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

TERRY PETTEWAY, THE HONORABLE DERRECK ROSE, MICHAEL MONTEZ, SONNY JAMES, and PENNY POPE, *Plaintiffs*, v. GALVESTON COUNTY, TEXAS, and HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, *Defendants.*	§	Civil Action No. 3:22-cv-57
UNITED STATES OF AMERICA, *Plaintiff*, v. GALVESTON COUNTY, TEXAS, GALVESTON COUNTY COMMISSIONERS COURT, and HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, *Defendants.*	§	Civil Action No. 3:22-cv-93
DICKINSON BAY AREA BRANCH NAACP, GALVESTON BRANCH NAACP, MAINLAND BRANCH NAACP, GALVESTON LULAC COUNCIL 151, EDNA COURVILLE, JOE A. COMPIAN, and LEON PHILLIPS,	§	Civil Action No. 3:22-cv-117

Plaintiffs,	§
	§
v.	§
	§
GALVESTON COUNTY, TEXAS, HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, and DWIGHT D. SULLIVAN, in his official capacity as Galveston County Clerk	§
	§
Defendants.	§

UNITED STATES' POST-TRIAL BRIEF IN RESPONSE

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The United States respectfully files this response to Defendants' post-trial brief, ECF No. 244.

I. THE EVIDENCE ESTABLISHES THAT THE ENACTED MAP RESULTS IN A VIOLATION OF SECTION 2

As set forth more fully below, the preponderance of the evidence produced at trial supports finding that Plaintiffs have established both that the three preconditions identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986) exist in Galveston County and that, based on the totality of circumstances, under the enacted 2021 map Black and Latino voters will have less opportunity than other voters to participate in the political process and elect candidates of their choice.

A. The *Gingles* Preconditions are satisfied.

As an initial matter, the United States must, once again, note the Fifth Circuit has expressly recognized that minority coalition claims fall within the scope of Section 2. *See, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 863-64 (5th Cir. 1993) (*en* banc); *see also* ECF No. 185 at 8, 11; ECF No. 243 at 3; Plaintiffs' Joint Proposed Findings of Fact and Conclusions of Law, ECF. 239 ("PFOF" and "PCOL") PCOL 27-29. And Defendants continue to concede as much. ECF No. 244 (Defs.' Closing Br.) at 34. "[I]t is axiomatic that [this Court] cannot ignore circuit court precedent," particularly not in favor of dissenting, concurring, or out-of-circuit opinions. *See League of United Latin Am. Citizens v. Abbott*, 604 F. Supp. 3d 463, 493 (W.D. Tex. 2022). This Court should reaffirm its earlier finding that coalition districts are cognizable under Section 2.

Gingles I: This first *Gingles* precondition requires only that Plaintiffs draw a district that is "reasonably configured" and "comports with traditional districting criteria, such as being contiguous and reasonably compact," in which Black and Latino voters are a majority of the citizen voting age population. *See Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023). The sole purpose of *Gingles* I is to establish that the potential for a legally compliant plan exists. *See id.* Defendants, however, have sought to graft onto this precondition an ever-changing requirement for compactness that has no legal basis. As one example, they now argue that Plaintiffs must show Black and Latino voters "must prefer the same candidates at the polls" to satisfy *Gingles* I. ECF No. 244 at 36. The Supreme Court, however, has made clear that *Gingles* I is "focused on geographical compactness and numerosity" and only *Gingles* II "concern[s] the political cohesiveness of the minority group."[1] *Milligan*, 143 S. Ct. at 1503.

Every illustrative version of Precinct 3 introduced by Plaintiffs in the record is reasonably configured under *Milligan*, including Fairfax Illustrative Precinct 3. PFOF 71-88; ECF No. 243 (U.S. Closing Br.) at 3-5. Defendants fail to recognize that the shape and location of each illustrative Precinct 3 is completely unlike the district rejected in *Sensley v. Albritton*, 385 F.3d 591, 598, n.3, 4 (5th Cir. 2004), which combined two areas of high Black population concentrations with a narrow corridor. *See* ECF No. 185 at 15-16. Thus, this Court should find that Plaintiffs satisfy *Gingles* I.

[1] The Supreme Court in *Milligan* only considered communities of interest as a criterion under *Gingles* I because the state legislature stipulated and defined it as a criterion during their redistricting process. 143 S. Ct. at 1504-05. Defendants here deliberately chose not to adopt criteria during the 2021 process. *See* PFOF 275, 278, 285-290.

Gingles II: The clear pattern across every analysis of political cohesion in this case is that Black and Latino voters in Galveston County consistently favor the same first-choice candidates across a series of elections. PFOF 108; 117-118, 142. Analyses from Drs. Barreto and Oskooii show that over 85% of Black and Latino voters choose the same candidate countywide and in commissioners court Precinct 3; analysis from Dr. Trounstine shows Black and Latino voters preferred the same candidate in 77% of general elections. PFOF 108, 117; *see also* PFOF 116 (The consensus among every expert is that cohesion is a continuous variable determined by an analyses of elections that show a particular pattern).

Defendants do not dispute this fact, but rather, suggest that primary election analyses be given more weight than they are accorded in vote dilution cases. ECF No. 244 at 41-43. Every expert assessing whether Black and Latino voters in Galveston County are politically cohesive, however, agrees that general elections are more probative than are primary elections. PFOF 126; PCOL 48, 50.

Primary elections have limited probative value, if any, in determining inter-group cohesion in this case in particular because they are very low turnout elections, particularly among Black and Latino voters, and as such, preferences are not likely to be as strong for any one candidate. PFOF 128-131. Dr. Trounstine testified that in the primary election phase, voters have already self-selected into a group with like-minded voters and "it's the general election where political coalition gets built"). Tr. v. 4, 186:3-10; 262:5-263:6 (Trounstine). In addition, the primary elections for the commissioners court are typically uncontested. PFOF 131. Dr. Alford concurred, testifying the general

elections are the most probative (*i.e.*, "provide the clearest picture") and that his conclusions regarding cohesion are based on general elections. Trial Tr. v. 10, 146:5-148:8 (Alford). Dr. Alford further testified that in instances where findings from a primary election analysis contradict findings from a general election analysis, "the general is more important." *Id*. at 147:21-148:2.

Notwithstanding the limited probative value of primary elections, Dr. Alford agreed that the results of the single most probative primary election, the 2012 primary election for commissioners court Precinct 3, showed that Black and Latino voters were "highly cohesive." PFOF 134. With respect to the other less probative exogenous primary elections analyzed in this case, collectively, the results show a pattern of Black and Latino voters selecting the same first-choice candidate more often than not. PFOF 132-135; PX 476 at A-22-24. Also, although the analyses of local non-partisan elections similarly show the steady presence of cohesion between Black and Latino voters, they too should be afforded little weight due to the data limitations reducing their probative value. PFOF 136-141.

Defendants also conflate the analysis to determine whether elections are racially polarized with the analysis to assess whether Black and Latino voters are politically cohesive. ECF No. 244 at 41-46. As such, Defendants' argument that Anglo support of the same candidate that Black and Latino voters support in primary elections does nothing to counter a finding of political cohesion. *Id* at 45-46. During cross examination, Dr. Alford testified that his observation that in some Democratic primary elections Anglo voters are voting consistently with Black and Latino voters is irrelevant

for purposes of *Gingles* II and in assessing whether Black and Latino voters are politically cohesive. PFOF 135.

Accordingly, Defendants' claims that Dr. Alford's primary elections analysis showed evidence of no racially polarized voting, Def. Br. 41-44, are also of no consequence and are contradicted by Dr. Alford's own testimony stating that for purposes of *Gingles* III, it is Anglo voting behavior in general elections and not Democratic primary elections that is relevant. *Id.*; PCOL 61.

Gingles III. The results of every expert's reconstituted election analysis found that under the 2021 enacted map, the Anglo majority votes sufficiently as a bloc to prevent Black and Latino voters from being able to elect their preferred candidate. PFOF 148-154, 160-162.

Neither Defendants nor their expert presented any evidence that contravenes Plaintiffs' experts' reconstituted election analyses confirming the third *Gingles* precondition is met. PFOF 158; PCOL 59-60. In fact, Dr. Alford did not conduct any independent analysis to assess whether Anglo bloc voting in the enacted map suffices to defeat the minority candidate of choice, nor did he dispute the results of any of the reconstituted election analyses of the Plaintiffs' experts. *Id.*; Tr. v. 10, 123:4−17 (Alford); *see generally* DX 305 (Alford Expert Report).

Instead, Defendants argue that partisanship explains polarized voting patterns in Galveston County by relying on Dr. Alford's testimony. ECF No. 244 at 48-52. Dr. Alford, however, also testified that he did not conduct any analysis to determine if any factor other than race explains the divergent racial voting patterns in partisan elections in

the County, and that he did not conduct any analysis to determine whether there are any variables about voters that are more correlated with partisan voting behavior in Galveston County than is the race of the voter. PFOF 165, 167. Notably, Dr. Alford also testified that he agreed with a previous court's conclusion that "[h]is conclusions [regarding partisan polarization] were not reached through methodologically sound means and were therefore speculative and unreliable." PFOF 166.

The evidence shows that partisanship cannot explain the racially polarized voting patterns established in Galveston County. *See* PFOF 171-174; *see also* PFOF 175-186; PCOL 70. On the contrary, the racial demographic makeup of political parties in the County confirms that its electorate is racially polarized, where Anglo voters largely participate in the Republican primary and Black and Latino voters generally participate in the Democratic primary. PFOF 173-174.

Lastly, Dr. Trounstine's reference to "political orientation" does not support Defendants' argument that partisanship and not race explain polarization in County elections, nor is the term synonymous with partisanship. ECF 244 at 52. According to Dr. Trounstine, political orientation is a broad term that encompasses anything a voter prioritizes, such as, policy choices, ideology, or demographic characteristics. Tr. v. 4, 187:15-188:8. In her opinion, "the fact that Latino and Black voters tend to support candidates from one party is a reflection of their cohesion, not an alternative explanation for it." PX 476, ¶ 35.

B. The Totality of the Circumstances evidence demonstrates that the political process is not equally open to the County's Black and Latino voters.

Under the totality of the circumstances inquiry, not only is "there is no requirement that any particular number of factors be proved," but it is also not necessary for the Court to determine whether "a majority of them point one way or the other." *Gingles*, 478 U.S. at 45. Indeed, "the Senate Report instructs courts not to become bogged down in "mechanical 'point counting.'" *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1147 (5th Cir. 1993) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. (1982) at 29 n.118). Thus, the Court need not determine whether each enumerated Senate Factor "weighs in favor of" either party. *See* ECF No. 244 at 53-59. Instead, the court must undertake a "searching practical evaluation of the 'past and present reality'" that considers the totality of Senate Factor evidence. *Gingles*, 478 U.S. at 62-63.

Plaintiffs presented detailed and extensive evidence relevant to the Senate Factors showing that the political process is not equally open to Black and Latino voters in Galveston County. PFOF 199-210; 396-493; *see also* PFOF 494-500; PCOL 83-85.

This includes the County's long history of official voting-related discrimination, which provides context to the totality of the circumstances analysis. PCOL 79. The record here presents the consistent pattern of Section 5 objections to proposed voting changes in Galveston County, starting in the year after the County became subject to Section 5 in 1975 and continuing up to and through the 2011-2012 redistricting cycle. PFOF 199-210, PCOL 120-121; *see infra* section II.D.

Evidence of stark socioeconomic disparities in education, employment, income, housing, and health between Black and Latino residents compared to Anglos in

Galveston County is uncontested. PFOF 452-493. Considered together with evidence of depressed levels of political participation by Black and Latino voters, this provides the necessary factual predicate for the finding required by Senate Factor 5 that Black and Latino voters are not able to participate effectively in the political process. *See* PFOF 397-401, 452-500.

A more extensive examination of the list of minority elected officials offered by Defendants regarding Senate Factor 7 shows that many were elected from majority-minority, single-member districts in which minority voters can elect candidates of their choice. PFOF 431.

II. THE EVIDENCE ESTABLISHES THAT THE ENACTED MAP WAS MOTIVATED, AT LEAST IN PART, BY DISCRIMINATORY INTENT

A. This Court cannot presume Defendants acted in good faith.

Any presumption that Galveston County may claim that it is entitled to that the enacted map, which split a longstanding majority-minority precinct, was crafted in good faith has been overcome here. While the "law is less clear . . . on exactly what the presumption of good faith entails," *LULAC v. Abbott*, 601 F. Supp. 3d 147, 179 (W.D. Tex. 2022), "there are strong reasons to conclude that the presumption of good faith is overcome … when there is a showing that a [legislative body] acted with an ulterior *racial* motive," *id*. at 181 (emphasis in original). Any needed showing has been made here.

The record shows that the commissioners who voted for the enacted plan acted with the clear knowledge of the plan's racial impact and did so even when presented with an alternative plan, Map 1, devised by their own redistricting counsel, that did not have

the prohibited discriminatory impact. PFOF 69-70, 191-193. County Judge Mark Henry, Commissioners Joseph Giusti and Darrell Apffel, and redistricting counsel Dale Oldham testified that they knew Precinct 3 was Galveston County's sole majority-minority commissioners court precinct and that voting for Map 2 would eliminate it as a majority-minority district in which Black and Latino voters could elect a candidate of choice. PFOF 191, 193, 229-230, 251, 253, 254, 256-257, 277, 354; *see also* Tr. v. 9, 149:20-24 (Giusti).

Commissioner Giusti, for example, "knew prior to casting [his] vote in favor of Map 2 that, if adopted, it would eliminate the majority-minority Black and Hispanic voting age population in Precinct 3." Tr. v. 9, 149:15-19 (Giusti). Early in the 2021 redistricting cycle, Judge Henry signaled his intention when he asked Mr. Oldham whether the redistricting plan "had to" include a majority-minority district. PFOF 224.

A racial motive was also clear from the County's redistricting counsel's testimony. At trial, Mr. Oldham claimed he relayed "incredibly clear" instructions to Mr. Bryan to not consider or display racial data in creating the draft plans. PFOF 245. Mr. Bryan, however, testified he was certain he received "no instruction one way or the other on racial and ethnic information." *Id*. In fact, he included racial data in his analytic spreadsheets later displayed to members of the commissioners court. PFOF 253-254. This obviously contradictory testimony further undermines any presumption of good faith which Defendants may claim.

Defendants are precluded from claiming partisanship motivated their actions. Judge Henry testified politics "wasn't my primary concern" and "wasn't my primary

driving force" during redistricting. Tr. v. 7, 22:25 (Henry). When asked if partisanship was a factor to him, Commissioner Apffel testified "I wasn't considering it, no." Tr. v. 9, 355:25-356:6. PFOF 241, 387. Even if partisanship motivated them, Defendants cite no authority suggesting that partisanship would entitle a legislative body to a presumption of good faith when the record establishes Defendants acted with "an ulterior *racial* motive." *LULAC*, 601 F. Supp. 3d at 181.

B. Defendants' own actions created a rushed redistricting process.

Defendants created a rushed redistricting timeline as the result of their own intentional acts or omissions. *See, e.g.*, PFOF 280-281 (declining to adopt a timeline setting out key dates for redistricting process); PFOF 304-305 (declining to engage a demographer soon after Census data release). Defendants' efforts to conceal their discriminatory intent in the 2021 redistricting cycle because of a compressed timeline are unavailing.

The United States Census Bureau released the 2020 Census data necessary for redistricting on August 12, 2021. PFOF 225. Defendants' redistricting counsel, Dale Oldham, failed to access the data in a "usable" format for several weeks. ECF No. 244 at 28; PFOF 225-29. Demographers for both Plaintiffs and Defendants, however, testified that they could all use the August 2021 data. PFOF 303-304. Mr. Fairfax testified that "anybody with GIS skills" could have used the data released in August. PFOF 303. Defendants' own demographer, Thomas Bryan, used the data immediately upon their release on August 12, 2021, for other clients. PFOF 304. Mr. Bryan could have

completed draft redistricting plans for the Galveston County commissioners court by the end of August had the County not waited until October 14, 2021, to retain him. *Id*.

The day after Mr. Bryan's engagement, Defendants instructed him to draft redistricting plans, a task Mr. Bryan accomplished in only two days. PFOF 236-238;242. And considering the speed at which Mr. Bryan created the two draft maps, he, or any other demographer, could have prepared draft maps to circulate for public viewing and comments had Defendants chosen to hold any public redistricting hearings before November 12, 2021. PFOF 304,309.

The Texas Secretary of State's November 1, 2021, advisory informing counties that they must redistrict by November 13, 2021, the start of the candidate filing period, does not support Defendants' actions. ECF No. 244 at 8; JX 34 at 1-2. The notice does not reflect any adjustment to the candidate filing period. PFOF 269. Defendants' assertions that after receiving the advisory, the timeline for redistricting became "compressed," and that, "[p]rior to November 1, 2021, Judge Henry was comfortable if the County could adopt a plan by around November 20th," are not credible nor are they supported by the evidence. ECF No. 244 at 8.

The candidate filing period is set forth in Texas's Election Code § 172-23, and there is no evidence that the filing period ever changed. PFOF 269; PCOL 130. Judge Henry and the commissioners, all veteran candidates, knew about the opening of the candidate filing period and that the 2021 redistricting had to be completed by mid-November. PFOF 281, 307-308; *see also* JX 45 at 1. Other jurisdictions met the

deadline, even those that held several rounds of hearings for public comment and adopted criteria in public meetings. PCOL 130-131.

C. The existence of Map 1 reinforces a finding that Defendants were motivated by discriminatory intent.

Defendants' suggestion that "[h]ad the County intended to break up Precinct 3 as a majority minority precinct and injure the strength of minority voters, Map 1 would not have been an option for adoption," is also unpersuasive. ECF No. 244 at 22. The determinative fact is not that Map 1 was presented; it is that despite being presented and the commissioners' knowledge of the racially discriminatory impact of Map 2, they proceeded to adopt Map 2. Defendants' suggestion that "Commissioner Giusti, and Judge Henry would likely have voted for Map 1 with any advocacy from Commissioner Holmes" is speculative and unfounded. *Id*. at 27.

Defendants' attempt to place the onus on Commissioner Holmes to advance support for Map 1 fails for several reasons. Map 1 contained changes Commissioner Holmes specifically did not want. PFOF 360. Commissioner Holmes was only informed that images of proposed Map 1 and Map 2 would be posted to the County website on October 29, the day they were posted. PFOF 264; Tr. v. 7, 76:12-24 (Holmes). On the same day, Judge Henry chose to post images of Map 1 and Map 2 on his campaign Facebook page and encouraged people who followed him to support Map 2. PFOF 266. On October 31, Commissioner Giusti reposted Judge Henry's post, also asking his constituents to support Map 2. *Id*. As Commissioner Holmes testified about Map 2's passage, "the fix was already in." PFOF 271.

Dismantling Precinct 3 as the County's only majority-minority district was never necessary to establish Judge Henry's stated desire for the creation of a coastal precinct combining Bolivar Peninsula and Galveston Island. ECF No. 243, at 23-24. These two options were not mutually exclusive. *See* PFOF 248, 374-375. Even Mr. Oldham agreed that creating a coastal precinct while retaining a majority-minority district was possible. PFOF 247. Moreover, according to Judge Henry, he did not request, nor would he have asked for, a coastal precinct map that also kept Precinct 3 as a majority-minority district.[2] PFOF 394.

The evidence shows that other commissioners worked to ensure the so-called "optimal" map configuration became final in a form acceptable to at least three commissioners. PFOF 309. In contrast, Commissioner Holmes was not informed of the priorities either Judge Henry or the other commissioners believed were necessary to draft an acceptable map. 357-363, PCOL 146. As a result, neither he, nor the public, had a meaningful opportunity to present alternative plans or to show that the dismantling of the sole majority-minority commissioners precinct and the unnecessary fragmentation of the Black and Latino coalition was required, or a natural result of Defendants purported priorities for the redrawing of the commissioners court map. PCOL 146.

[2] Judge Henry's post-trial comments highlight this. In an interview, he stated, "that is where I get excited . . . this will make it easier for any entity, state or county, to redistrict. We can do away with this fantasy of coalition districts, which will make it easier for everyone." Andre Perrard, *Federal judge ruling in Galveston County lawsuit may reshape redistricting*, NEWSRADIO 740 KTRH (Sept. 11, 2023), *available at* https://perma.cc/6ZRX-J8FN.

D. Defendants misconstrue *Arlington Heights*' historical background requirement.

Precedent does not support Defendants' suggestion that this Court ignore "evidence of racial discrimination that [is] over 20 or 30 years" old.[3] ECF No. 244 at 17. The Fifth Circuit explained that "'relatively recent' does not mean immediately contemporaneous" and recognized how "history (even 'long-ago history') provides context to modern-day events." *Veasey v. Abbott*, 830 F.3d 216, 232 n.14 (5th Cir. 2016); *see also Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 282-86 (S.D. Tex. 2017). Defendants' reliance on *McCleskey v. Kemp*, 481 U.S. 279 (1987), is inapt because the historical evidence in that case focused solely on "Georgia laws in force during and just after the Civil War," *id*. at 298 n.20. The record here is full of significantly more recent examples of discrimination. *See, e.g.*, PFOF 201-210.

Defendants' argument that Section 5 objections are "improper" evidence disregards federal courts' repeated reliance on them as evidence of past intentional discrimination. ECF No. 244 at 17. The Fifth Circuit has relied on Section 5 objections to Texas's statewide redistricting plans between 1980 and 2010 as evidence of discriminatory intent under *Arlington Heights*. *Veasey*, 830 F.3d at 240. Other courts have as well. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223-24

[3] Defendants seek to consign the first Section 5 objection to a voting change in Galveston County in 1976, and the conditions in the antebellum South, to the same moment in the 19th century. Eighteen-year-old Black or Latino County residents seeking to vote for the first time in 1976 were born in 1958; many were barred either by law or "massive resistance" from entering many public places for their formative years; assigned to segregated public schools; survived the extended aftermath of Hurricane Ike's destruction; and most recently lost their ability to elect a candidate of choice to commissioners court. They are not historical figures. Rather, they will turn 65 this year.

(4th Cir. 2016) (considering past Section 5 objections as evidence of both discriminatory intent and discriminatory results). In a recent Section 2 challenge to Alabama's 2021 congressional redistricting plan, a three-judge district court analyzing the Senate Factors considered how "more than 100 voting changes proposed by the State or its local jurisdictions were blocked or altered under Section 5 of the Voting Rights Act." *Caster v. Merrill*, 2:21-cv-1536-AMM, 2022 WL 264819, at *72 (N.D. Ala. Jan. 24, 2022), *aff'd sub. nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023).[4]

Here, it is proper to consider Galveston County's and its municipalities' long history of non-compliance with federal law. In fact, the "proximity and comparability" of the 2012 commissioners court redistricting plan to which a Section 5 objection had been interposed "weighs in favor of an inference of discriminatory intent." *LULAC*, 601 F. Supp. 3d at 171; PFOF 208-209.

CONCLUSION

For the above-stated reasons, the United States requests that the Court find the 2021 Galveston County Commissioners Court plan violates Section 2 of the Voting Rights Act of 1965 and to enter the relief requested in the proposed order attached to its initial post-trial brief.

[4] In *Caster*, the parties stipulated to past Section 5 objections. *See* 2022 WL 264819, at **31, 40, 72. Here, Defendants do not dispute the existence of past Section 5 objections, and some are in the record as joint exhibits. *See, e.g.*, JX. 6 (March 5, 2012, Section 5 objection letter, T. Perez to T. Trainor).

Respectfully submitted this 18th day of September 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to all counsel of record in this case.

/s/ *Catherine Meza*
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