a-half and the apparent agreement between the parties on several fundamental premises, it raises the question: why did the County set aside $1.5 million in taxpayer funds for litigation rather than taking a course of action that would have cost nothing and which no member of the Court claims to oppose? *See* Trial Tr. vol. 7, 253:24–254:11 (Henry). Why did they adopt a map they knew would risk litigation without pursuing other options? *See* Joint Ex. 12 at 5 (2021 engagement letter); Dkt. 108 at 19 n.5 (Defendants' brief, arguing the engagement letter "highlights that litigation was anticipated").

The answer lies in Defendants' misplaced belief that "the time and need for race-based legislation is over." Trial Tr. vol. 1, 53:14−15 (Opening). Defendants have not concealed their desire to rewrite Section 2's results language, or have Fifth Circuit precedent on coalition districts overturned. But, as was recently confirmed by the Supreme Court in *Allen v. Milligan*, decades of precedent remain the law, and Congress (not the commissioners court) remains the proper authority to amend the VRA. 143 S. Ct. 1487, 1506 (2023) ("The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our § 2 jurisprudence anew.").

At base, the way Defendants went about dismantling the historic, lone majority-minority commissioners precinct strongly evinces an intent to purposefully take a course of action that had an adverse impact on Galveston's Latino and Black voters. But even

without a finding of discriminatory intent, the direct and indirect evidence shows that Defendants' decision to dramatically alter the racial composition of the precincts preceded and predominated over other redistricting principles in the Enacted Plan's initial design. For these reasons, as set forth below and in Plaintiffs' Proposed Findings of Fact ("PFOF") and Conclusions of Law ("PCOL"), the Court should rule in Plaintiffs' favor on all claims, enjoin the Enacted Plan, and ensure a legally-compliant map is used in the next election.

II. THE ENACTED MAP VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT IN EFFECT.

Plaintiffs have proven "the essence of a §2 claim," which is "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023). The Enacted Plan, if enforced, will indisputably "cancel out" Black and Latino voters' ability to elect their preferred candidate by "submerg[ing]" them in majority-Anglo precincts with zero chance of electing their candidate of choice. *Id.* The effect of the Enacted Plan violates Section 2 and the map must be struck down.

A. Galveston's Black and Latino population satisfies Gingles *I.*

As the Supreme Court confirmed just months ago in *Milligan*, Plaintiffs satisfy the first *Gingles* precondition by demonstrating a majority-minority district that is "reasonably configured" and "comports with traditional district criteria, such as being contiguous and reasonably compact." 143 S. Ct. at 1503. The four illustrative plans from William Cooper, a redistricting expert with over three decades of experience in over 750 jurisdictions, prove that Galveston's Black and Latino residents are geographically compact such that they

easily constitute a majority in such a district, Pls.' Ex. 386 (Cooper Expert Report); Pls.' Ex. 438 at 11−13 (Cooper Rebuttal), and that there are "many, many different" ways of drawing such a district. Trial Tr. vol. 3, 52:7−15 (Cooper).

Defendants' attempt to show otherwise is based upon a legal argument foreclosed by binding precedent and the unreliable analysis of Dr. Mark Owens. The Fifth Circuit has rejected Defendants' arguments that coalition districts are not permitted. *See, e.g.,* PCOL ¶¶ 27−29 (collecting cases). As to the latter point, Dr. Owens's testimony reveals he lacks sufficient knowledge, education, experience, or skill to provide reliable opinions on traditional redistricting principles and the geographic compactness of minority communities. *See* PFOF ¶¶ 36−38 (summarizing Owens testimony). Instead, it appears Dr. Owens' opinions here were developed "expressly for purposes of testify[ing]" and have not "grown naturally and directly out of research" he has conducted "independent of the litigation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). They are thus of no use to the Court in this matter. *Id.* At base, Defendants' arguments represent no more than an attempt to heighten the *Gingles* I standard, an effort the Supreme Court recently rejected in *Milligan*. 143 S. Ct. at 1514 (rejecting attempt to "inject[] into the effects test of § 2 an evidentiary standard that even our purposeful discrimination cases eschew"). These arguments should likewise be rejected here.

B. Gingles *II/III: A cohesive Anglo vote usually defeats a cohesive minority vote.*

As to *Gingles* II and III, all experts agree that general elections are most probative in this case, PFOF ¶¶ 120−26, 135−40, and defense expert Dr. Alford did not dispute Plaintiffs' experts Dr. Barreto's and Dr. Oskooii's ecological inference ("EI") results; in

fact, he adopted them for purposes of his opinion. *See generally* PFOF ¶¶ 47, 117–18, 158.

For coalition districts, the Fifth Circuit assesses minority voters "as a whole"—as one "minority group" under *Gingles* II—to determine "whether the minority group together votes in a cohesive manner" absent evidence that one part of a coalition votes against the other. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988). In Galveston, both parties' experts show that "black-supported candidates receive a majority of the [Hispanic] vote" and "Hispanic-supported candidates receive a majority of the [Black] vote." *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *see* PFOF ¶ 118 (undisputed evidence that large majorities of Latinos and Blacks prefer the same candidates). By Dr. Alford's account, "I don't think you could see a more classic pattern of what polarization looks like in an election." Trial Tr. vol. 10, 17:11–18:3 (Alford).

Even in the less-probative primary election phase, PFOF ¶¶ 127–31, 173–74, Latino/Black voters fit the coalition test. Using the "gold-standard" ei.MD.bayes command rather than the less appropriate ei.reg.bayes command, *see, e.g.*, Trial Tr. vol. 10, 27:16–28:10 (Alford)), Drs. Oskooii's and Alford's Democratic primary analyses show that Black and Latino voters shared first-choice candidates in 22 of 24 (92%) contests. PFOF ¶¶ 132–33. This agreement in 92% of primary results contrasts sharply with the evidence in *Perez v. Abbott*, where Black and Latino voters more often than not *opposed* each other in Democratic primaries. 274 F. Supp. 3d 624, 655–71 (W.D. Tex. 2017). This quantitative evidence is also further supported by non-statistical testimony that Galveston's Latino and Black voters have distinctive shared interests and regularly work as one to further those interests at the ballot box and beyond. *See generally* PFOF ¶¶ 143–46; PCOL ¶ 46 (citing

cases using non-statistical evidence).

Therefore, taking Black and Latino voters in coalition, Dr. Oskooii's EI analysis plainly satisfies the *Gingles* II standard for minority cohesion: 25 recent elections show that Black/Latino voters support a candidate of choice in every election in each of Plaintiffs' illustrative plans at 87+% average rates, and similar levels countywide. Pls.' Ex. 356 at Figs. 6, 13 (Oskooii Report). Thus, a "significant" majority of the minority group "as a whole" usually votes for the same candidates and is cohesive in the proposed district. *Campos*, 840 F.2d at 1243, 1245 (citing *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986)).

As for *Gingles* III, Defendants do not dispute that, as a mathematical matter, Anglos vote cohesively in sufficient numbers (at average rates over 85%) to defeat the minority-preferred candidate in *every* election studied and in *every* precinct of the Enacted Plan. PFOF ¶¶ 148–62. Dr. Oskooii's reconstituted election results—based on actual election results and thus complementing ecological estimates—independently confirm the legal significance of racially polarized voting in Galveston: They show a direct 1:1 correlation between the percentage of Anglo eligible voters in an Enacted Precinct with the severity of loss for minority-preferred candidates. Trial Tr. vol. 4, 289:12−290:7 (Oskooii); Pls.' Ex. 356 at ¶¶ 74−75 (Oskooii Expert Report). Thus, all analytical methods and lay testimony confirm that voting is racially polarized such that "minority and majority voters consistently prefer different candidates" and that "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters," denying minorities an equal opportunity to elect representatives of their choice. *Gingles*, 478 U.S. at 48.

C. Minority vote dilution occurs at least plausibly on account of race.

Defendants' only rebuttal, that racially divergent voting patterns are solely attributable to partisanship without connection to race, is wrong.

Under the relevant framework, after Plaintiffs satisfy the initial *Gingles* burden with the statistical evidence of racially divergent patterns that dilute minority voting, this shifts the burden to Defendants to show that these patterns are wholly explained by some non-racial phenomena, after which the Court weighs all available evidence. *See, e.g.*, *Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996); *Lopez v. Abbott*, 339 F. Supp. 3d 589, 604 (S.D. Tex. 2018); *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 760 (S.D. Tex. 2013), *aff'd*, 601 F. App'x 255 (5th Cir. 2015). Because partisanship and race can be correlated, the ultimate inquiry requires a "searching practical evaluation of the past and present reality . . . [and] courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation." *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 860−61 (5th Cir. 1993) (en banc). The question is *not* whether there is definitive evidence of racial animus in the electorate. *Id.* at 860. Instead, the ultimate question is whether "the challenged districting thwarts a distinctive minority vote *at least plausibly* on account of race," and the words "on account of . . . mean with respect to race or color." *Milligan*, 143 S. Ct. at 1503, 1507 (internal citations and quotations omitted, emphasis added).

Defendants cannot seriously contend that, through a random fluke, 85+% of Anglo voters arbitrarily prefer the partisan label "Republican" while 85+% of minority voters arbitrarily prefer "Democrat." *See* PFOF ¶¶ 117, 160; Pls.' Ex. 452 at ¶ 5 (Oskooii Rebuttal). Such a strong statistical pattern leads one to infer a significant relationship

between race and voting behavior. Defendants therefore bear a serious burden to show the strong correlation is explainable by completely non-racial phenomena. Here, by defense expert's own admissions, Defendants failed to present any reliable or methodologically sound evidence to satisfy their burden. *See generally* PFOF ¶¶ 165−71 (Dr. Alford acknowledging his limited analysis and agreeing that his methods were speculative). Even crediting their scant evidence, based primarily on a single U.S. Senate contest, *id.*, the preponderance of the evidence favors Plaintiffs.

The root of the Fifth Circuit's consideration of race, party, and voting behavior is to respect the "balance" Congress struck in its 1982 amendments to the VRA prohibiting the effects of racial vote dilution as described in *White v. Regester*, 412 U.S. 755 (1973), while neither guaranteeing a right to proportional representation nor insulating mere political defeats as cautioned against in *Whitcomb v. Chavis*, 403 U.S. 124 (1971). *See Clements*, 999 F.2d at 851; *cf. Gingles*, 478 U.S. at 84 (O'Connor, J. concurring). With this in mind, the Fifth Circuit in *Clements* explicitly "focus[ed] on the same two factors cited by the Court in *Whitcomb* and the concurring Justices in *Gingles*": (1) that Anglo voters constituted a majority of *both* political parties, with 30−40% of Anglos voting Democratic, and (2) that "both political parties, and especially the Republicans, aggressively recruited minority lawyers to run" meaning voters were "not infrequently voting against candidates sharing their respective racial or ethnic backgrounds." 999 F.2d at 861.

In Galveston County, both factors cut against Defendants: Less than 15% of Anglos countywide vote for Democratic candidates, and Anglo participation in the Democratic primary is vanishingly thin, PFOF ¶¶ 160, 173−74. Further, there is not a single Republican

primary victor in Galveston County government that outwardly presents as a person of color, whereas every elected Democrat presents as a person of color. *See* PFOF ¶¶ 175—78; Pls.' Ex. 452 at ¶ 7 (Oskooii Rebuttal). Even Dr. Robin Armstrong, whose appointment to commissioners court was unsuccessfully marshaled as an argument to dismiss this case, *cf. Gingles*, 478 U.S. at 76 (noting with skepticism the sudden emergence of minority officials during pendent Section 2 litigation), lost his 2022 Republican primary bid for state senate, illustrating a broader trend of Black and Spanish-surnamed candidates meeting defeat in local Republican primary elections. Trial Tr. vol. 10, 195:13–18 (Armstrong); PFOF ¶ 430. Minimal minority success within a political party, such as Galveston's Republican primaries, is a strong indication of racial bloc voting. *Rodriguez*, 964 F. Supp. 2d at 776−77. Further, even in the nonpartisan context, the only concrete and reliable evidence adduced at trial is that minority candidates tend to emerge successfully only from majority-minority areas, a fact that even defense expert Dr. Alford admitted could show *racial* polarization. PFOF ¶¶ 141, 431.

It is also important that the Fifth Circuit did not dismiss voting patterns as mere partisanship in *every* county in *Clements*. In Bexar, Harris, and Jefferson counties, it held that the extent of potential racial dilution did not outweigh the "unique" and "substantial" interest the state had in linking judicial districts to the geographic area over which they have jurisdiction. *Clements*, 999 F.2d at 874, 885, 890−91. By contrast, here, there is not even a tenuous governmental interest to offset minority dilution given the many maps that could satisfy Defendants' purported criteria but maintain a version of historic Precinct 3.

Finally, lay witness experiences confirm the role of racial identity in voting

behavior, allowing the Court to base its finding of RPV on a "searching practical evaluation of the past and present reality." *Id.* at 860−61. For example, Anglo elected officials' responsiveness to minority communities "is intimately related" to the legal significance of bloc voting because, if there is bloc voting connected to race, it "allows those elected to ignore [minority] interests without fear of political consequences." *Id.* at 857. One need only consider the 2021 redistricting process itself. Historic Precinct 3 was no ordinary district, it was a source of pride to the minority community, and the only source of minority representation on the County's governing body for decades. PFOF ¶¶ 65–67.

Nor is this the ordinary Section 2 circumstance in which a governing body simply maintains a pre-existing at-large system or fails to draw an additional district. Here, despite overwhelming public comment concerning the discriminatory impact of the map, *see* PFOF ¶¶ 349−50 (collecting testimony), *infra* p. 21, the commissioners court actively stripped minority residents of representation and now spends their tax dollars defending a map that dilutes their votes. Judge Henry even threatened in an "aggressive" manner the majority non-Anglo attendees of the lone public meeting with removal. Trial Tr. vol. 9, 149:25–150:8,151:3–5 (Giusti); PFOF ¶¶ 350–52, 442–43. These actions are the hallmark of non-responsiveness, following a long line of non-responsive actions. *See* PFOF ¶¶ 433−51.

There is more to indicate vote dilution on account of race, however, including evidence of racial appeals in campaigns, PFOF ¶¶ 415−20, barriers to political participation for communities of color, PFOF ¶¶ 402−14, and explicit racial discrimination against officials, candidates, and people of color, PFOF ¶¶ 415−20, 432, 462, 497−500. The personal experiences of minority residents in the county show that their distinctive interests

are not solely based on socioeconomics, but rather are also informed by their experiences *as* racial and ethnic minorities. *Id.*; *see also* PFOF ¶¶ 398, 440, 462 ("These experiences teach children that their 'voice does not matter' and their 'vote doesn't matter.'"). This evidence is more than sufficient to establish that the minority vote dilution caused by the Enacted Plan is "at least plausibly" on account of race. *Milligan*, 143 S. Ct. at 1503.

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

The totality of the circumstances favors Plaintiffs and conclusively demonstrates that the political process leading to election to the commissioners court is *not* "equally open to minority voters" without a majority-minority precinct. *Gingles*, 478 U.S. at 79. Of the nine factors described in the 1982 Senate Report, *see id.* at 36–37, Plaintiffs have demonstrated all but Senate Factor 4.[1]

Plaintiffs' Proposed Findings of Fact and Conclusions of Law detail all Senate Factors, but a few points merit further emphasis. Galveston County's history of official voting-related discrimination (Factor 1) includes *both* "long-ago history" that "provides context to modern-day events," as well as "more probative" evidence of "relatively recent discrimination." *Veasey v. Abbott*, 830 F.3d 216, 232 & n.14 (5th Cir. 2016). In addition to the undisputed history, PFOF ¶¶ 196–210, 398, recent examples include the County or its officials facing litigation regarding Spanish-speaking poll workers and Spanish-surnamed voter purges, *see* PFOF ¶¶ 402–03, and polling place closures and election issues

[1] Critically, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45 (internal citations omitted). As for Senate Factor 4, "[t]he absence of a slating organization will not mitigate evidence of an unequal opportunity to participate in the political process." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993), *on reh'g*, 999 F.2d 831 (5th Cir. 1993).

disproportionately harming the Black and Latino communities, particularly those with less access to transportation. PFOF ¶¶ 404–13. More broadly, the undisputed ongoing disparities in Galveston County (Factor 5), which Defendants concede weigh in Plaintiffs' favor, confirm the relevance of the history of discrimination in perpetuating inequalities and barriers to voting. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006); *Rodriguez*, 964 F. Supp. 2d at 778–79; *see also* Trial Tr. vol. 10, 280:14–19 (Defendants' Mot.). An examination of a "wide range" of factors shows that "Anglos outpace the Black and Latino population almost *across the board* in *every single data point*," and that these disparities directly impact voting participation. PFOF ¶ 104 (quoting William Cooper, emphasis added); *see also* PFOF ¶¶ 397, 399−401, 452, 462, 464−66, 476−77, 487−88 (describing expert and law witness testimony and evidence).

The effects of these disparities are borne out in the limited success minority candidates have had county-wide (Factor 7). PFOF ¶ 421. In addition to scant representation in County government, PFOF ¶¶ 422−32, Defendants' meager set of city and school board officials spread out over half a century only underscores the need for majority-minority districts: Most of those officials were elected from single-member districts, many of which resulted from preclearance denials and/or litigation. PFOF ¶¶ 431. Thus, compared to the hundreds of Anglo countywide officeholders and untold thousands of Anglo city council, school board, and other local officials in Galveston's history, minority elected success has been minimal and, where it has occurred, is mostly attributable to the existence of majority-minority districts like the one Defendants dismantled here.

Finally, the totality inquiry must be conducted in the context of the challenged

plan's dilutive effect. When "even substantial minority success will be highly infrequent under the challenged plan," (and, in fact, here impossible), courts can conclude "on this basis alone" that the plan serves to "cancel out or minimize the voting strength of [the] racial grou[p]" in violation of Section 2. *Gingles*, 478 U.S. at 99−100 (O'Connor, J. concurring) (quoting *White*, 412 U.S. at 765). Thus, under the totality of the circumstances, the political processes leading to representation in Galveston County government are not "equally open to minority voters." *Gingles*, 478 U.S. at 79.

III. DEFENDANTS INTENTIONALLY DISCRIMINATED AGAINST MINORITY VOTERS IN VIOLATION OF SECTION 2 AND THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

There is both direct and circumstantial evidence that Defendants acted intentionally to dismantle Galveston's sole majority-minority commissioners precinct, providing independent grounds for enjoining the Enacted Plan under Section 2 and the Fourteenth and Fifteenth Amendments. *See Perez*, 274 F. Supp. 3d at 637 ("[T]he legislative history of § 2 and case law also make clear that voters may bring a claim based on discriminatory voting practices using either the results test *or* an intentional discrimination test."); *Harding v. County of Dallas*, 948 F.3d 302, 312 (5th Cir. 2020).

Importantly, it is not Plaintiffs' burden "to show that individual legislators' subjective personal racism toward [minorities] was the motive," rather Plaintiffs need only adduce "objective evidence of an intent or purpose to discriminate by taking a course of action that will cause a racially disparate adverse impact, at least in part in order to achieve that impact." *Patino v. Pasadena*, 230 F. Supp. 3d 667, 725–26 (S.D. Tex. 2017) (citing *Veasey*, 830 F.3d at 285). Here, the evidence shows the commissioners court intended an

adverse impact on Galveston's Latino and Black voters by dismantling historic Precinct 3 and achieved it through a process designed to suppress public transparency and input from minority voices, including the sole minority commissioner.

A. There is direct evidence of discriminatory intent.

There is substantial direct evidence that Defendants took a course of action they knew would have a racially disparate adverse impact at least in part to achieve that impact. The intent evidence here is thus stronger than typically required for intentional discrimination. *See Veasey*, 830 F.3d at 235–36 (explaining that requiring direct evidence of discriminatory intent would "essentially give legislatures free reign to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions.").

As the architect of Map 2, Judge Henry provided detailed instructions to his redistricting counsel as to the configuration of a coastal precinct and mainland precincts in a way that divided the sole majority-minority precinct (and, as a result, the minority population) almost equally into the four new precincts. PFOF ¶¶ 232, 242, 394 (collecting testimony). In giving this instruction, he indicated he was aiming for a map he wanted in 2011 but was unable to attain because of the VRA; that is, because of its retrogressive effects on minority voting power in Benchmark Precinct 3. PFOF ¶ 232 (same). This goal is why Judge Henry hand-picked counsel from the prior cycle that helped defend a retrogressive map, *see* Trial Tr. vol. 7, 178:13−179:9, 283:21−23 (Henry), and explains why one of Judge Henry's first questions to Mr. Oldham shortly after retaining him was whether the County "had to" draw majority-minority districts this time. Pls.' Ex. 144 (Apr.

20, 2021 email). And the reason for Henry's desired configuration is clear: Precinct 3 was a perceived racial gerrymander benefiting Galveston's minority voters. *See* Trial Tr. vol. 7, 302:9–22, 305:6–19 (Henry); Trial Tr. vol. 9, 356:7–14 (Apffel); Trial Tr. vol. 8, 178:19–21 (Oldham). All of this supports an intent to dismantle Precinct 3 as the sole majority-minority commissioner precinct in the Enacted Plan.

This issue is not reasonably in dispute, given Defense counsel argued the commissioners court had "to deal with the racial gerrymandered map in Precinct 3" and moved "principally Anglo voters" from Bolivar into Precinct 3 in Map 1 to do so and, as the evidence shows, dismantled Precinct 3 in Map 2 for the same reason. *See* Trial Tr. vol. 1, 44:10–45:6 (Defendants' Opening Statement).[2]

This is not to say that a previously created race-conscious benefit can never be legally altered, or that subsequent racial gerrymanders would be required. Neither factor is at issue here, where the commissioners court's own counsel advised them a least-change configuration based on historic Precinct 3 was "legally defensible," Trial Tr. vol. 8, 122:14−123:2, 162:1−5 (Oldham), and where Plaintiffs have proved that alternative configurations meeting Defendants' purported non-racial criteria abound in districts comparable or better than the Enacted Plan in compactness. *See generally* PFOF ¶¶ 78–88, 374, 391. In other words, it is the decision to proactively *undo* a perceived racial benefit and not merely a failure to continue it that shows discriminatory intent by "taking a course of action that will cause a racially disparate adverse impact, at least in part in order to

[2] Although this demonstrates some racial intent in both instances, Plaintiffs are not alleging that Map 1 would have had a sufficiently discriminatory impact to necessarily give rise to a legal claim if adopted.

achieve that impact." *Patino*, 230 F. Supp. 3d at 725–26 (S.D. Tex. 2017).

B. The Arlington Heights *factors also support a finding of discriminatory intent.*

In light of this direct evidence of "a clear pattern, unexplainable on grounds other than race, . . . the evidentiary inquiry is [] relatively easy." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). But the indirect evidence, considered under the *Arlington Heights* framework, 429 U.S. at 266, further confirms Defendants' intent to dismantle the only majority-minority precinct and, knowing the public upset it would cause, design a process to minimize public transparency and meaningful input.

The "impact of the official action . . . provide[s] an important starting point. *Id.* (internal quotations omitted). Here, the Enacted Plan executes a textbook cracking of Galveston's Black and Latino voters, *see* Pls.' Ex. 386 at 6 (Cooper Expert Report), thereby targeting these minority voters "with almost surgical precision." *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). The foreseeable effect of the Enacted Plan, and that it would dilute minority voting strength, is "objective evidence that, combined with other evidence, provide[s] ample support for finding discriminatory intent." *Patino*, 230 F. Supp. 3d at 728. Commissioners court members knew that historic Precinct 3 was the sole majority-minority district in the county, electing the sole minority commissioner, *see* PFOF ¶ 230, and were shown analytic spreadsheets for map proposals confirming the new racial compositions of precincts. PFOF ¶¶ 253–57. It was obvious how the Enacted Plan would eviscerate minority chances of again electing their candidate of choice—Commissioner Apffel admitted one could "just look at the picture and tell" Map 1 would be better for Commissioner Holmes. Trial Tr. vol. 9, 372:15–25 (Apffel).

Arlington Heights next requires examining the historical background of the decision, the specific sequence of events leading up to the decision, departures from the normal procedural sequence, substantive departures, and legislative history. *Veasey*, 830 F.3d at 231 (citing *Arlington Heights*, 429 U.S. at 267–68). The historical background of this decision includes an attempt to retrogress minority voting rights during a time of pre-clearance, *see, e.g.*, Joint Ex. 45 (2012 Objection Letter), and persistent and continuous efforts to suppress minority voting power. *See generally*, PFOF ¶¶ 196–210, 400–13.

The sequence and legislative record show that, every step of the way, Defendants designed a process that deviated from prior practice to limit public transparency and engagement by affected Black and Latino voters. In deviation from Galveston's prior practice, Defendants (i) failed to disclose proposed redistricting counsel or consider other options before meeting to vote, (ii) failed to announce the Census data's release or resulting population deviations in current precincts, (iii) failed to adopt redistricting criteria as they had done before despite notice that their failure to do so in 2011 appeared racially discriminatory, (iv) failed to make any *draft* maps available for public comment (disclosing only those that were considered "final") even though drafts were first created on October 17; (v) failed to provide several opportunities for in-public comment at various locations throughout the county and in the evening hours, and (vi) failed to provide opportunities for comment in time to make any substantive changes to the map. PFOF ¶¶ 262, 275–363.

In fact, the only aspects of the 2021 redistricting process repeated from 2011 were those the County knew evinced possible discrimination: failing to adopt redistricting criteria and excluding Commissioner Holmes from meaningfully participating in the

process. *See* Joint Ex. 45 at 2 (2012 Objection Letter). With this information in hand, Judge Henry decided once again not to adopt criteria, and proceeded to coordinate with at least two other commissioners in private, flouting TOMA and then using TOMA as a pretext for excluding Holmes, all while refusing to call a public meeting before the maps were "final." Trial vol. 7, 301:8–12, 306:6–307:9, 310:24–311:5 (Henry).

Indeed, when Commissioner Apffel called Commissioner Holmes shortly before the November 12 meeting, he recalled Holmes saying Apffel was the "only one that's called to speak with me about this." Trial Tr. vol. 9, 327:6−12 (Apffel). This exclusion "of minority member input" is strongly probative of discriminatory intent. *Perez v. Abbott*, 253 F. Supp. 3d 864, 961 (W.D. Tex. 2017). And yet a central theme in Defendants' trial narrative was to blame Commissioner Holmes for not "politicking" as they did in disregard of a law "promulgated to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny." *Save Our Springs All., Inc. v. Lowry*, 934 S.W.2d 161, 162 (Tex. App. 1996) (internal citation omitted).

This last point illuminates the purpose of the deficient process: to make sure "the fix was already in" before the November 12 special meeting. Trial Tr. vol. 7, 160:21–25 (Holmes). This explains why Judge Henry's first question about the redistricting process to his counsel was about whether he could accomplish his goal of dismantling the majority-minority precinct. Pls.' Ex. 144 (Apr. 20, 2021 email). It explains Judge Henry's lack of concern over the actual deadline and failure to set forth a redistricting timeline either publicly or privately despite being the one "responsible for making sure that deadline was met." Trial Tr. vol. 7, 281:5−12 (Henry). It explains why Defendants gave their

demographer no more than "a couple hours of warning" in an "unusual[ly] tight deadline timeline" for drafting maps even accounting for census delays. Trial Tr. vol. 9, 35:17−36:6 (Bryan). It explains why Defendants never planned to use the November 1, 2021 *regular* meeting to publicly deliberate on draft maps, hoping instead to "discuss and possibly adopt" a new plan in a *special* meeting, Joint Ex. 27 (Oct. 28, 2021 email from T. Drummond to D. Oldham et al.), so it would occur at a location smaller than the county seat and that could not "accommodate the number of persons expected to attend the meeting" as required by Local Gov't Code § 81.0005(b). And it explains why Judge Henry chose this smaller location despite having "received more comments and feedback [about draft maps] than any other thing we had done," Trial Tr. vol. 7, 220:25–221:2 (Henry), and why he refused to publicly disclose any data on the proposed maps despite requests for this information. *See* Trial Tr. vol. 7, 325:14−326:24, 328:10−330:14 (Henry); Joint Ex. 23 (Galveston County Redistricting Website).

If Defendants had taken *even a few* of these steps to increase transparency or adhere to the spirit of TOMA, the multitude of alternative map configurations meeting Defendants' so-called criteria might have been revealed *during* the process. And this would have dissolved Defendants' pretextual reasons for the Enacted Plan's discriminatory impact. It was not the delay of the U.S. Census, released and ready to use three months before the deadline, Trial Tr. vol. 8, 297:6–16 (Bryan), that caused this. Nor was it the Secretary of State's November 1, 2021 advisory, which confirmed that the deadline actually never changed from November 13, 2021. *See* Joint Ex. 34 (Election Advisory). The process was the way it was because Defendants designed it that way. And there is a

"[s]trong inference" that Defendants chose this course of action to achieve the Enacted Plan's adverse effect, given that alternative plans show this adverse result was otherwise avoidable. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, n.25 (1979). It would be error to accept Defendants' "efforts to cast this suspicious narrative in an innocuous light" which fail to "acknowledge[] the whole picture." *See McCrory*, 831 F.3d at 228.

The Enacted Plan's discriminatory impact and the deficient process were undeniably obvious, and identified by community members in online written comment, *see* Pls.' Ex. 414 at 21, 35 (Burch Expert Report), and overwhelming in-person comment on November 12. Here are just a few examples of the hundreds of comments on the record:

- "[W]hy was the public not included in the process?" Joint Ex. 42 at 361 (Online Public Comments);
- "Map 2 should be stricken because it clearly discriminates against race." Joint Ex. 42 at 333 (Online Public Comments);
- "The proposed maps will create the exact same discriminatory situation that the Department of Justice found in 2012." Joint Ex. 42 at 436 (Online Public Comments);
- "As a minority, we feel that these maps are very unfair and not a good representation of the community as a whole." Pls.' Ex. 591 at 14:6−10 (November 12, 2021 Special Meeting Transcript);
- "[W]hy do you even have us here? You had no intention of changing the map – of even getting our input." Pls.' Ex. 591 at 27:12− 15 (November 12, 2021 Special Meeting Transcript);
- "Our neighborhood should be kept together so that we can avoid voting dilution and the retrogression of minority voting rights." Pls.' Ex. 591 at 29:16−19 (November 12, 2021 Special Meeting Transcript).

The Enacted Plan's obvious discriminatory impact was only achieved through a process designed to prevent creation of viable alternatives before the deadline. This

conduct violates the Fourteenth and Fifteenth Amendment and Section 2 of the VRA and requires the Court to strike down the Enacted Plan. *See Harding*, 948 F.3d at 312 (5th Cir. 2020); *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). This is so regardless of whether Defendants understood Benchmark Precinct 3 to be a Black crossover district as they contend. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) ("[I]ntentionally dr[awing] district lines in order to destroy otherwise effective crossover districts . . . raise[s] serious questions under both the Fourteenth and Fifteenth Amendments.")

IV. RACE PREDOMINATED OVER OTHER CRITERIA IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Finally, regardless of discriminatory intent, Defendants prioritized race over other criteria and thus harmed the County's Black and Latino voters by "separat[ing] [them] into different voting districts on the basis of race" in violation of the Fourteenth Amendment. *Miller v. Johnson,* 515 U.S. 900, 911 (1995). The textbook cracking in the Enacted Plan was achieved by moving most of the Latino and Black voters in Benchmark Precinct 3 *out* of Precinct 3 and splitting them almost equally across four precincts. This itself provides "strong circumstantial evidence that 'racial considerations predominated'" the commissioners court's decision. *See Thomas v. Bryant*, 938 F.3d 134, 158 n.119 (5th Cir. 2019) (citing *Cooper v. Harris*, 581 U.S. 285, 307–17 (2017)).

Plaintiffs' redistricting experts have shown definitively that neither a new coastal precinct nor adherence to other traditional criteria required cracking the Black and Latino population or dramatically changing historic boundaries. *See generally* PFOF ¶¶ 79–80 (Cooper coastal maps); 376–79 (Burch/Rush coastal maps). Even the commissioners

court's redistricting counsel admitted the creation of a coastal precinct cannot explain these features of Map 2. *See* Trial Tr. vol. 8, 164:13−17 (Oldham). And the County's demographer also confirmed it was "definitely possible" to attempt maps with a coastal precinct that retained the core of prior districts had he been asked. Trial Tr. vol. 9, 47:2−10 (Bryan). Plaintiffs' illustrative maps, one of which has the *same* coastal precinct as the Enacted Plan, *see* PFOF ¶¶ 376–79, are thus "key evidence" and "highly persuasive" in proving the commissioners court "had the capacity to accomplish all its . . . goals without moving so many members of a minority group." *Cooper*, 581 U.S. at 317.

By contrast, the Enacted Plan clearly contravenes a traditional redistricting criterion applied by the commissioners court in past cycles to retain existing precinct boundaries as much as possible, *see* Pls.' Ex. 539 (2001 criteria), a practice that grants consistency in representation for voters and reduces voter confusion. *See* Trial Tr. vol. 3, 85:18–88:2 (Cooper). Had Defendants applied traditional criteria and followed past redistricting practices in the County, the natural result would *not* have been to dismantle Benchmark Precinct 3 as they did in adopting the Enacted Plan, even if they wanted to create a coastal precinct at the same time. Defendants have otherwise disclaimed the two most typical defenses to a racial gerrymandering claim, partisan motivation, PFOF ¶ 387, and the need to *create* majority-minority districts to comply with the VRA.

Instead, Defendants hope to explain the design and adoption of the Enacted Plan by asserting a set of redistricting factors disclosed through interrogatory responses. *See* Pls.' Ex. 593. But all evidence shows that these purported criteria were not in fact applied during the 2021 redistricting process. *See generally* PFOF ¶¶ 364−95. The commissioners court

failed to fully identify these factors until a year and a half after adopting the Enacted Plan, and even then only as part of amending earlier disclosures. *See* Trial Tr. vol. 7, 324:13−325:1 (Henry) (discussing Pls.' Ex. 593 at 5−7). Not a single witness at trial testified to having applied them. *See* PFOF ¶ 366 (collecting testimony). And the Enacted Plan in fact violates these criteria by splitting a voting tabulation district to accommodate an incumbent residence. *See* Trial Tr. vol. 3, 83:25–85:4 (Cooper). Since Defendants' purported redistricting factors are nothing more than "post hoc justifications," they cannot justify the Enacted Plan's design and adoption. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189–90 (2017) (courts must consider "the *actual* considerations that provided the essential basis for the lines drawn").

That leaves only improper predominance of race to explain the textbook cracking of Galveston's Latino and Black population in the Enacted Plan that converted the existing majority-minority commissioners Precinct 3 from the highest to the lowest percentage Black and Latino composition. Trial Tr. vol. 3, 42:20−43:9 (Cooper). And here, there is overwhelming evidence to support that race predominated in the Enacted Plan's initial design, by Defendants' own admission. Specifically, there is substantial evidence that Judge Henry and others on the commissioners court disfavored Benchmark Precinct 3 as a perceived racial gerrymander, and that mainland districts were designed to dismantle the historic core of Precinct 3 before other redistricting criteria came into play. *See supra*, Section III. The evidence also makes clear that Defendants understood a plan based upon historic Precinct 3 to be legally defensible. They publicly posted a minimum-change option, Map 1, *see* Joint Ex. 23 (Galveston County Redistricting Website), which their own

counsel advised them would be legally defensible. *See* Trial Tr. vol. 8, 122:14–123:2 (Oldham). And, as stated above, this tends to show a discriminatory intent to dismantle the core of historic Precinct 3 nonetheless, and without any perception it was required by applicable law. *See supra*, Section III.

Importantly, even if the Court found Defendants' aversion to maintaining the core of Precinct 3 to be in good faith and the spirit of legal compliance, it would still violate the Fourteenth Amendment. *See, e.g.*, *Covington v. North Carolina,* 316 F.R.D. 117, 124 n.1 (M.D.N.C. 2016), *summarily aff'd*, 581 U.S. 1015 (2017). Because there is no legitimate or compelling reason to justify the commissioners court's predominance of race in designing the Enacted Plan, it fails strict scrutiny, and must be struck down as an unconstitutional racial gerrymander. *Cooper*, 581 U.S. at 330.

V. REMEDIES SOUGHT

NAACP/LULAC Plaintiffs respectfully request that the Court enjoin any use of the Enacted Plan and adopt a swift remedial schedule to ensure a legally compliant map is set before the November 11, 2023 filing period opens, and have proposed an order (attached) allowing the commissioners court to adopt a legally compliant map while reserving authority to cure any legal deficiencies through an "orderly process in advance of elections." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam).

Further, in light of the proven constitutional violations and pattern of discrimination in Galveston County, Plaintiffs also respectfully request the Court consider briefing and proceedings to determine the appropriateness of retaining jurisdiction under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c).

Respectfully submitted, this the 11th day of September, 2023.

/s/ *Hilary Harris Klein*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 11, 2023, the foregoing document was filed electronically (via CM/ECF), and that all counsel of record were served by CM/ECF.

/s/ *Hilary Harris Klein*