UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

TERRY PETTEWAY, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00057 (consolidated)
UNITED STATES OF AMERICA, Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00093
DICKINSON BAY AREA BRANCH NAACP, et al. Plaintiffs, v. GALVESTON COUNTY, TEXAS, et al. Defendants.	§ § § § § § § §	Civil Action No. 3:22-CV-00117

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

DEFFENDANTS' RESPONSE TO PLAINTIFFS' CLOSING BRIEFS

Plaintiffs' problems largely begin and end with their proposed coalition. Apart from Defendants' argument that the Voting Rights Act ("VRA") does not permit coalition claims, the first element Plaintiffs must demonstrate is compactness. Instead, they present people with different backgrounds, histories, cultural influences, languages, and who live all over the County. Nor have Plaintiffs demonstrated cohesive voting, or that race rather than politics explains why Galveston County voters vote the way they do. Plaintiffs certainly have not proven intent on any level. Plaintiffs' claims must be dismissed.

I. Plaintiffs' Voting Rights Act Claims

A. The illustrative precincts do not meet *Gingles* I because they do not take traditional redistricting criteria into consideration.

Plaintiffs ask the Court to assume with them that numbers alone form a *Gingles* I analysis—coalition numbers to form a majority, and a formula to assess geographical boundaries.[1] The DOJ invites the Court to look past the shape and irregularities in the proposed plans, practically conceding they will not win any "beauty contest." Though there is some admission by the DOJ that traditional redistricting criteria are part of a *Gingles* I analysis,[2] the DOJ mentions only population deviation, voting precinct splits, contiguity, and similar performance among two enacted plans—leaving communities of interest glaringly absent, as Rush and Fairfax did not consider them, and Cooper joined population

[1] Defendants' findings relating to compactness are at Dkt. 245 ¶¶313-324 (discussing Dr. Cooper), ¶¶325-333 (discussing Dr. Rush), ¶¶334-346 (discussing Mr. Fairfax), ¶¶347-362 (discussing Dr. Owens' analysis). Defendants' findings relating to community-of-interest evidence is ¶¶363-373.

[2] Dkt. 243 at PDF p.8.

from areas around the County he admitted had "huge" disparities. Dkt. 245 at ¶¶329 (Rush); 345 (Fairfax); 324 (Cooper). Failing their own experts' proper consideration of communities of interest under traditional redistricting principles, Plaintiffs pivot to arguing that this would add a factor to, or heighten, a *Gingles* I analysis. The Supreme Court and Fifth Circuit expressly instruct otherwise.[3] Plaintiffs do not pass the first *Gingles* hurdle. Under Plaintiffs' numbers-only approach, there is no place in the elements of a VRA claim to consider whether a community of interest is present. *Gingles* II looks at voter cohesion statistics; *Gingles* III looks to white bloc voting (and the reasons for it). But courts cannot just assume that because a group of voters are the same race "that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC v. Perry*, 548 U.S. 399, 434 (2006) ("*LULAC I*"). Case in point: Republican Commissioner Dr. Robin Armstrong, and Democrat Constable Derreck Rose. Another problem is that Plaintiffs' experts join minority populations from **all over the County** without analyzing *precinct-level* data relevant to the boundaries they propose. *See* Dkt. 245 ¶¶298, 361. Even Mr. Cooper agrees there is a "huge disparity between League City and Texas City," so that considering the two areas as one unit "makes no sense," even though he included minority population from both areas Plaintiffs' proposed plans, then added up Black and Latino CVAP to reach narrow majorities. Dkt. 245 at ¶¶314-24.

While the Supreme Court has not clearly defined traditional districting criteria, the

[3] *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997) ("compactness inquiry should take into account 'traditional districting principles such as maintaining communities of interest"); *Robinson v. Ardoin*, 37 F.4th 208, 218 (5th Cir. 2022) (per curiam) ("beyond geography" plaintiffs must show the district comports with principles like "maintaining communities of interest"; the population must have similar "needs and interests").

Fifth Circuit has made clear that communities of interest are among those criteria. *Robinson v. Ardoin*, 37 F.4th 208, 218 (5th Cir. 2022) (an illustrative plan must take into account "traditional districting principles such as maintaining communities of interest and traditional boundaries"). And despite Plaintiffs' arguments to the contrary, *Allen* underscores the *importance* of considering communities of interest. *Allen* involved an area with a "high proportion" of Black voters joined by "a rural geography, concentrated poverty, unequal access to government services" or "adequate healthcare, and [which share] a lineal connection" to enslaved persons brought to the area before the Civil War. *Allen v. Milligan*, 599 U.S. 1, 21 (2023). With those facts, the trial court did not have to "conduct a beauty contest" between the parties' maps to determine compactness. *Id*.

The same strong ties are not present here. There are no such areas (with a shared history and sufficient population) in Galveston County to create a majority-minority Commissioners Court precinct. Plaintiffs therefore have to add population from other areas and communities—including Hispanic voters from all over the County. Plaintiffs also attempt to discredit Dr. Owens. But he was properly qualified, fully analyzed and explained his opinions, and his testimony lacked the bias present in Plaintiffs' expert testimony. Dkt. 245 at ¶¶347-62, 649-52. Plaintiffs failed to establish *Gingles* I.

B. *Gingles* II cohesion is not established.

1. Plaintiffs rely on general election data, even though primary data is more probative in coalition cases.

Plaintiffs' experts contend only general elections are needed to analyze cohesion.

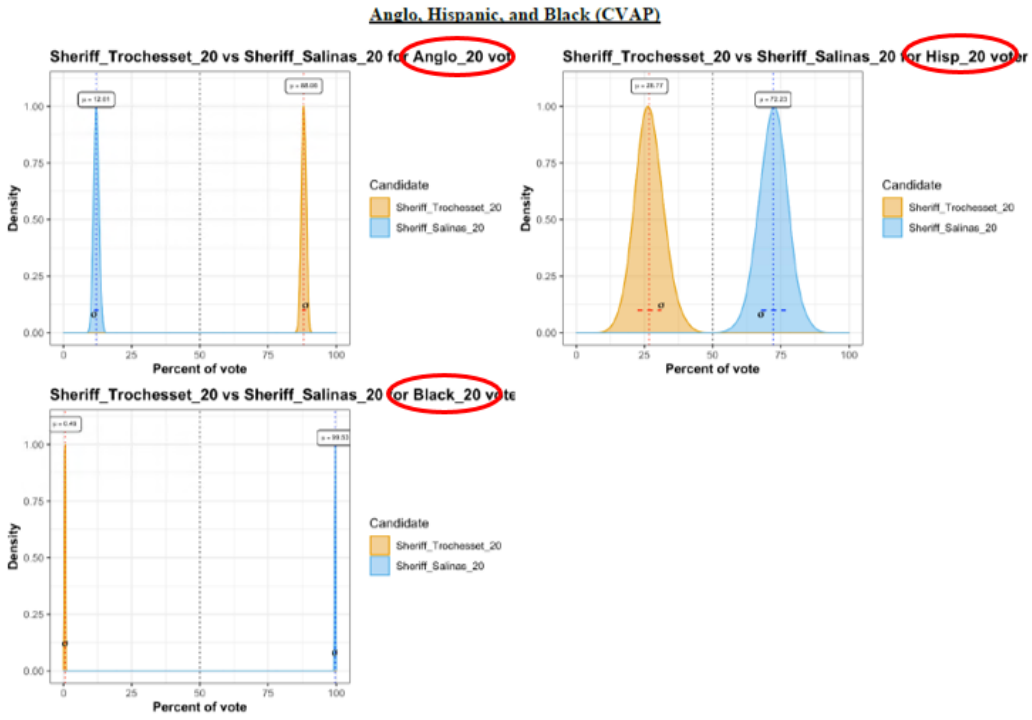
That is a question for the Court.[4] LULAC v. Abbott, 601 F. Supp. 3d 147, 165 (W.D. Tex. May 4, 2023) ("*Abbott* I"). Primary elections are particularly useful where, as here, courts must analyze cohesion between two different minority groups. *Id.* at 169 n. 10 ("shared voting preferences at the primary level would be powerful evidence of a working coalition" but is not needed to prove cohesion for a single minority group) (citation omitted). When two minority groups generally vote together for the same political party, "and vote for that party's candidates at high rates, ***primary elections . . . are by far the most probative evidence*** of cohesion." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.) (per curiam) (three-judge court) (emphasis added). Cohesion failed in *Pataki* where the primary results showed Hispanic and Black voters were cohesive "barely one third of the time." *Id*. In *Abbott I*, the Court agreed with Dr. Alford's view that primary elections "are relevant to analyzing divisions within political coalitions and that partisan affiliation is the main driver of voter behavior in general elections." *Abbott I*, 601 F. Supp. 3d at 166. Here, Dr. Alford analyzed **24** primary elections and found in only 2 did Black and Latino voters support the same candidate with 75% or more of their vote. DX 305 at 14-19; Dkt. 245 ¶432, 436-439. Even using Dr. Trounstine's lower standard of cohesion, Latino and Black voters support each other's candidates in only 8 out of 24 primaries. *Id*. But a one-third cohesion rate is no cohesion at all. Nonpartisan elections also fail to show cohesion, where only half show

[4]"Dr. Barreto's testimony shows signs of partiality" (*Abbott I*, 601 F. Supp. 3d at 165) with cherry-picked election data and discounting primaries. Dkt 245 ¶424-26. Here, Dr. Barreto did not look at primary or nonpartisan elections, but agreed primary elections are important to determine if partisanship is at play in voter decision-making. Day 3 Tr. 257:22-258:3; 265:16-21.

Latino and Black voters supporting the same candidate. Day 4 Tr. 236:1-5; 262-63.[5] And, all of this discussion puts aside general election results showing no cohesion, such as Trounstine's conclusion that 62.18% of Latinos favored Mark Henry in his 2014 County Judge race, when 90% of Black voters favored his opponent. Day 4 Tr. 222:23-223:17. In short, when properly analyzed, cohesion is absent.

2. The diverse Galveston County Latino population creates significant gaps in confidence intervals.

Drs. Barreto and Oskooii present unreliable estimates for Latino voters. Dkt 245 ¶419. The broad confidence intervals shown in Latino election results means the Court cannot know what Hispanic voters are doing in Galveston County, as is seen in the width of the shaded areas representing confidence gaps in the below chart:



[5] Several witnesses testified that when Latino and Black candidates run against each other, Latinos vote for Latinos, and Blacks vote for Blacks. Day 2 Tr. at 18:16-22; Day 6 Tr. at 15:19-21, 45:8-15, 104:13-19.

PX 384 at 55 (emphasis added); *see also* Dkt 245 ¶421.

Dr. Barreto asks the Court to take cohesion on faith, rather than reliable data. When examining expectations for Latino votes in a 2020 race for District 56 Judge, he found a 95% certainty Latino votes will fall between 54.1% and 84.4%. Day 3 Tr. 280:2-282:1 (assessing Paxton/Garza race).

Office	Candidate	[LOWER] RxC - Anglo Voters	[UPPER] RxC - Anglo Voters	[LOWER] RxC - Hispanic Voters	[UPPER] RxC - Hispanic Voters	[LOWER] RxC - Black Voters	[UPPER] RxC - Black Voters
[...]							
District 56 Judge	Cox	77.8	83.6	15.6	45.9	3.0	12.7
	Lindsey	16.4	22.2	54.1	84.4	87.4	97.0

PX 384 at 38-39 (Barreto Rpt.) (emphasis added). This ***30-point margin*** casts significant doubt about cohesion. Dr. Barreto presents roughly the midpoint, 70.9, as the estimated actual vote percentage for Latino voters, but confidence in that estimate is much lower than that of Black or Anglo estimates. Masked by these Hispanic confidence intervals are *cross over* votes from other groups. To the extent the Court rests its analysis on Hispanic cohesiveness estimates, their relative worth must be considered.

C. Nonracial causes for voting must be considered under *Gingles* III.

Plaintiffs contend, under a purely mathematical approach, that Anglo voters can defeat a minority-preferred candidate. But where politics explains voting, defeat at the polls is not 'with respect to' or 'on account of' race. *See Allen*, 599 U.S. at 25. As *Allen* explained, bloc voting along racial lines must arise against a "backdrop of substantial racial discrimination" within, here, the County, that "renders a minority vote unequal to a vote by a nonminority voter." *Id*. That is, it distinguishes between "actionable vote dilution and

'political defeat at the polls.'" *LULAC v. Clements*, 999 F.2d 831, 855 (5th Cir. 1993) ("express language" in the 1982 Senate Report provides "'racial bloc voting' is established when 'race is the ***predominant determinant of political preference***'") (emphasis added). Politics, not race, explains Galveston County voting. The County was largely Democrat until the 2010 election. Since then, Democratic candidates have consistently seen defeat—to the point that Republicans often go unopposed in general elections, including newly elected Commissioner Dr. Robin Armstrong. Anglo Commissioner Apffel was a Democrat before 2010 (when he lost to a Black Democratic opponent, Judge Pope); he then switched to the Republican party and was elected. Day 9 Tr. 295:14-297:6.

Nor does the record show a difference in results between Republican candidate success based on race, as Drs. Barreto and Alford noted. Day 3 Tr. 324:15-325:12; Day 10 Tr. 19:6-20:10. In the 2018 U.S. Senate election in Texas, Anglo voters supported Latino candidate Ted Cruz over an Anglo candidate "at levels very similar to the level they vote for Anglo Republicans in other elections on that ballot." Day 10 Tr. 53:1-16, 19:5-24; Dkt. 245 ¶475. Commissioner Armstrong was successful with Republicans, whose chairs elected him a candidate for Precinct 4 over three Anglo candidates. Dkt. 245 ¶492. Latino Republicans are also successful, including County Clerk Dwight Sullivan, District Court Judge Patricia Grady, and former District Court Judge Michelle Slaughter. Day 6 Tr. 52:9-21.

Plaintiffs' experts Krochmal and Burch offer conclusions about the reasons Galveston County voters vote. But Dr. Burch had never been to Galveston County before trial, and never spoke with any voters before telling the Court that Anglo Republicans in

the County vote on account of race. Day 2 Tr. 149:15-18. This is unhelpful to the Court's need to conduct an intensely local appraisal. *See Harding v. Cnty. of Dallas*, 948 F.3d 302, 308-09 (5th Cir. 2020). Nor did she consider or rule out other potential reasons for the way people here vote. And clearly, Dr. Krochmal has shown extreme bias against the Republican party, calling it "a vehicle for white power." DX 303. Their combined testimony on this issue is not credible.

D. The totality of the circumstances does not support a VRA claim.

A totality analysis looks to the process, its openness to the minority group(s), and whether its/their members have less opportunity than those in other groups to participate and elect representatives of their choice. The Senate factors do not support such finding.

Plaintiffs offer little to no discussion of Senate factor 1; the DOJ mentions an "undisputed history" of discrimination, referencing a poll tax and all-white primary while also conceding this is not "immediately contemporaneous" evidence. The DOJ cites its **own** objection letters from 1976 until 2013, essentially saying its own statements under Section 5 somehow amount to Section 2 evidence. They are not. *See* Dkt. 244 at 17-18. Not only does decades-old evidence fail to shed light on current conditions or needs (*Shelby Cnty. v. Holder*, 570 U.S. 529, 552-53 (2013)), evidence of **current conditions** and improvements **are** relevant *(Brnovich v. Dem. Nat'l Comm.*, 141 S.Ct. 2321, 2338-39 (2021)), and have been detailed by Defendants. Dkt. 244 at 53-54 and Dkt. 245 at ¶¶532-560. Plaintiffs ignore this evidence because it shows Senate Factor 1 favors Defendants. *See* Dkt. 245 at ¶¶547 (polling locations), 546 (mail-in ballots), 545 (early voting), 544 (ease of voting), 548 (Spanish language materials and no county-caused hindrance), 549

(minority get-out-the-vote events).

Plaintiffs offer no discussion of Senate factor 2, other than a general reference to over 100 paragraphs of findings. The DOJ mentions evidence of racially polarized voting or "RPV," but fails to discuss the **extent** of any RPV, which is what Senate 2 addresses. Just as primary and nonpartisan elections show a lack of cohesion, this factor weighs in Defendants' favor. *See* Dkt. 245 ¶431-52, 561-563.[6] For factors 3 and 4, Plaintiffs offer no discussion, and neither favors Plaintiffs. *See* Dkt. 244 at 54-55; Dkt. 245 ¶564-71. In fact, Plaintiffs identify ***no*** procedures that hinder effective minority participation.

For Senate factor 5, Plaintiffs largely point to their findings without discussion. The DOJ mentions disparities in income, education, employment, home ownership, and health coverage for Black and Latino voters, but does not **connect** these cites to hindering minority voters' ability to participate effectively in the political process. *See* Dkt. 244 at 53 and Dkt. 245 ¶572-585). Senate Factor 5 does not favor Plaintiffs.[7] But even if it did, it alone cannot control a totality finding against Defendants.

Plaintiffs do not discuss Senate factor 6; again only pointing to 100 paragraphs of findings. None of the evidence offered by Plaintiffs falls within the language of Senate 6. Racial "incidents" unrelated to elections, for example, is not Senate 6 evidence. The DOJ concludes "other candidates" have used anti-immigrant imagery and "invasion" language

[6] Nor is Plaintiffs' citation to lay testimony probative of the extent of racially polarized voting. Their cites concern isolated elections, or reveal a lack of sufficient knowledge to testify on the extent of RPV within the County. *See* Dkt. 239 ¶ ¶143-46, 184-85.

[7] The NAACP Plaintiffs state "Defendants concede" Senate 5. Dkt. 242 at 18. Not true. Defendants do not dispute the history of discrimination in the *country*, and do not concede that Plaintiffs have shown Galveston County history hinders minority voters' ability to effectively participate in political processes today.

(Dkt 243 at 16) and cites Dr. Burch's discussion of "[a]ds and materials from several state and congressional legislators"[8] beyond Galveston County borders, which is not Senate 6 evidence. A single, isolated ad in Galveston County for a candidate who lost does not tip the Senate 6 scale in Plaintiffs' favor. *See Clements*, 999 F.2d at 879 (evidence of two racial appeals, one of which resulted in the election of a Black candidate, were isolated incidents). Dkt. 244 at 55-56; Dkt. 245 ¶586-594. Senate Factor 6 does not favor Plaintiffs.

The Petteway Plaintiffs do not discuss Senate 7, and the others discount Black and Latino elected officials at municipal levels as if they do not count in a VRA analysis.[9] The DOJ criticizes minority representation on the Commissioners Court, even though there are two minority members today.[10] The demonstrated success of minority candidates in the County, regardless of the election, illustrate to the broader electorate that circumstances are far different than they were six decades ago, thereby creating a more favorable electoral environment for minority candidates. Election of minority candidates anywhere in the County creates the opportunity to establish political structures and mainstream minority success. This is relevant and weighty evidence under Senate 7, and weighs in Defendants' favor. *See* Dkt. 244 at 56-57; Dkt. 245 ¶595-606.

Plaintiffs provide no meaningful discussion of either enhancing factor. The DOJ

[8] Dr. Burch cites examples outside of the County: (1) Randy Weber "anti-immigrant ads," (2) Brandon Creighton using "invasion language" to refer to immigrants, and (3) Republican primary candidates for State Senate District 11 using "invasion language" in reference to immigrants. *See* PX 414 at 32.

[9] This attempt to limit election evidence is odd, considering Plaintiffs' expansive reach (in terms of time and geography) for evidence of other VRA elements.

[10] The DOJ also ignores that six current and former parties to this case have been (three still are) minority elected officials: Defendant Dwight Sullivan as County Clerk, Constable Terry Petteway, Constable Derreck Rose, Constable Michael Montez, Hon. Sonny James, and Hon. Penny Pope.

even cites an incorrect standard for the first factor—that a *significant* lack of responsiveness exists. *Veasey v. Abbott*, 830 F.3d 216, 245 (5th Cir. 2016). Plaintiffs' 100-paragraph findings cite references actions involving the border, or a confederate statue. Not only are these not examples of a significant lack of responsiveness to minority concerns (the statue involved complex considerations of history and its plaque was removed, and the border issue involved public health and safety concerns and helped an understaffed Texas county), the record shows great effort from the County to respond to community needs as a whole, and the minority community specifically. *See* Dkt. 244 at 57-58; Dkt. 245 ¶607-23. Nor are the reasons for the 2021 Map tenuous: it makes geographic sense, combines coastal areas, keeps Commissioners in their precincts, fixes population deviation, and respects County lines and natural/clear boundaries like the Island, and major roads, like State Highway 3. Dkt. 244 at 58-59; Dkt. 245 ¶624-36.

II. The NAACP and Petteway Plaintiffs have not established their Constitutional claims.

Since the 2011 redistricting cycle, some of the same plaintiffs here have sued the County ***three times*** without success. Intent to discriminate was not found in the prior cases, and is not present here (for any claim, VRA or otherwise).

A. "Awareness" of impact is not enough.

Plaintiffs rely on commissioner awareness of minority populations and Map 2 effects as proving intent. While awareness of a result might provide a "strong inference" of intent, it is not a "synonym for proof," and is insufficient without more. *See Pers. Adm't of Mass*, 442 U.S. 256, 279 n.25 (1979). Instead, the 2021 Map was little more than a

consequence of cleanly dealing with County growth and a more efficient government. *See id*. Plaintiffs must show the commissioners court acted *because of* these effects. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The Commissioners Court was presented with two options, one of which would have (as Plaintiffs now admit) maintained Precinct 3 as a majority-minority precinct. There was no advocacy or public support for that map—not at the November 2021 meeting, and as the record bears out, not before the meeting, either.

Commissioner Holmes initially indicated to Mr. Oldham that he liked Map 1 (preferably without Bolivar). Day 8 Tr. 101:5-12. Even with Bolivar, Commissioner Holmes knew Map 1 preserved Precinct 3's majority-minority status; he said as much to NAACP Plaintiffs' attorney Sarah Chen two weeks before the vote on the map proposals. DX 165 at 6 (Map 1 "is close to current configuration, but one area that is unacceptable [Bolivar], and **from what I know would be close to current racial percentages**") (emphasis added). He then set up a call with attorney Chen to discuss further. DX 165 at 5. On November 4th, Southern Coalition for Social Justice's ("SCSJ") mapping fellow and Galveston County resident Roxy Williamson emailed a "Galveston Redistricting Coalition" with talking points on the two map proposals. DX 121.[11] Those talking points encouraged people to state they **support Map 1, but object to Bolivar Peninsula being included**. *Id*. That evening, Commissioner Holmes spoke at a meeting of the Texas

[11] The SCSJ, the NAACP, and League of Women Voters' (LWV) connection is explained in an email. DX 126 at 2. LWV TX partnered with SCSJ on redistricting. They are connected by a LWV board member who is an attorney that previously represented the TX NAACP. *Id*. SCSJ then "hired 2 mapping fellows to help in TX, and one of them, Roxy Williamson, lives in Galveston . . . ." *Id*.

Democratic Women of Galveston County ("TDW") about the two map proposals. DX 120, DX 123, DX 124.[12] The following morning, the Galveston Democratic Party chair emailed "fellow Democrats" with a link to the online maps, stating "**[n]either map, of course, is in our favor** and we must do what we can to express our dislike." DX 126 (emphasis added). The Democrat community was not told that Map 1 would likely elect a Democrat candidate, but was led to believe Map 1 dismantled Precinct 3. Those beliefs are evident from the online and November 12th meeting comments. Commissioner Holmes, advised by attorneys and experts in this suit who were active behind the scenes, and other influencers fostered this misunderstanding and passed on the opportunity to enact Map 1. *See* DX 140; Dkt. 245 at ¶291. As a result, the commissioners' courts desire for a geographically clean map with a coastal precinct prevailed.

Burch's testimony that intent to discriminate exists because Map 2 was enacted knowing there would be an impact on Precinct 3, and the County did not mitigate that impact, is unhelpful. Day 2 Tr. 154:20-155:1. Not only is this not the standard, she fails to consider other reasonable explanations for Map 2's adoption—including the coastal precinct and Commissioner Holmes' decision not to advocate for Map 1, which certainly played a role in Commissioner Giusti's ultimate decision (Day 9 Tr. at 99:19-100:3), and Judge Henry's. Dkt. 245 at ¶759. Again, that members of the Commissioners Court and Mr. Oldham were aware of where minority populations are is not sufficient to overcome

[12] Defendants unsuccessfully attempted to obtain a copy of the recording of this November 4th Zoom meeting. Commissioner Holmes testified at his deposition that he did not know where he was speaking, if he attended, or what was discussed. Dkt. 205-14 at 169-170.

the presumption of legislative good faith or to prove intent to discriminate. *Miller*, 515 U.S. at 916 (legislatures will "almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process"). Dormant knowledge is not evidence of racially discriminatory intent. Rather, discriminatory purpose for example, in a vote dilution claim, "implies more than . . . intent as awareness of consequences" and instead "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects." *Id*.

Where "race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race," a claim that the legislature intended to discriminate against minorities must fail. *Id*. at 916. The Commissioners Court did not subordinate traditional race-neutral districting principles in adopting Map 2. As Cooper agrees, Map 2 is compact. Dkt. 245 ¶640. It equalized population. Day 3 Tr. 103:21-104:1. It is contiguous, and keeps Galveston Island and Bolivar Peninsula together in one precinct. Its adoption is not evidence of discriminatory intent.

B. The *Arlington Heights* factors do not support a finding of intent.

The historical background under *Arlington Heights* 1 does not evidence intent. As discussed under Senate one, the DOJ's reference to poll taxes and white-only primaries do not evidence intent to discriminate in 2021. The 1992 consent judgment was 29 years before the 2021 Map was adopted, helped minority candidates over the past three decades, as Judge Penny Pope testified. Trying to come up with recent evidence, the DOJ points to not adopting criteria (something that is not required), exclusion of Commissioner Holmes

from the process (a patently false argument),[13] and including Bolivar Peninsula in Precinct 3 (which, both in 2011 and today, does not impact minority-majority status).

For the second factor, the sequence of events does not evidence intent to discriminate.[14] Dkt. 244 at 24-25. NAACP Plaintiffs cast Judge Henry as the villain architect of Map 2 who "provided detailed instructions to his redistricting counsel" to dismantle Precinct 3. Dkt. 242 at 15. With full unapologetic zeal, NAACP Plaintiffs point to Paul Ready's **email correspondence on JP Court Precinct Maps** and misrepresent it as reflecting a "readiness to" eliminate Commissioners Court Precinct 3's majority-minority status. Dkt. 240, at 23; Day 8 Tr. 185:19-186:13. In any event, Judge Henry did not provide "detailed instructions" to anyone. Day 7 Tr. 188:1-6; Day 8 Tr. 148:1-17. He asked for a coastal precinct, and Mr. Oldham presented one as an option, along with a least-changes map.

No evidence supports Plaintiffs' conclusion that a lack of meetings was meant to limit public input. On the contrary, the County posted the maps online to mitigate the shortened timeframe and provide an opportunity for public input. The County was also trying to get the maps out sooner. DX 96, DX 98, JX 35, PX 252.

As for factors 3 and 4, the delay in Census data explains any claimed departures

[13] As the record overwhelmingly shows, Plaintiffs' story that Commissioner Holmes was somehow excluded from the redistricting process is completely false. JX 23; Dkt. 245 ¶ ¶240-245, 251-62. Dr. Krochmal's opinions on this point have been fungible, and are wholly unsupported. Dkt. 245 ¶522.

[14] Plaintiffs misstate several facts, including that there was sufficient time to engage in the same process as in 2011, or that "fully useable Census data" was available to the County on August 12th (it was not; even Mr. Oldham had to hunt down usable data as late as September 14th, DX 175 at 2-3. Enacting a timeline without knowing when Census data would be released would have been futile. When the timing issue is broken down, Plaintiffs' time complaints turn into a criticism of a process compressed into, and completed within, less than two months.

from prior practice. Nor does the legislative history indicate intent under factor 5. Mark Henry's comments at the November 12th meeting indicate most public feedback supported Map 2. His posting on Facebook indicates a preference for Map 2's coastal precinct. DX 106 ("Please submit your support for proposed map #2. This map creates a much-needed coastal precinct. Having a coastal precinct will ensure that those residents directly along the coast have a dedicated advocate on Commissioners Court"). As Defendants have outlined, this factor does not favor Plaintiffs. Dkt. 245 ¶572-85.

C. Drawing inferences from alternative plans is improper.

Plaintiffs argue that the coastal precinct is a pretext and that alternative coastal precinct plans maintain a majority-minority precinct. This argument assumes that a coastal precinct is the only important factor for the County (which is patently untrue).[15] Plaintiffs claim that any partisan motivations have been discredited; yet, there is evidence that commissioners expressed partisan concerns. *See* JX-23 at 8 (Apffel "political purposes"); Day 8 Tr. 90:4-13; Day 8 Tr. 106:19-25. Even wrongly assuming that the coastal precinct is the only factor, Plaintiffs cannot demonstrate that these alternatives actually elect the minority groups' candidate of choice. "[P]laintiffs must meet the overarching demand that their new districting scheme enhances their ability to elect candidates of their choosing."

[15]For example, Plaintiffs' illustrations do not best meet six factors discussed by the County, including compliance with 14th Amendment requirements, maximizing and equalizing population, unified representation of Galveston Island and Bolivar Peninsula, geographic compactness, minimizing splits in voting precincts, commissioner's residence requirements, and partisanship. Day 3 Tr. 199:8-201:13. The 2021 Map equalized population to a 1.05% deviation between precincts. Day 3 Tr. 104:14-19. Plaintiffs' proposed maps have much greater deviations, which are likely to lead to more rapid disproportionality. Dkt. 245 ¶341. Maps without geographically compact districts, or unify the coast, minimize voting district splits, include incumbent residences, or do not meet partisan objectives cannot evidence ulterior motivations.

Fusilier v. Landry, 963 F.3d 447, 462 (5th Cir. 2020) (citing *Abbott v. Perez*, 138 S.Ct. 2305, 2332 (2018) and *Harding*, 948 F.3d at 309). Without evidence that the proposed precinct would elect a minority group's candidate of choice, this Court cannot consider it as an alternative. The likelihood that a proposed map with a Black and Hispanic percentage of 52.7%[16] will actually allow minority voters to elect their choice candidate is questionable due to evidence in this case of Latino turnout ratios which are known to be low, and large confidence intervals for Latino voting results (noted in the *Gingles* II discussion above). As there are no alternative maps with a coastal precinct and which have been shown to perform for minorities, no inferences can be drawn from Plaintiffs' alternative maps.

D. The record shows there was no intent to discriminate.

A conclusion that Map 2 must have been adopted to frustrate minority voting power contradicts the record, including Mr. Oldham's and Mr. Bryan's testimony that race was not considered in drawing the maps (Day 8 Tr. 71:18-72:20 (Oldham); Day 8 Tr. 282:1-5 (Bryan); Day 8 Tr. 282:17-22 (Bryan)), and that Map 2 was created to satisfy the request for a coastal precinct. Day 8 Tr. 74:10-17.[17]

Bryan's color-coded VAP spreadsheet was not done at client request, and no

[16] Of the proposed plans that claim to include a coastal precinct and an opportunity district, Defendants focus on Cooper 3 or 3A and Rush Alternative Maps 1, 2, 3, and 4. The combined BCVAP and LCVAP for plan 3 is 52.34%. PX-351 at 3; Day 3 Tr. 150:18-23. Estimates based on ACS data that was unavailable to all parties before January of 2023 could not have been considered by the County. Day 3 Tr. 45:21-46:1

[17] The DOJ argues there was no demand or need for a coastal precinct, ignoring that Bolivar residents expressed a desire for one in 2011 (JX 3), and that most online comments favored Map 2. DX 149 at 62; DX 148. Oddly, the DOJ argues Mr. Bryan was not informed that a coastal precinct was a priority—except that he *drew one*. Dkt. 243 at 23 (citing Dkt. 239 ¶¶380-84, 385. Finally, Plaintiffs' emphasis on the "Pop Pivot" tab that automatically generates for any of Mr. Bryan's projects ((Dkt. 240 at 14) does not mean that race was considered, or in any way affected, redistricting.

commissioner considered race, other than Commissioner Holmes. Dkt. 245 at ¶¶657, 665, 668-670, 770-771, 252; Day 7 Tr. 232:2-10; Day 9 Tr. at 94:7-9; 132:18-21; Day 9 Tr. at 310:21-311:13. Any inconsistency between Oldham and Bryan is inconsequential, as the testimony from all is categorically that race was not a determining factor. Dkt. 245 at ¶¶770-771; Day 8 Tr. 110:22-111:5.

Comments at the public hearing or online are not evidence of discriminatory intent. Two map options were presented, Commissioner Holmes did not let anyone know he was having alternative maps drawn up, and did not let his constituency know at any time that Map 1 would *not* dismantle Precinct 3. That information certainly would have impacted public comments, both online and at the November 12th meeting. Drs. Krochmal and Burch fail to take this into consideration. Additionally, Commissioner Holmes withheld the existence of his maps at the November 12th meeting until public comment was completed and a motion to approve Map 2 was made. The DOJ misstates the record when it contends the Court had a RPV analysis prior to adopting Map 2. Dkt 243 at 20. The County did not receive copies of Commissioner Holmes' maps until he sent them to the County Judge's office after the meeting was over. DX 147.

The NAACP Plaintiffs contend indirect evidence shows intent, arguing the Commissioners Court would know the public would be upset so it "designed" a process to "minimize public transparency and meaningful impact." Dkt. 242 at 17. Because Map 1 would not have dismantled Precinct 3 as Plaintiffs have claimed, that argument falls flat. Also, the County *did* post the proposed maps for public comment. The County also tried to *speed up* the process. DX 96, DX 98, JX 35, PX 252. Had Commissioner Holmes—a 22-

year veteran of the Commissioners Court with a reputation for taking action on behalf of his constituents—believed there was any attempt to actually exclude **him or the public** from the process, it is reasonable to believe he ***would have*** taken action. He did not.

Nor can Mr. Oldham's hiring (first proposed in a January 25, 2021 meeting) evidence discriminatory intent. He was familiar with the County, an expert on redistricting, and was key in the prior redistricting cycle, including negotiations with the DOJ. Day 7 Tr. 178:13-21; Dkt. 245 ¶158. There was no obligation (or, indeed, no expectation) that the County announce Census data release; even in late September, their mapping employee did not know Census data was available. Dkt. 245 ¶193. The County did not adopt redistricting criteria in 2011 or 2021, and was under no obligation to. Not adopting criteria cannot evidence discriminatory intent. A conclusion that jurisdictions must adopt criteria without stating what that criteria must be makes no sense. Instead, the record shows the County considered these things to be important: compliance with the law, unified representation of Galveston Island and Bolivar Peninsula, geographically compact commissioners court precincts, minimizing splits in voting precincts, and each precinct including the commissioner's residence. Day 5 Tr. 192:18-194:23. As Dale Oldham testified, partisanship was also a factor. Day 8 Tr. 110:22-111:9.[18]

While everyone involved wanted more time, there simply was not enough. Plaintiffs point to everything they would have preferred to occur and which time did not permit as

[18] Plaintiffs contend partisan motive is not "acceptable" for an intentional race-based vote dilution claim (Dkt. 243 at 24-25 (citing *Perez v. Abbott*, 250 F. Supp. 3d 123, 180 (W.D. Tex. 2017)). *Perez* discussed whether there was evidence of partisan motivation and found that splits in that plan were consistent with Anglo, not Republican, maximization. *Perez*, 250 F. Supp. 3d at 156-57.

evidence of intent, entirely ignoring the timing differences between the 2010 and 2021 redistricting cycles.

The DOJ contends the Black and Latino population was unnecessarily fragmented across four precincts. They do not address that Precinct 3 previously spanned straight down the entire length and middle of the County, or that Precinct 336 was overpopulated and *had* to be split. *See* PX-346 at 6 (336 has population of 6,082); Dkt. 205-15 at 212:7-17 (voting precincts capped at 5,000). The map submitted for preclearance in 2011 maintained a district with a majority-minority CVAP, as did the 2012 settlement map. Plaintiffs argue the County could have tried to draw maps that satisfied both a coastal precinct goal, and retention of most precinct boundaries. Their own illustrative maps, however, fail to do this in a way that would provide a practical Precinct 3 majority-minority, as discussed above.

CONCLUSION AND PRAYER

As Joe Compian explained in a 2012 letter to the DOJ, County "Collaborating Organizations" disagreed with the DOJ's approval of the Commissioners Court map, and instead wanted a map that "almost achieves two majority minority precincts . . . ." *Id*. For all the weight Plaintiffs now place on past DOJ objections, Mr. Compian's suggested map (JX 8 at 11, 16) was not something the DOJ believed was necessary in 2012, under a *lesser* Section 5 standard. Yet, the Petteway and NAACP Plaintiffs ask the Court to implement something similar (Map 1) under Section 2, today. That Map 1 is the fallback request for relief is further proof there was no intent to discriminate, as that map was drafted and presented as a viable choice to the Commissioners Court in 2021.

Defendants ask that the Court reject and dismiss Plaintiffs' claims, in full.

Respectfully Submitted,

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

Dallin B. Holt
Texas Bar No. 24099466
S.D. of Texas Bar No. 3536519
Jason B. Torchinsky*
Shawn T. Sheehy*
dholt@holtzmanvogel.com
jtorchinsky@holtzmanvogel.com
ssheehy@holtzmanvogel.com
15405 John Marshall Hwy
Haymarket, VA 2019
P: (540) 341-8808
F: (540) 341-8809

**admitted pro hac vice*

PUBLIC INTEREST LEGAL FOUNDATION

Joseph M. Nixon
Federal Bar No. 1319
Tex. Bar No. 15244800
J. Christian Adams*
South Carolina Bar No. 7136
Virginia Bar No. 42543
Maureen Riordan*
New York Bar No. 2058840
107 S. West St., Ste. 700
Alexandria, VA 22314
jnixon@publicinterestlegal.org
jadams@publicinterestlegal.org
mriordan@publicinterestlegal.org
713-550-7535 (phone)
888-815-5641 (facsimile)

**admitted pro hac vice*

GREER, HERZ & ADAMS, L.L.P.

By: /s/ *Joseph Russo*
Joseph Russo (Lead Counsel)
Fed. ID No. 22559
State Bar No. 24002879
jrusso@greerherz.com
Jordan Raschke
Fed. ID No.3712672
State Bar No. 24108764
jraschke@greerherz.com
1 Moody Plaza, 18th Floor
Galveston, TX 77550-7947
(409) 797-3200 (Telephone)
(866) 422-4406 (Facsimile)

Angie Olalde
Fed. ID No. 690133
State Bar No. 24049015
2525 S. Shore Blvd. Ste. 203
League City, Texas 77573
aolalde@greerherz.com
(409) 797-3262 (Telephone)
(866) 422-4406 (Facsimile)

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all counsel of record via the ECF e-filing system on September 18, 2023.

/s/ Angie Olalde