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Defendants¹ file this Closing Brief in lieu of closing statements, pursuant to the Court's order.

SUMMARY

After ten days of trial, Plaintiffs² have failed to support any of their claims. Yet, Plaintiffs have taken a utilitarian approach to this case. For example, faced with County voting results that demonstrate voter decisions are best explained by partisanship, Plaintiffs sponsored “expert” testimony opining that all white Republican voters in Galveston County vote based on the candidate's race. *See* DX 303 (tweet from Plaintiffs' expert Max Krochmal asking “Who can now say the Republican party isn't a vehicle of white power?”). Plaintiffs appear to have similarly strategized around Commissioner Holmes' participation in the political redistricting process. Nevertheless, Plaintiffs have not proven their claims.

Racial gerrymandering claims under the Fourteenth Amendment impose an extremely high burden of proof. The Petteway and NAACP Plaintiffs have shown *no* evidence that race was the predominant factor in enacting the 2021 Commissioners Court redistricting plan (“2021 Map”). They therefore cannot satisfy “their burden of overcoming the presumption of good faith,” much less their burden to prove discriminatory intent.” *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (“*Perez*”).

¹ Defendants are: Galveston County, Texas, the Galveston County Commissioners Court, County Judge Mark Henry, and County Clerk Dwight Sullivan.

² Plaintiffs are: Terry Petteway, Constable Derrick Rose, the Hon. Penny Pope (the “Petteway Plaintiffs”) (Plaintiffs Michael Montez and Sonny James have been dismissed. Dkt. 100, 125), the Mainland Branch NAACP, Dickinson Bay Area Branch NAACP, Galveston Branch NAACP, and Galveston LULAC Council 151 (“NAACP Plaintiffs”), United States (“DOJ Plaintiff”).

The Fifteenth Amendment does not support redistricting challenges such as those here. Regardless, the NAACP and Petteway Plaintiffs have failed to prove intentional racial discrimination under the Constitution, which requires proof that Defendants acted at least in part **because of** a discriminatory purpose. Just as they have failed to overcome the presumption of legislative good faith, they have not shown any act performed *because of* race—rather than to balance the population, create a coastal precinct with a single commissioner as opposed to three, even out the squiggly boundaries that were part of the DOJ’s 2011 settlement, and keep Commissioners’ houses within their precincts. Accomplishing an all-Republican Commissioners Court is no proof of a Constitutional violation. In sum, the *Arlington Heights*³ factors provide no inference of intent here.

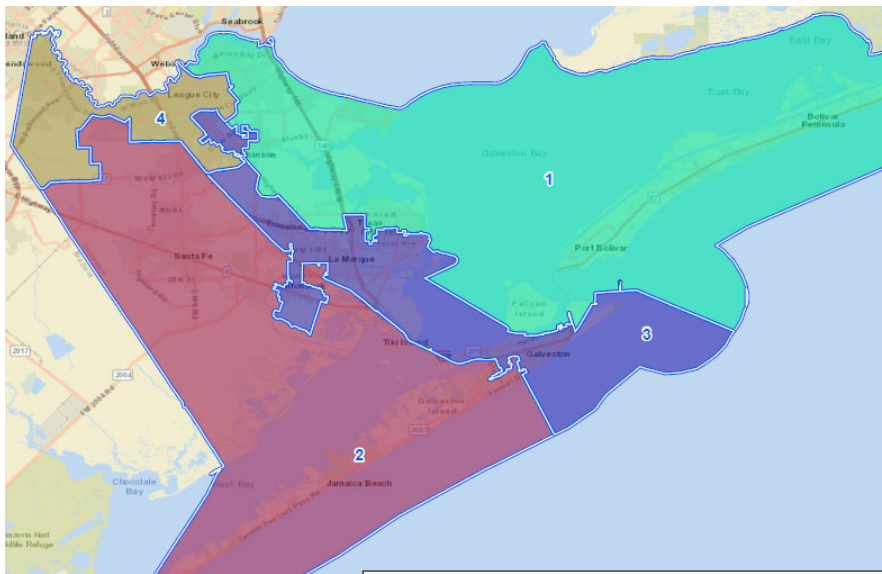
The DOJ and Petteway Plaintiffs have not established Voting Rights Act (“VRA”) claims—intentional or effects. For the same reasons the Fourteenth Amendment claims fail, Section 2 intentional vote dilution claims also fail. Plaintiffs’ Section 2 vote dilution (effects) claims are also categorically unsupported: the VRA does not contemplate coalition claims; Plaintiffs fail to show a compact district can be drawn around a community of interest under *Gingles I*; Plaintiffs fail to credit nonpartisan and primary elections, and therefore provide only slanted evidence of voter cohesion; while politics, not race, best explains voter behavior in Galveston County. Finally, not only have Plaintiffs failed their burden of proof on the totality of circumstances, Defendants’ proof affirmatively demonstrates that Plaintiffs cannot win a totality of the circumstances

³ *Vill. of Arlington Heights v. Metrop. Hou. Dev’pt. Corp.*, 429 U.S. 252, 265 (1977) (“*Arlington Heights*”).

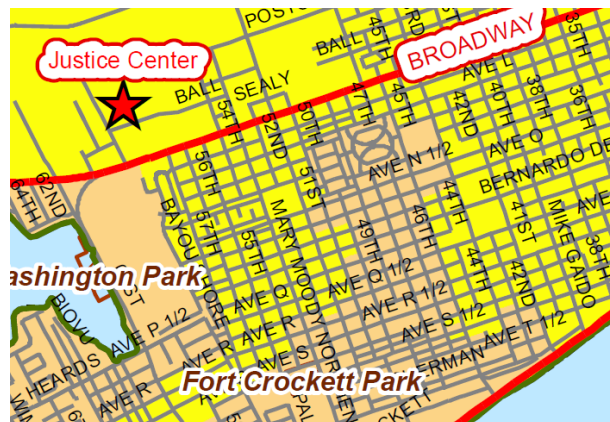
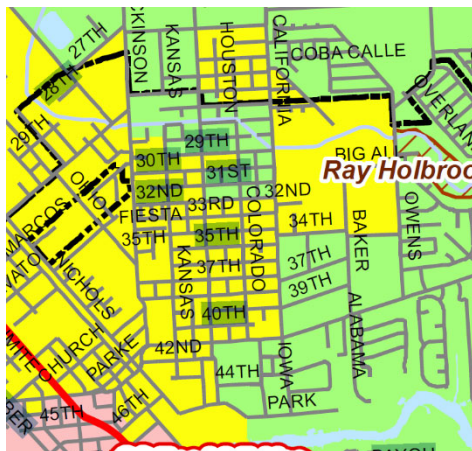
analysis. Judgment for the County is appropriate.

FACTS

Except to draw a racial gerrymander to avoid retrogression under Section 5, the 2012 map did not make geographic sense. Most notably, Precinct 3 created a dam running down the middle of Galveston County from far northern League City down to the seawall on Galveston Island, with fingers reaching into various areas along the way:



DX 4. The 2011 map made even less geographic sense at street level:



DX 5.⁴

The old map also did not make sense from a community-of-interest perspective. Testimony at trial shows that minority communities in the City of Galveston, for example, stick together while mainlander minority groups form their own separate communities. This is evident even in the composition of the Plaintiffs—the NAACP organizational Plaintiffs have separate divisions based on geography and LULAC is separate from the NAACP. Individual plaintiffs also testified they are familiar with their distinct communities—for example, Mr. Phillips knows the City of Galveston, but is not familiar with even the racial demographics of the mainland. DX 310 at 103:20-104:8.

Unless work exposed a witness to a different area of the County, they were not knowledgeable about other parts of the County. Evidence suggests shared socioeconomic issues and political beliefs among Black and Hispanic voters, but not that they form one strong community tie. For example, Ms. Courville testified about moving off the Island even though her husband did not want to (Day 2 Tr. 212:1-8), and described the “cohesive historical place” where she works and lives as “the Settlement” or “West Texas City mostly.” *Id.* 230:12-23, 231:7-9. Ms. Courville testified about having to drive from Texas City to Galveston to visit the Clerk’s office (*id.* 225:6-19),⁵ and about how La Marque ISD provided good schools and education (*id.* 266:16-267:9), but was “given” to a different school district in Texas City to control.

⁴ Left: close-up of northern yellow “bubble” of Precinct 3. Right: close-up of Galveston Island South of Broadway between 61st and 44th. Yellow areas are Precinct 3, green are Precinct 1, brown are Precinct 2

⁵ Dwight Sullivan testified his office is in the process of renovating the former College of the Mainland site to move closer to where more voters live. Day 10 Tr. at 246:19-247:13.

Prior to the *Shelby County*⁶ decision, the State of Texas redistricting process, including redistricting done by Galveston County, was subject to preclearance. As a majority-minority precinct, Commissioner Precinct 3 was subject to DOJ mandates, including that minority citizen percentages cannot be decreased (retrogressed) in redistricting. This continued requirement of no retrogression, and particularly, settlement negotiations over the map in 2012, provided clear indications that Precinct 3 was drawn predominantly on the basis of its racial makeup. But, without *Shelby County*, the County had no protection from legal exposure for that fact.

In addition to legal exposure for the race-based creation of Precinct 3, the growth of Galveston County in its northern sections and changes in population required changes to the maps in 2021. Because of the way the old map was drawn, cleaning up boundary lines and forming a coastal precinct would largely change old precinct boundaries. To navigate the ever-changing legal minefield of redistricting, the County hired legal counsel who had decades of experience on redistricting matters, and who proved himself both knowledgeable and helpful to the County in the 2011-2013 preclearance process and trial. Day 7 Tr. at 171:12-172:5. Initial discussions occurred in December of 2020; Dalton “Dale” Oldham and his associated firm was retained in April 2021.⁷

The Census Bureau data release for 2020 was grossly delayed, setting the redistricting process back by over six months. Day 8 Tr. at 30:9-12. Without that data, it

⁶ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

⁷ Judge Henry spent time with Dale Oldham during the 2011 process and was impressed with his knowledge of the VRA and the County. Day 7 Tr. 171:12-172:5. He was helpful not only with preclearance in 2011, but also with trial. Day 7 Tr. 172:9-18.

was anyone's guess as to what, and where, specific changes would have to be made. Counsel advised the County to wait to discuss map changes, consistent with prior practice.

When the Bureau finally released data in August of 2021, it was unusable for Mr. Oldham. He was able to obtain some useful information in September,⁸ and set up meetings with each of the members of the Commissioners Court between September 8th and 23rd to get their input. In addition to needing to meet legal requirements, counsel collected Court members' perspectives on how a map should look. This feedback ranged from Judge Henry's vision of a more efficient coastal precinct, to Commissioner Holmes' desire to keep "all" of Precinct 3,⁹ to more minute details like keeping the commissioners' homes in their precincts and creating less erratic precinct boundaries.¹⁰ Also an issue was whether Precinct 3 could be legally maintained. The DOJ required an increase in Precinct 3's Black population during settlement negotiations in 2012. Thus, race was the driving factor behind its creation.

In the first round of meetings in September, Mr. Oldham informed the commissioners about population deviations that required precinct changes. Precinct 3 was also the most underpopulated precinct as of 2020 (by 8,000). JX 23. Precinct 2 was the most overpopulated. DX 63. A least-changes plan seemed an acceptable way to resolve the problem with the prior design of Precinct 3.

⁸ Day 8 Tr. at 36:11-37:23.

⁹ See JX 23 ("*Keeps asking me what areas I would like to have / *All").

¹⁰ The commissioners' homes are all in the northern part of the County, *including Commissioner Holmes*. PX 386 at 26 n.24; Day 8 Tr. 83:8-84:1. In fact, most of Galveston County's population is in the northern part of the County. Day 7 Tr. 216:12-218:3. That is why Precinct 4 appears so small in comparison to Precinct 2. See DX 4.

From Mr. Oldham’s perspective, **the process was a political one**. Day 8 Tr. at 78:23-80:5. He was not going to cross the line of representing a single commissioner or group of commissioners or pick a side in what was to be a political discussion. Day 8 Tr. 80:13-80:17. Mr. Oldham told the commissioners he would not convey information shared between him and any commissioner to others without their consent. To address the requests of all of the commissioners, he concluded he would need two map concepts for a demographer—the least-changes map (Map 1), and a coastal precinct map (Map 2). Mr. Oldham did not want demographer, Tom Bryan, to refer to racial data in drawing either plan. Day 8 Tr. at 66:13-67:4. Both Mr. Oldham and the Mr. Bryan confirmed that no racial data was referred to in designing either map proposal. Day 8 Tr. at 71:18-72:20 (Oldham); 282:1-5; 17-22 (Bryan).

By approximately October 17th, two draft plans were created. Mr. Oldham presented the proposed maps to the commissioners one or two at a time, obtained feedback, and made changes as requested. The Court members (except Commissioner Holmes) did not consider race.¹¹ Day 8 Tr. 110:22-111:9. The map presentations concluded by approximately October 22nd, with small “clean up” revisions made thereafter. By October 29th, the plans were posted online for the public to view and comment on. The County posted the proposed maps on the same day they were received. Day 7 Tr. 205:19-24; Day 8 Tr. 118:1-5. Of the public comments that supported a map, most supported Map 2. *See* JX 42. Several wanted neither map—some wanted Bolivar removed from Map 1, and

¹¹ *See* Day 7 Tr. 232:2-10 (Henry); Day 9 Tr. at 94:7-9; 132:18-21 (Giusti); Day 9 Tr. at 310:21-311:13 (Apffel); *see also* JX 23 at 4 (Holmes’ notes).

others expressed a stronger rejection of both maps. Day 7 Tr. 323:13-24.

The timeline was compressed. Prior to November 1, 2021, Judge Henry was comfortable if the County could adopt a plan by around November 20th. Day 7 Tr. 174:15-21. But rather than be able to hold public hearings, on November 2nd, the Secretary of State emailed an advisory requiring maps to be adopted and provided to the State by November 13, 2021. PX 250. The County then had 11 days from the receipt of that notice—or 2 weeks from when it posted its draft plans online—to adopt a map. While any commissioner could have requested public hearings on the maps with 72-hours' notice, there was really no time for it. Due to timing, Mr. Oldham advised the County to make online comments available, and provide the opportunity for comments at a public meeting.

No commissioner was left out of the process. Commissioner Holmes met with counsel on September 20th. JX 23 at 1. He believed at the time (incorrectly) that “every other member of the court ha[d] seen maps with updated data.” JX 23 at 1. There were no maps in September. Day 8 Tr. at 57:5-9. He then met with counsel on September 23rd and provided his specific requests. His detailed changes were incorporated by counsel into Map 1. JX 23; Day 8 Tr. at 52:20-25; Day 8 Tr. at 51:21-23; Day 8 Tr. at 76:21-77:6. He met against with counsel on October 19th and 22nd to review draft maps. He was called by Judge Henry's staff on October 29th, November 2nd, November 4th and November 5th with updates on and maps and meeting times. JX 23 at 4-6.

On October 28th, Commissioner Holmes emailed Sarah Chen that Map 1 had “close to current racial percentages” as the 2012 map, but it included Bolivar. DX 164 at 6. It is what Commissioner Holmes chose *not* to do that is telling: he chose not to advocate for the

map that would have maintained Precinct 3 as a majority-minority precinct. He chose not to push for Map 1's adoption in the community. He chose not to indicate to any other commissioner that he wanted Map 1—in fact, he maintained that he did not like either map. He did not tell anyone he was having alternative maps drawn. He did not give copies of those maps to any member of the Commissioners Court or their staff, or to redistricting counsel before the meeting. He did not discuss the data behind those maps or whether they complied with the law when he unveiled them at the November 12th meeting; he did not even unveil them until after a motion to approve Map 2 was made. He did not move to amend the motion on Map 2. Most telling is that, as Commissioner Holmes admits (Day 7 Tr. at 120:9-11), he did not tell his constituents that Map 1 would have kept Precinct 3 largely intact and maintained a majority-minority district (even though he emailed with Roxy Williamson on November 4th and spoke at a local Democratic group that day). DX 121, DX 124, DX 130. Witnesses were surprised at trial by this news. *See* Day 1 Tr. 99:11-17, 165:17-167:18. But Commissioner Holmes *did* tell NAACP Plaintiffs' attorney Sarah Chen this fact. DX 164 at 6. He also personally hired Petteway Plaintiffs' attorney, Chad Dunn, and Mr. Dunn's work confirmed this fact as well. DX 144 at 5. Even after preparing with Mr. Dunn for the November 12th meeting (DX 132 at 2 (Dunn-Holmes emails with dates)), Commissioner Holmes did not mention Map 1's attributes to the public.

Commissioner Giusti has a good relationship with Commissioner Holmes, and often votes with Commissioner Holmes. Day 9 Tr. at 8-17. Had Commissioner Holmes favored Map 1, since he is the commissioner of Precinct 3, Commissioner Giusti would have voted for Map 1. Day 9 Tr. at 92:17-93:1. But Commissioner Holmes never asked him about

support for Map 1. Day 9 Tr. 99:19-100:3. Judge Henry thought his coastal precinct was more efficient, (Day 7 Tr. 236:25-237:2), and “wanted to hear a reason and argument as to why Map 1 would be a better map.” Day 7 Tr. 238:6-8. He testified that, “If Commissioner Holmes had asked me to consider Map 1, I would have a hard time telling him no. He has never asked me for a thing in 12 years,” but Commissioner Holmes did not ask *Id.* 238:9-16. Simply put, there is significant evidence in the record that Commissioner Holmes’ advocacy for Map 1 could have led to its adoption.

The explanation for why Commissioner Holmes refused to even minimally advocate for Map 1 when he knew that Precinct 3 within it would allow a coalition of minority groups to elect their candidate could be as simple as a political inability to support a map that looked so similar to the one that the DOJ objected to in 2012. The DOJ’s changes to that map were minimal—excluding Bolivar and 52 residents on the mainland. The evidence at trial overwhelmingly shows that including Bolivar would not destroy a majority-minority precinct.

A more insidious explanation is revealed in an email from Stephanie Swanson, a League of Women Voters or “LWV” representative (DX 105) who worked with Roxy Williamson to put together the October 29, 2021 redistricting letter to the Commissioners Court. *See* PX 239. The Southern Coalition for Social Justice (“SCSJ”), another group with lawyers representing Plaintiffs here, hired Roxy Williamson as a redistricting mapping fellow for Galveston County. DX 126 at 2. Ms. Swanson’s November 11, 2021 email to SCSJ counsel and Ms. Williamson strategized that, “[i]f they vote for map 2, we could argue intentional discrimination as well as preclearance for the jurisdiction, since they

would be a repeat offender.” DX 140. That is, the self-styled “Redistricting Coalition” (DX 121) could argue for more control over the County if Map 2 was adopted instead of Map 1. That would give Democrats an advantage in their continued fight against a Republican majority in Galveston County.

The evidence shows partisanship, not race, explains voter behavior in Galveston County. This is evident in the primary elections that Plaintiffs’ experts chose to discount and ignore, despite the fact that primaries provide voter data unhampered by a partisan label. It is apparent that Plaintiffs, who are all Democrats, preferred a judicial fight against Republicans at this point in time, rather than face an anticipated continued loss of a few percentage points at a time to Republicans.

ARGUMENT

II. Plaintiffs’ Constitutional Racial Gerrymandering and Intentional Discrimination Claims Fail

In addressing the Petteway and NAACP Plaintiffs’ Constitutional claims at the outset, the Court must be mindful of its jurisdictional limits and, particularly, justiciability issues arising from claims resting factually on political preferences. Partisan gerrymandering claims are nonjusticiable political questions, as they lack judicially manageable standards to resolve them. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494, 2506-7 (2019). While certain redistricting claims are justiciable (*id.* at 2495-96), partisanship is expected to happen in redistricting. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Whether masquerading as racial gerrymandering, intentional vote dilution or a VRA claim, without other facts “[holding] that legislators cannot take partisan interests

into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.” *Rucho*, 139 S.Ct. at 2497. In such a case, a Court should find jurisdiction is lacking.¹²

A. Plaintiffs have not reached their high burden to establish intent.

As recognized in *Abbott I*, there are similarities, but key differences, between racial gerrymandering and intentional vote dilution claims. *Abbott I*, 601 F. Supp. 3d at 161-62. The latter allege a districting plan is “a purposeful device to maintain or cancel out the voting potential of [] minorities,” while racial gerrymandering claims allege race was used “as a basis for separating voters into districts.” *Harding v. Cnty. of Dallas, Tex.*, 948 F.3d 302, 312 (2020). Each of Plaintiffs’ constitutional claims require a high burden of proof. To show an intentional vote dilution claim, Plaintiffs must prove that race was *part* of the County’s redistricting plans, but proof in a racial gerrymandering claim requires more: that consideration of race **predominated** over other considerations such as partisanship. *Abbott I*, 601 F. Supp. 3d at 161-62. Plaintiffs’ failure to meet their burden on the intentional vote dilution claim should generally mean they also fail on their racial gerrymandering claim. Thus, Defendants address the intentional vote dilution claim first.

B. The Fifteenth Amendment does not support vote dilution claims.

Under Fifth Circuit precedent, there is no cause of action for intentional vote dilution under the Fifteenth Amendment. *See Prejean v. Foster*, 227 F.3d 504, 519 (5th

¹²As stated below, partisan motives may also defeat racial gerrymandering, vote dilution and VRA claims even if facts show that claims are justiciable (not the case here). *See e.g., LULAC v. Abbott*, 601 F.Supp.3d 147, 162 n 6 (W.D. Tex. May 4, 2023) (“*Abbott I*”).

Cir. 2000). This makes sense because the U.S. Supreme Court has never held that vote dilution claims are cognizable under the Fifteenth Amendment. *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). Instead, intentional vote dilution cases are resolved under the Fourteenth Amendment. Even if the Court finds the claim actionable under the Fifteenth Amendment, Plaintiffs cannot meet their burden, as discussed below.

C. Intentional Racial Discrimination: There is no evidence Defendants redistricted with racially discriminatory intent.

This is not an intent case. Intentional vote-dilution claims require proof that the challenged plan has discriminatory effects *and* was enacted as a purposeful device to maintain or cancel out minority voting potential. *Harding*, 948 F.3d at 312. Plaintiffs “bear the burden to show that racial discrimination was a *substantial* or *motivating* factor behind enactment of the law.” *Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016). Importantly, intentional discrimination requires more than just showing disproportionate effects on members of a certain race. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Indeed, as the Fifth Circuit observes, “[Commissioners’] awareness of a disparate impact on a protected group is not enough: the law must be passed *because of* that disparate impact.” *Veasey*, 830 F.3d at 231 (emphasis in original); *see also Rogers*, 458 U.S. at 618 (discriminatory intent must be shown). Stated differently, the act of passing the County’s map must have been “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Abbott I*, 601 F. Supp. 3d at 160. Plaintiffs have a similar burden on an intentional discrimination claim under Section 2 of the Voting Rights Act. *See U.S. v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009).

Courts use factors outlined in *Arlington Heights* to assess whether a plan was enacted with illicit intent, after reviewing the impact of the action. *Arlington Heights*, 429 U.S. at 266. In addition to the requirement of discriminatory effects, the *Arlington Heights* factors include: (1) the historical background of the decision, (2) the specific sequence of events leading up to the decision, (3) departures from the normal procedural sequence and substantive departures, and (4) legislative history. *Id.* at 267-68; *see also Abbott I*, 601 F. Supp. 3d at 160 (considering procedural and substantive departures together). These factors are not exhaustive. The inquiry into a showing of discriminatory intent is highly sensitive and fact-bound. *Abbott I*, 601 F. Supp. 3d at 161.

Plaintiffs also have the burden to overcome a presumption of legislative good faith. That is because “federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.” *Perez*, 138 S.Ct. at 2325. To assess a challenge to a districting plan, courts “must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus. And the good faith of the state legislature must be presumed.” *Id.*

Additionally, when asked to infer racial motivations in support of Equal Protection Claims, this Court should be mindful of certain existing difficulties. Application of intentional vote dilution principles in redistricting cases is “complicated.” *Id.* at 2314. It may be very difficult for a court to determine whether a districting decision was based on race or party preference. *Id.* The inquiry into the motivation behind official action is both “a problematic undertaking” and “a hazardous matter.” *Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 612 (S.D. Tex. 2022) (citations omitted). Additionally, “[s]ince the Equal

Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to ‘competing hazards of liability.’” *Id.* at 2315. Redistricting is truly a “legal obstacle course. . . .” *Id.* (citations omitted); *see also Gaffney*, 412 U.S. at 753 (observing that the substantial political consequences of redistricting are intentional and inevitable); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests”). All of this demonstrates that the Court must be cautious in drawing any inferences of racial motivation.

Now that the Court has heard the evidence, it is clear that Defendants did not act with any discriminatory purpose or intent.

i. *Arlington Heights* Factors

1. Discriminatory Effects

Discriminatory effects in the context of intentional vote dilution requires sufficient proof that the redrawn map “bears more heavily on one race than another.” *Abbott I*, 601 F. Supp. 3d at 164 (citations omitted). A simple analysis of a reduction in Black or Hispanic CVAP percentages between Precinct 3 in the County’s 2012 map and the 2021 Map might suggest the 2021 Map negatively impacts Black or Hispanic voters. However, the analysis is more detailed and, regardless, more is required to prove discriminatory intent. *Rogers*, 458 U.S. at 618.

The 2011 Map’s Precinct 3 required a redraw and reduction in minority CVAP to create a legally defensible map. *See* Day 7 Tr. 60:18-61:8. Additionally, any Republican

partisan gerrymandering that occurs during a redraw will tend to lessen the voting strength of minorities; yet, partisan gerrymandering is beyond the power of federal courts to police. *Abbott*, 601 F. Supp. 3d. at 164. This Court should not conclude that discriminatory effects automatically exist any time a governmental entity reduces minority percentages to comply with the law, or as a result of partisan gerrymandering. *See id.*; *cf. Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001) (in racial gerrymandering claims plaintiffs’ burden is demanding and extraordinary caution should be used before adjudicating claims that a jurisdiction drew lines on the basis of race when there is “a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated”).

2. Historical background of the decision

When measured against appropriate case guidance, evidence in the relevant historical background of the decision favors Galveston County.

“Historical evidence must be “reasonably contemporaneous with the challenged decision.” *LULAC v. Abbott*, 601 F. Supp. 3d 147, 170 (W.D. Tex. May 4, 2023) (“*Abbott I*”). **“Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.”** *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (emphasis added). Reliance, for example, on “historical evidence” of Civil War-era laws was too stale to show purposeful discrimination. *Id.* What was relevant decades ago does not shed light on current conditions or needs. *See Shelby Cnty.*, 570 U.S. at 552-53 (“history did not end in 1965,” more than 40 years passed between preclearance laws’ enactment and their reauthorization in 2006, and focusing on

“decades-old data relevant to decades-old problems, rather than current data reflecting current needs” was not appropriate); *see also Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338-39 (2021). There is no clear demarcation as to time, but the Court is clear that what happened in the 1960s is not probative of a violation today. It is reasonable to conclude here that evidence of racial discrimination that over 20 or 30 years ago is not sufficiently “current” to be probative of Plaintiffs’ burden. Evidentiary examples follow.

a. DOJ objection letters are not proof of discriminatory intent.

Reliance on Department of Justice objection letters as historical background proof of Galveston County’s discriminatory intent is improper. “The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.” *Miller*, 515 U.S. at 922. As a result, courts give no deference to Justice Department interpretation raising serious constitutional questions, such as where the Department proposes to create an obligation to engage in race-based redistricting. *Id.* at 923. Thus, not only is the Department’s objection to Galveston County’s 2011 map proposal not a finding of discriminatory intent, the basis for the objections cannot be provided any evidentiary weight. Additionally, Section 5 preclearance arose under a completely different standard and framework that compels the submitting jurisdiction to prove a negative—that the proposed changes are *not* discriminatory. *See Abbott I*, 601 F. Supp. 3d at 170-71.

This Court’s acceptance of the Department’s view from 2011, as Plaintiffs urge, would impermissibly “surrender[] to the Executive Branch [the judiciaries’] role in

enforcing the constitutional limits of race-based official action.” *Id.* at 922.

b. An expired 2007 consent decree is not evidence of discriminatory intent.

Plaintiffs have cited a 15-year old instruction that Galveston County include bilingual materials at voting locations. An 2007 Consent Decree that expired in 2010; it related to the lack of use of Spanish under the minority language protections of the VRA. Day 10 Tr. 258:3-12. Galveston County entered into the 2007 Consent Decree fully committed to complying with all requirements under the law. PX 564 at 3. Even though not required to, the County continues policies under the decree. Day 10 Tr. 258:18-259:4. Galveston County has not only met, but exceeded, those requirements, as discussed in Defendants’ Proposed Findings at (Senate Factor 1 discussion). For example, though under no obligation to do so, the County continues to deploy bilingual poll workers in every single voting location—in some, up to 5 bilingual workers. Day 10 Tr. 259:7-16. The Clerk (who also speaks Spanish, *id.* at 233:19-24) maintains a Spanish language coordinator in his office and the investigative and complaint procedure required by the expired decree. Day 10 Tr. 259:25-260:23. Rather than exhibiting official discrimination, these continuing practices evidence the County’s work to make voting more accessible to minorities.

c. The 2011 process

In 2011, Judge Henry was new to redistricting, so he followed the guidance of the Texas Association of Counties and hired redistricting counsel. Day 7 Tr. 166:19-167:4. The County was subject to preclearance, so to accelerate that timeframe, counsel for the County sued the DOJ and also sent preclearance letters for its County Commissioners and

Justice of the Peace/Constables precinct maps. Day 7 Tr. 169:24-170:1. The County interviewed a number of firms in 2011 who did not appear knowledgeable about the process. Day 7 Tr. 173:3-23. They ultimately hired counsel who worked with Dale Oldham.

Shortly after the DOJ rejected the map submitted for preclearance in 2011, the DOJ traveled to Galveston, asked for incredibly minor changes to the map to which the County agreed, and the maps were cleared. Day 7 Tr. 170:2-16. The minor changes included the removal of Bolivar Peninsula from Precinct 3, which has a small voting population.

Importantly, **two** prior lawsuits filed by Plaintiff Constable Petteway and others against the County have been resolved **without adverse findings against the County**. To the contrary, in 2011, Constables Petteway, Rose and others rushed to file suit several months before any preclearance decision issued by the DOJ, and the Fifth Circuit ultimately ruled that the 2011 plaintiffs were *not* prevailing parties—leading to a take-nothing judgment against them. *See Petteway, et al. v. Galv. Cnty, et al.*, 738 F.3d 132, 141 (5th Cir. Dec. 17, 2013). Also, as discussed above, the DOJ (a nonparty) immediately worked to settle with the County and accepted only minor revisions¹³ before agreeing to preclear. Day 8 Tr. at 98:9-99:9.

In the 2013 case, Judge Costa dismissed the vote dilution claims from the bench and agreed with the County's rationale for cutting Justice of the Peace and Constable precincts—to save money and promote efficiency. DX 177. Once again, the redistricting challenges were dismissed without awarding any relief to the plaintiffs. Therefore,

¹³ Compare DX 304 with DX 4.

Plaintiffs' arguments here that hiring the same lawyer from 2011 or enacting the "same discriminatory plan" as was submitted for preclearance in 2011 lack evidentiary teeth.

Plaintiffs have also argued that Commissioner Holmes was excluded from the 2021 redistricting process, that he was not allowed to have input on the map proposals or meet with the County's lawyer more than once, and that he was kept in the dark about posting the maps online. Dkt. 125 at 25. Commissioner Holmes' notes show this is not true.¹⁴ As discussed above, Commissioner Holmes had several meetings with redistricting counsel, was invited to call him at any time about redistricting (Day 8 Tr. at 56:2-7), and the County's counsel incorporated Commissioner Holmes' specific requests into the "least changes" Map 1 proposal (*see* JX 23 at 3 and Day 8 Tr. at 52:20-25; Day 8 Tr. at 51:21-23; Day 8 Tr. at 76:21-77:6). Commissioner Holmes' requests were also the most detailed and specific of any other Commissioner or the County Judge. Day 8 Tr. at 52:20-25; Day 8 Tr. at 51:21-23; Day 8 Tr. at 76:21-77:6.

Plaintiffs cite the rush to prepare draft maps and adopt a plan as evidence of racial discrimination, but the extreme delay in obtaining Census data makes an apples-to-apples comparison between 2011 and 2021 impossible. The release of Census data was delayed to August 16, 2021, and an easy-to-use "toolkit" was not released until September 16, 2021. DX 173 at 2-3. The evidence shows the County's two map proposals were posted online

¹⁴ Commissioner Holmes' notes were not provided in the normal course of discovery. Dkt. 140 at 1-2. Defendants had to subpoena records and seek a court order to enforce the subpoena. Dkt. 140. It then took a *second* court order to receive JX 23. Dkt. 177 at 14-15; *see* Dkts. 165, 166. Until that time, the best record of Commissioner Holmes' involvement was DX 156, Tyler Drummond's notes about his talks with Commissioner Holmes that were saved in an email to himself.

for public comment on October 29, 2021, within hours of receiving them from redistricting counsel and the demographer, and were immediately sent to Commissioner Holmes. *See* JX 28 (email transmitting maps); JX 31 (maps sent to Commissioner Holmes by County counsel); DX 106. The timeline crunch was squeezed even tighter a few days later, on November 2, 2021, when the Texas Secretary of State sent an email advisory out with a November 13, 2021 deadline for counties to adopt commissioner court plans. PX 250.

Nor is there evidence of any intentional delay (much less intentional racial discrimination). The County repeatedly, and fervently, sought to speed up the process—even leading to heated email exchanges with redistricting counsel. *See* DX 96 (Oct. 26, 2021 email); DX 98 (Oct. 28, 2021 email), JX 35 & PX 252 (Nov. 2, 2021 emails).

Beyond the Census delay, no formal redistricting criteria were adopted in 2011 because either the County was instructed by counsel or there is no reason to; had counsel told the County to adopt criteria, the County would have. Day 7 Tr. 167:22-168:4.

Though Plaintiffs have argued there was no analysis or rationale for the adopted plan, there was—it created a unified coastal precinct, making one commissioner instead of three responsible for issues along the County’s coastal shoreline, including beach renourishment projects that require work with the State’s General Land Office. It also made the precinct boundaries less jagged and artificial.

Both plans equalized the population under the Texas and federal Constitutions (Day 8 Tr. at 268:7-12), the four commissioners’ homes were in their precincts in both map

proposals,¹⁵ and politics were taken into account as well (Day 8 Tr. 110:22-111:9). While Plaintiffs argue that it was only necessary to shift one voting tabulation district to correct the population deviation, they forget that the Map 1 proposal would still have maintained a majority-minority precinct. Had 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. But the record shows that Commissioner Holmes, whose precinct would have been largely kept intact, advocated against Map 1.

Plaintiffs also cite the November 12, 2021 special meeting—its timing, location, the availability of parking, the size of the courtroom, and whether there were microphones. They have repeatedly emphasized County Judge Henry’s comment at the beginning of the meeting that he will “clear out” people making noise, and that he had constables in the courtroom.¹⁶ The County Judge and Commissioners Apffel and Giusti each testified that no one asked to change the location of the meeting or said to expect so many attendees that there would not be space for everyone. Day 7 Tr. at 219:16-25 (Henry); Day 9 Tr. at 103:6-104:3 (Giusti); Day 9 Tr. at 323 14-25 (Apffel). Judge Henry had expected IT to set up microphones (though there were mics on the cameras livestreaming the meeting). Everyone who wanted to speak was able to. *See* DX 149 at 57-61. No one was removed from the courtroom. An overflow room was opened that broadcast the meeting, as well. This level of attendance was unanticipated, and does not point to discriminatory intent.

¹⁵ Compare PX 386 at n.24 with DX 280 (Map 1) and DX 282 (Map 2).

¹⁶ DX 149 and the accompanying video at PX 129 each show that Judge Henry’s comment did not follow any presentation or discussion about the maps; it happened before the public began their comments, and was meant to quiet the room so that comments could be heard. *See* Dkt. 125 at 26.

Plaintiffs ultimately contend that the 2021 Map itself is all the evidence needed to establish their claims. Precinct 3 existed before and does not exist today. That alone does not amount to intentional discrimination. Galveston County's minority communities were placed in Precinct 3 to create a majority-minority precinct, and remained there under preclearance. Its constituents were 54.9% Black and Hispanic CVAP. DX 290 at 3. The Map 1 combined Black and Hispanic VAP was 58%. PX 528 at "Pop Pivot" tab. Commissioner Holmes even stated on October 28, 2021 that, from what he knew, that Map 1's Precinct 3 would be close to the Benchmark map's racial percentages. DX 165. In short, there were *two* map options available.

Plaintiffs have not shown any intent to cancel out minority voting power, or purposeful discriminatory conduct. Plaintiffs cite to a rushed process, only one public meeting, all of which is attributable to delays in receiving Census data, not intent to cancel the voting potential of Black and Hispanic Galveston County residents. Plaintiffs presented witness testimony about lived experiences with racial discrimination as promised by Ms. Leeper in her opening statement. That testimony, while perhaps arguably relevant to Senate Factor 5, does not touch on any *Arlington Heights* factor or weigh upon the question of intent or purpose.

2. Specific sequence of events leading up to the adoption of the 2021 Map

Courts sometimes consider this factor with the *Arlington Heights* 'departures from ordinary procedures' or 'legislative history' factors. This factor reviews how the plan came to be. *See Abbott I*, 601 F. Supp. 3d at 171-72. It weighs in favor of Galveston County.

The evidence shows the Commissioners Court tried to prepare for redistricting a year in advance by contacting counsel familiar with the County from the last redistricting cycle (DX 43, JX 9, PX 123-124). In April, Mr. Oldham was hired “to provide expertise on the Voting Rights Act and one-person, one-vote and the other aspects of redistricting - - of federal redistricting law.” Day 7 Tr. 29:16-18; PX 138 (County receives proposed engagement letter); JX 12 (engagement agreement). Shortly after hiring Mr. Oldham, the County was informed that despite its early efforts, it (and the rest of the Country) faced a “looming census crisis” (PX 144).

Finally, in August, the data was released. It was “mumbo jumbo,” according to Commissioner Holmes. Day 7 Tr. 129:2-6. The sequence of events leading up to the 2021 Map’s adoption provides no evidence of discriminatory intent.

- 9/2021 Redistricting counsel analyzes the data and begins meeting with Commissioners to discuss what they would like to see in redistricting (JX 16, 19, 20, DX 74, DX 79-80, DX 84)
- 9/8/2021 Factfinding call with counsel, Judge Henry & Commissioner Apffel (JX 16)
- 9/13/2021 Factfinding call with counsel & Commissioner Giusti (JX 19)
- 9/16/2021 Factfinding call with counsel & Commissioner Clark (JX 20)
- 9/20/2021 Factfinding call with counsel & Commissioner Holmes (JX 23, DX 79), additional information sent to Commissioner Holmes (DX 80)
- 9/23/2021 Second factfinding call with counsel & Commissioner Holmes (DX 84)
- 10/17/2021- Redistricting counsel works with demographer to provide 2 map choices:
10/18/2021 (1) a “least change” map, and (2) a “coastal precinct” map
- 10/19/2021 Counsel meeting with Commissioner Holmes (JX 23 at 184)
- 10/22/2021 Counsel meeting with Giusti and Commissioner Holmes (JX 23 at 184)

- 10/29/2021 Maps posted online, Judge Henry's staff calls Commissioner Holmes with update (JX 23 at 185)
- 11/1/2021 Secretary of State advised that Counties must redistrict by Nov. 13th (JX 34)
- 11/4/2021- Judge Henry's staff calls Commissioner Holmes with updates
11/5/2021 (JX 23 at 185-86)
- 11/12/2021 Meeting to consider Maps 1 and 2 and enact a plan (a majority of the online public comments support Map 2) (JX 41, JX 42, DX 153)

First, the testimony is that racial data was not considered. Other than Mr. Oldham's consideration of the racial gerrymandering prospects in the 2012 Precinct 3 and the need to create a least-changes option, each of the individuals involved in drafting the two proposed maps clearly stated that no racial elements were considered.

The VRA imposes obligations under Section 2 (separate and apart from Section 5 preclearance standards). The Constitution also prevents a jurisdiction from using race as a predominant factor in drawing precinct boundaries—even if the intent is to create a majority-minority district. *See Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004).

In 2021, therefore, the County hired attorneys to assist in redistricting to comply with the one-man-one-vote Constitutional requirements of equal representation under the United States Constitution, as well as with the obligations imposed by other laws, including Texas statutes and the Texas Constitution. It was a minefield of a process. And even more so, time to maneuver that minefield was truncated, due to delayed Census data - August 13, 2021 (PL 94-174 format), and September 16 2021 for the more useable format.

Thomas Bryan, the County's demographer, did not consider race when drawing the

two map proposals.¹⁷ Mr. Oldham met with all Commissioners, incorporated their requests to the best of his ability, and had *two maps* provided to them to consider and begin politicking: a least-changes map (Map 1), and a coastal precinct map (Map 2). Plaintiffs point repeatedly to columns G through I on the “Pop Pivot” tab of an Excel spreadsheet. But Mr. Bryan explained that this analytic spreadsheet was his standard work product for every client regardless of assignment, and that he did not discuss racial data with the Commissioners or with Mr. Oldham during their various meetings. Day 8 Tr. at 44:3-21. That tab also discusses VAP (voting age population), not the legally significant measure of CVAP. PX 528, “Pop Pivot” tab. As Mr. Bryan testified, no one requested this information, and no one was reviewing this information. As discussed above, the commissioners (other than Commissioner Holmes) testified they did *not* consider racial data.

Nor can intent be inferred from the results of the maps alone. Doing so could impermissibly permit “discriminatory effects” evidence to override other relevant evidence. *See Rogers*, 458 U.S. at 618. More importantly, Map 1 eliminates such inferences. Even if the Court were to put aside partisanship and other design criteria and assume that those involved in the process had an insidious desire to eliminate a majority-minority precinct because of the impact on minorities, the creation and consideration of Map 1, which by all accounts maintained Precinct 3 as a majority-minority precinct, remains unexplained. The more reasonable inference is that racial discrimination was not

¹⁷ *See* Day 8 Tr. at 66:9-67:8 (Dale Oldham testimony about instructions to Mr. Bryan); Day 8 Tr. at 105:11-17 (Dale Oldham testimony that only Commissioner Holmes was concerned about racial data and the other commissioners were focused on the politics); Day 8 Tr. at 242:8-243:6 (Mr. Bryan testimony that race did not affect any lines drawn in either map proposal).

a purpose. Finally, inferences of racial intent are implausible given these facts:

- Map 1 maintained Precinct 3 as a 55% majority-minority precinct. Day 3 Tr. at 53:9-14.
- Commissioner Holmes knew Map 1 maintained Precinct 3 as majority-minority precinct. DX 164 at 6; DX 144 at 5.
- Commissioner Holmes did not advocate for (he advocated against) Map 1. *See* DX 149 at 74:23-75:17.
- Commissioner Holmes admitted he did not tell any of his constituents that Map 1 appears to allow them to elect a candidate of their choice. Day 7 Tr. at 120:9-11; *see also* Day 1 Tr. at 166:14-167:18 (McGaskey); Day 2 Tr. at 50:9-21 (Pope); Day 1 Tr. 99:11-17 (Rose).
- Commissioner Giusti and Judge Henry testified they would likely have voted for Map 1 with any advocacy from Commissioner Holmes. Day 7 Tr. at 238:12-16 (Henry); Day 9 Tr. at 99:19-100:3 (Giusti). Commissioner Apffel testified that Commissioner Holmes did not ask him to support Map 1. Day 9 Tr. at 330:23-25.

The only likely inference to be drawn from these facts is that, but for a refusal to participate in the political process, Map 1 might have been in place today. Had Commissioner Holmes simply participated in the political process and furnished his constituents with relevant information, he very well could have maintained a coalition precinct that, based on Plaintiffs view, would elect a Democrat who wanted to run for that office. These facts do not support an inference of racial intent on the part of the County.

3. Departures from the normal procedural sequence, and substantive departures

“Departures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role. But they also might not.” *Abbott I*, 601 F. Supp. 3d at 172 (citations omitted). Brevity in the process of enacting maps does not warrant a belief in nefarious intent where alternative explanations exist, such as the known significant delay

in the United States Census Bureau release of usable census data. *See id.* at 173 (“claim of discriminatory intent stemming from the delay [caused by 2021 Census Bureau data release] is “extraordinarily weak”); *Perez*, 138 S. Ct. at 2328-29 (“we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith”). Galveston County dealt with the same issues in this case; no discriminatory intent can be gleaned from the sequence of events here.

As discussed in Defendants’ Findings of Fact and Conclusions of Law filed with this Brief, the 2021 redistricting cycle was unprecedented in terms of timing. Mr. Oldham described the 2020 Census as “the worst census in over 100 years. Day 7 Tr. 30:11-12; FOF ¶¶160, 165.

However, just as in 2011, the County hired counsel. Just like in 2011, the County did not adopt redistricting criteria (on counsel’s recommendation).

In 2011, there were five public meetings in 2011, held after the County had maps in hand; those maps were to guide the public, give them something to see, and were displayed at every meeting. Day 7 Tr. 168:8-23. In 2021, the delayed data meant draft maps were not available until the eve of the adoption deadline. In 2021, the Texas Legislature passed Senate Bill 13, knowing that the Census data would be delayed. Under that bill, the Texas Secretary of State had the ability to alter statutory redistricting timelines due to the delay in releasing Census data. On November 1, 2021 (emailed on November 2nd), the Secretary of State issued an advisory informing Texas counties that they would be required to submit their redistricting plans by November 13, 2021. JX 33; JX 34.

In both 2011 and 2021, the County was criticized for its process. However, in each year the County did its best to provide draft maps to the public, seek comment, and pass a redistricting plan that complies with the law. COVID wrecked the time table for redistricting, as it did so many other election procedures across the nation. See e.g., *Cooper v. Raffensperger*, 472 F. Supp. 3d 1282, 1292 (N.D. Ga. 2020).

4. Legislative history

The legislative history factor focuses on statements of, legislators, in this case, the County Judge and Commissioners, relating to passage of the maps in question. *Abbott I*, 601 F. Supp. 3d. at 174. The statements of the members of the Commissioners Court suggest not discriminatory intent, but decision-making based on the needs of the County and general public support. As Judge Henry stated at the November 12, 2021 meeting, of the 440 online comments received before the meeting, Map 2 received more responses in support. PX 591 at 61-62. As discussed above and in Defendants' findings, the members' requests of redistricting counsel were based on geography, efficiency, incumbency and political motivations. FOF ¶¶252, 622, 747, 205.

Plaintiffs ignore the implication of partisan motivations to their case. For example, Plaintiffs called Commissioner Holmes to testify that Commissioner Apffel told him in a phone conversation shortly before the November 12 public meeting that he would favor Map 2 "because he wanted to be County Judge." Day 7 Tr. at 82:10-12. That particular statement is not documented in Commissioner Holmes' handwritten notes (JX-23 at 8 ("for political purposes")) and Commissioner Apffel denies making the statement. Day 9 Tr. at 328:25-329:6. However, even if the allegation were true, Holmes' story reveals nothing

more than political motivation—which, even if hidden, does not create liability here. *Abbott I*, 601 F. Supp. 3d at 175 (the legislative history suggests [bill supporters] were less than forthright about their motivations” for changing the district, but nothing indicated the change was for racial impacts). Plaintiffs suffer from the same deficiencies as those in *Abbott I*; namely that they “pointed to nothing - no stray remark, secret correspondence or suspicious omission – that would tend to indicate [bill supporters] acted even partially because of the racial impact.” *Id.* at 175-76. The legislative history provides no indication of intentional racial discrimination.

Commissioner Holmes’ October 28, 2021 understanding of Map 1’s configurations was buoyed just over a week later, on November 8th. He had hired Chad Dunn as his personal redistricting counsel and Mr. Dunn (who now serves as trial counsel for the Petteway Plaintiffs) had an analysis completed on the two proposed County maps. On November 8th, Mr. Dunn emailed that analysis in Word format to Commissioner Holmes, explaining:

County-Proposed Maps

Two maps proposed by the county were analyzed.

Galveston County Map 1

- County-proposed Map 1 makes only minor changes in the Benchmark map. The core neighborhoods within each precinct are maintained.
- The population deviation in majority minority Precinct 3 is resolved by adding heavily Republican Bolivar Peninsula precincts to the west, which reduces the Black CVAP in Precinct 3 to 32 percent, and the B + H CVAP to 55 percent. However, the district appears to continue to perform for Black and other minority voters.

DX 132 at 1 (for Nov. 8th date and attachment format) and DX 144 at 5 (emphasis added).¹⁸

¹⁸ Defendants submitted two variations of these emails so that date information is included for these emails. They were originally produced without dates, as shown in DX 144.

Despite knowing that Map 1 would perform for minority voters, Commissioner Holmes chose not to advocate for Map 1, and instead openly opposed *both* map proposals to the public. *See* PX 591 starting at 68 (Map 2) and 74-75 (Map 1). With respect to Map 1, he condemned the inclusion of Bolivar Peninsula because it is predominantly Anglo (*see* PX 591 at 75), but said nothing to the public about the fact that the number of Bolivar Peninsula voters would not alter Precinct 3’s majority-minority status, or about the fact that Precinct 3 was underpopulated by approximately 8,000 voters. JX 23 at 1 (Commissioner’s handwritten notes from September 20, 2021 that he needs to gain 8,000 people).

Mr. Dunn also provided two maps to Commissioner Holmes on November 8th. DX 132. Commissioner Holmes brought poster-board-sized copies of those maps to the November 12, 2021 special meeting. He did not attempt to make a motion to adopt them at the meeting, he did not provide copies to the other commissioners or anyone at the County before the meeting, and did not mention to anyone with the County that he was having alternative maps prepared. Instead, he unveiled them at the very end of the meeting, only after a motion was made to adopt Map 2. *See* PX 129, video at 1 hour 30 minutes.

5. Additional Factors to Consider

a. Presumption of Good Faith

The presumption of legislative good faith has not been overcome here. To prevail on their intentional discrimination claim, they must overcome “the presumption of good faith that must be accorded legislative enactments.” *Miller*, 515 U.S. at 916. In this area, the law puts a finger on the scale in favor of the County. *Abbott I*, 601 F. Supp. 3d at 179. Additionally, that presumption applies, even if there were a “finding of past

discrimination.” *Perez*, 138 S. Ct. at 2324–25.

There is no evidence to defeat the presumption of legislative good faith here. The Galveston County Commissioners have spent their whole lives in Galveston County and they brought their lifetime of local knowledge to bear in drafting and enacted the 2021 Map. The local knowledge that these Commissioners have about how best to meet local needs is reflected in the Map that they chose. Their good faith in enacting a plan that best reflects the needs of the County they love must also be presumed.

b. Irrelevant Circumstantial Evidence

Plaintiffs have recounted reams of irrelevant, circumstantial evidence of ill intent. These points, discussed below and in Defendants’ findings (such as the Confederate statute Mr. Neeley’s arrest or sending constables to the border), do not show discriminatory intent. FOF ¶¶582, 610, 611. They do not even fit into the *Arlington Heights* factors discussed above. Opposing the unlawful entry of aliens into the United States is both a legitimate (if debatable) policy position and one comporting with federal law as it currently exists. *See Arizona v. United States*, 567 U.S. 387, 395- 96 (2012).

D. Fourteenth Amendment Racial Gerrymandering: Plaintiffs Have Provided No Proof That Race “Predominated” The County’s Decision-making.

The essence of a [racial gerrymandering claim] . . . is that the [government] has used race as the predominant basis for separating voters into districts. *Harding, Texas*, 948 F.3d 302, 312 (5th Cir. 2020). Given that Plaintiffs are unable to make a showing of the requisite intent to form an intentional discrimination claim, Plaintiffs certainly cannot meet the even higher burden to show that race was the “predominant” factor in drawing and adopting

Map 2—that other considerations were subordinated to race. *See Abbott I*, 601 F. Supp. 3d at 161. The legal standard for racial gerrymandering claims is extremely high. Additionally, the presumption of legislative good faith is a further insurmountable legal hurdle for the NAACP and Petteway Plaintiffs. *Id.*

There is no evidence that race predominated when drawing the maps, or that Defendants subordinated traditional principles to race. Plaintiffs’ expert William Cooper testified he had no problems with the municipal splits in the 2021 Map, or its compactness scores. Day 3 Tr. 106:1-15; 111:16-24. He did not conduct any political performance analysis, so he could not opine on whether the traditional redistricting criterion of political affiliation was satisfied. Day 3 Tr. 112:15-22. He testified the enacted plan did not pair any of the incumbents. Day 3 Tr. 112:9-14. Lastly, he testified the 2021 Map is contiguous. Day 3 Tr. 45:8-10, 46: 6-13. Traditional redistricting criteria were not subordinated to race.

As discussed above, Plaintiffs’ evidence fails to meet the relevant factors under *Arlington Heights*. As Plaintiffs failed their burden to show intent on their intentional vote dilution claim, they certainly cannot meet the higher burden of showing race was the “predominant” factor on their racial gerrymandering claim. Without proof of their gerrymandering claim, the Court need not consider whether Defendants have shown use of race was narrowly tailored to a compelling interest. *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 653 (1993)). The Constitutional claims must be dismissed.

III. Plaintiffs’ Voting Rights Act Claims Fail

At the outset, neither the Constitution nor the VRA guarantees proportional representation. Section 2 expressly states that “nothing in this section establishes a right to

have members of a protected class elected in numbers equal to their proportion in the population.” 52 U.S.C. § 10301(b). Minority groups are “not constitutionally entitled to an apportionment structure designed to maximize its political advantage” and have “no federal right to be represented in legislative bodies in proportion to their numbers in the general population.” *Panior v. Iberville Par. Sch. Bd.*, 536 F.2d 101, 104 (5th Cir. 1976) (internal quotations omitted). To the extent Plaintiffs contend proportional representation on the Commissioners Court is required, their claims fail.

A. The record shows no majority-minority district could exist for Black or Hispanic citizens alone, and a coalition district is not contemplated under the VRA.

The County’s Black population is currently 12%. DX 290 at 5. Its Hispanic population is 25%. *Id.* The County cannot maintain a majority-minority district, including Precinct 3, unless Black and Hispanic voters form a coalition.

As Defendants argued at summary judgment, the VRA does not provide a cause of action for a coalition of minority plaintiffs. *See* Dkt 176 at 17-19. The Fifth Circuit has permitted coalition claim since its decision in *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc). But since then several circuits have held the VRA does not permit coalition claims. *See Hall v. Virginia*, 385 F.3d 421, 431-32 (4th Cir. 2004); *Nixon v. Kent County*, 76 F.3d 1381, 1392-93 (6th Cir. 1996); *Frank v. Forest County*, 336 F.3d 570, 575-76 (7th Cir. 2003). These cases are consistent with Judge Higginbotham’s dissents in *LULAC v. Midland ISD* and *Campos v. City of Baytown*. *See LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on reh.*, 829 F.2d 546 (5th Cir. 1987); *Campos v. City of Baytown*, 840 F.2d 943, 945 (5th Cir. 1988)

(Higginbotham, J., dissenting from denial of reh. en banc). They are also consistent with Judge Jones' concurring opinion in *Clements*. See *Clements*, 999 F.2d at 894 (Jones, J., concurring). The issue of whether a minority coalition can raise a VRA claim may be ripe for Supreme Court review, and Defendants re-urge that argument here.

Even if the VRA permitted coalition claims, Plaintiffs cannot meet their burden. Plaintiffs must establish three preconditions under *Gingles*¹⁹ to establish a VRA claim. Each precondition must also be shown on the challenged precinct level. See *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). If all three *Gingles* preconditions are shown, Plaintiffs next have the burden of establishing that the “totality of the circumstances” support a finding of vote dilution. *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (cleaned up).

B. *Gingles* I Compactness

Under *Gingles* 1, the Plaintiffs must show that a CVAP majority of Black and Hispanic voters are, together, sufficiently large and geographically compact (reasonably configured) to constitute a majority in a single-member precinct.²⁰ *Allen*, 143 S. Ct. at 1503; see also *Gingles*, 478 U.S. at 50; *Robinson v. Ardoin*, 37 F.4th 208, 216 (5th Cir. 2022) (plaintiffs must first define the minority group). A district is reasonably configured when it complies with traditional redistricting criteria, including contiguity, compactness, and whether it constitutes a community of interest. *Allen*, 143 S. Ct. at 1503; *Bush v. Vera*,

¹⁹ *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

²⁰ Defendants maintain their position that the VRA does not permit coalition claims among minority groups to satisfy *Gingles* I to preserve the argument, though Defendants understand the Court has rejected this argument.

517 U.S. 952, 997 (1996); *see also Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997).

In considering whether *Gingles I* is met, the Court should look at the connection of the community proposed. This is because one cannot conclude that race makes voters “think alike” or “share the same political interests” or “prefer the same candidates at the polls.” *Perry v. LULAC*, 548 U.S. 399, 433 (2006) (quotation omitted). Thus, “a district that combines two far-flung segments of a racial group with disparate interests” does not support a *Gingles I* finding for a plaintiff. *Id.* The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district. If the minority population is so dispersed that “a reasonably compact majority-minority district cannot be created” there is no requirement under § 2 for a majority-minority district. *Bush*, 517 U.S. at 979. Plaintiffs failed to provide sufficient proof of *Gingles I*, and consistently refuse to acknowledge the need to do so.

As Defendants argued in their motion for summary judgment, the Fifth Circuit has rejected long, narrow jurisdictions drawn for the purpose of connecting disparate minority communities. *See* Dkt. 176 at 28-29 (citing *Sensley*, 385 F.3d at 597). Plaintiffs’ expert Cooper presented maps that were just as long (18 miles) to connect minority populations—except he connected communities in the northern part of Galveston County with those on Galveston Island. All of his Illustrative Plans, precinct 3 contain portions of Texas City and League City. Day 3 Tr. 157:9-20; 158:15-18. Cooper’s view is that there is a “large disparity” between the Texas City and League City communities and it “makes no sense” to consider them one unit “because the two places are totally different. Day 3 Tr. 183:3-10; 190:22-191:6; *see also* FOF paras. 316 (socio-economic and degree data); 317 (poverty

levels); 318 (earning capacity); 321 (homeownership).

Plaintiffs cannot meet this burden. As Ms. Lucille McGaskey testified for the Plaintiffs on the first day of trial, there are primarily two Black communities in the County—one in Galveston and another in the Texas City/La Marque area. The Hispanic community, however, is not compact like that, it is “all over the place,” fairly well assimilated within the County. Day 1 Tr. at 167:12-168:4. Experts, Drs. Barreto and Alford, testified about voter cohesion. Primary elections are relevant, show divisions within political coalitions, and remove the partisan affiliation factor present behind behavior in general elections. Dr. Alford analyzed several primary elections. *See* DX 305 at Tables 2 & 3. Dr. Barreto discounted primary elections. As the *Abbott II* court concluded, “whether general elections are sufficient to satisfy the legal criterion of voter cohesion is outside Dr. Barreto's stated field of expertise.” *LULAC v. Abbott*, 604 F. Supp. 3d 463, 499 (W.D. Tex. May 23, 2022) (“*Abbott II*”). Dr. Barreto’s conclusions therefore warrant little weight.

Lay testimony shows a lack of Black and Hispanic voter cohesion. Roxy Williamson, who grew up in Galveston and was hired by the SCSJ as a mapping (redistricting) fellow, emailed Commissioner Holmes for advice about who would sign onto an advocacy letter she was helping to put together. DX 97. She said, “I was hoping you could offer some suggestions. I am planning to ask . . . The SD11 Tejanos to sign on, I’m at a loss for who else to consider.” *Id.* This further evidences that a political alliance to battle redistricting and save a Democratic precinct is not a community of interest.

It matters who is combined in a district, not merely that it is possible to combine people with similar skin color into a district. Whether a community of interest—not just

people of the same race who live in different cities miles apart—can be combined into a single precinct is a *Gingles* I or a totality analysis need not be decided here, following the presentation of evidence in a trial to the Court. Plaintiffs’ expert Anthony Fairfax did not look to the issue of whether a community of interest was contained within his proposed map. Day 4 Tr. 159:5-18. Nor did Dr. Rush. *Id.* 59:14-22. The Plaintiffs fail to establish adequate geographic, historic, or other interests beyond politics or socioeconomic status to join Black and Hispanic voters. The clearest evidence that these separate communities do not form a community of interest are the disparate locations of the Black and Hispanic communities within the County. County-wide, it is clear that Hispanic CVAP is rather evenly disbursed, while Black CVAP is not. As shown below, **more than 2 times** the number of the Hispanic CVAP lived outside of the old Precinct 3 than in it, while more of the Black CVAP lived inside Precinct 3, than outside it:

Table 1: Comparison of Citizen Voting Age Population, by Precinct and Plan

	Benchmark HCVAP	Benchmark BCVAP	Benchmark WCVAP	Enacted HCVAP	Enacted BCVAP	Enacted WCVAP
Precinct 1	12125 (20.1%)	5093 (8.4%)	41079 (68.0%)	13274 (21.7%)	6403 (10.4%)	39296 (64.2%)
Precinct 2	11056 (16.6%)	5375 (8.1%)	47201 (70.8%)	13250 (20.5%)	9121 (14.1%)	40186 (62.2%)
Precinct 3	13311 (24.2%)	16904 (30.7%)	22833 (41.5%)	10436 (18.8%)	5032 (9.1%)	35881 (64.8%)
Precinct 4	9470 (16.6%)	3093 (5.4%)	40337 (70.5%)	9002 (15.5%)	9909 (17.0%)	36087 (62.1%)
Total	45962	30465	151450	45962	30465	151450
Not in P3 (Pct of Total)	32651 (71.0%)	13561 (44.5%)	128617 (84.9%)			

DX 290 at 3 (highlighting added).

Galveston County’s population increased by almost 60,000 people from 2010 to 2020. The Hispanic proportion of the County’s population increased from 22% to 25%,

while the Black proportion of the population decreased from 14% to 12%:

Table 1: Change in Galveston County from 2000 to 2010 to 2020

	2000	2010	2020
Total Population	250,198	291,309	350,682
Ideal Precinct Population (4)	62,550	72,827	87,671
Hispanic Population	44,939 (18%)	65,270 (22%)	88,636 (25%)
NH Black Population	38,179 (15%)	39,229 (14%)	43,120 (12%)
NH White Population	157,851 (63%)	172,652 (59%)	191,358 (55%)

DX 290 at 5. Much of this population increase occurred in the north and in League City. FOF ¶¶ 45, 165. Even though the Hispanic population is currently twice the size of the Black population, and even factoring CVAP numbers into the analysis, each of Plaintiffs’ proposed plans (from their experts Cooper, Fairfax and Rush) place a higher percentage of Black CVAP in their illustrative plans, than Hispanic CVAP. DX 290 at 4 (Appendix A).

The emphasis on Black CVAP and Black communities in La Marque and on Galveston Island, over Hispanic CVAP and Hispanic communities, is reminiscent of Mr. Compian’s criticism of the 2011 settlement map required by the DOJ: “The plan undervalues Latinos.” DX 26. He explains the settlement map “and absolutely does not recognize the growth of the Latino population in this County,” called the DOJ’s attention “only” to “African American percentages” “repugnant,” and stated that “our Latino congregations and organizations are beginning to believe that the DOJ places a greater value on the voting rights of African Americans.” JX 8.

C. *Gingles* II– No Cohesion Between Black and Hispanic Voters

Gingles II and III are often addressed together. *Harding*, 948 F.3d at 308. *Gingles* II asks whether members of the minority group vote cohesively. Minority political cohesion

is usually shown through proof of “a significant number of minority group members usually vot[ing] for the same candidates.” *Id.* “[I]f the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.” *Campos*, 840 F.2d at 1245. While there is no clear threshold percentage for voter cohesion, it is clear that 51% falls “far short of the large majority typically required to show political cohesion.” *Abbott II*, 604 F. Supp. 3d at 499. Finally, in dealing with coalition districts courts do not hesitate to dismiss cases proposing coalition districts based on Plaintiffs’ failure to meet the second *Gingles* precondition. *See, e.g., Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1216 n.21 (5th Cir. 1996); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989).

i. Hispanic Confidence Intervals are Problematic

Dr. Alford testified that, because of the broad confidence intervals with Latino election results, “we do not know with the same certainty what Hispanic voters are doing in Galveston County as to the degree of certainty we have for what Black and Anglo voters are doing.” Day 10 Tr. 65:8-16. Accordingly, there is a “level of uncertainty with Latino vote estimates that’s a little greater there. It can reflect issues like the heterogeneity of distribution.” Day 10 Tr. 65:17-22.

Dr. Barreto agreed that Hispanic voter cohesion levels “were not consistently above 75%” in his analysis. Day 3 Tr. 233:5-22. He also acknowledged that his own analysis revealed wider confidence intervals for Latino voter cohesion than for Black or White voters. Day 3 Tr. 290:13-291:1. Barreto ignored the wider confidence levels. Of the 29 elections he analyzed, the Latino intervals ranged from as narrow as 20 points (Texas

Supreme Court Position 5 race) to as wide as 34.4 points (2022 TX-14 Congressional race). FOF ¶ 60. These confidence intervals were even broader when Spanish surname turnout adjusted was used. The confidence intervals were consistently 40 points wide. (Barreto Report, PX 384 at 35-37; Day 3 Tr. 294:22-25, 295: 1-19.

ii. Primary Data Is Useful and Shows Cohesion Is Nonexistent

By comparing nonpartisan and primary elections to partisan elections, partisanship can be disentangled from race. But even if they cannot be disentangled, Plaintiffs still cannot meet their burden to show redistricting was “on the basis of race”—because equally plausible explanations exist in the record, including partisanship, incumbency, and geography. Plaintiffs cannot relieve themselves of the burden to demonstrate proof of cohesion by ignoring primary election evidence. The VRA does not protect partisan impacts. As credited in *Abbott I*, primary elections are relevant in analyzing divisions within political coalitions. *Abbott I*, 601 F. Supp. 3d at 166. Yet, Plaintiffs expert either wholly refuse to analyze primaries or completely discount their results.

As discussed in the Findings filed with this brief, Dr. Barreto’s position on primaries in this case is inconsistent with his views in other matters, Day 10 Tr. 53:24-54:10; in one such situation Dr. Barreto and Dr. Oskooii co-authored a report, looked at a Democratic primary election having the same level RPV as the general elections and used that information to conclude that the voting results are independent of the influence of partisanship. *See* Day 10 Tr. 55:4-21. Yet, they refuse that exercise in this case. As Dr. Alford shows, Dr. Barreto attempts to turn clear evidence of party polarization in partisan general elections into evidence of racial polarization, with no local analysis. *See* DX 306

at 7-8 (Dr. Alford’s Report reviewing Dr. Barreto’s comments on the 2008 Democratic presidential primary where Black voters supported President Obama at approximately 80% while Latino voters supported Anglo candidate Hilary Clinton). Dr. Alford concluded that primary-election results are useful to determine whether racially polarized voting exists and “can help sort of get a clearer picture of what happens absent that really strong party cue.” Day 10 Tr. 23:11-24:3; 25:5-17.

Table 3: Combined ‘RxC’ Estimates from Dr. Trounstine’s Tables on Pages A-27 through A-29 with Additional Replication Results

Election Date	Office	Candidate	Ethnicity	Won	Trounstine RxC EI Estimate			Replication RxC EI Estimate		
					Latino	Black	White	Latino	Black	White
24-May-22	Attorney General	Jaworski, Joe	W	0	26.26	77.5	73.62	69.2%	66.8%	71.5%
24-May-22		Garza, Rochelle Mercedes	L	1	73.55	22.51	26.44	30.8%	33.2%	28.5%
24-May-22	Compt. of Public Accounts	Dudding, Janet	W	1	18.57	67.21	82.05	63.7%	61.2%	65.3%
24-May-22		Vega, Angel Luis	L	0	81.25	32.83	17.99	36.3%	38.8%	34.7%
24-May-22	Comm. of General Land Off.	Martinez, Sandragrace	L	0	86.23	74.47	35.71	51.1%	65.3%	49.6%
24-May-22		Kieberg, Jay	W	1	13.66	25.6	64.3	48.9%	34.7%	50.4%
1-Mar-22	U.S. House Dist 14	Williams, Mikal	W	1	76.43	12.83	57.39	45.5%	38.3%	46.7%
1-Mar-22		Howard, Eugene	B	0	23.64	87.13	42.64	54.5%	61.7%	53.3%
1-Mar-22	Lieutenant Governor	Collier, Mike	W	1	9.25	18.29	49.88	34.6%	25.1%	42.5%
1-Mar-22		Brailey, Carla	B	0	46.83	55.18	22.8	34.2%	46.1%	30.4%
1-Mar-22		Beckley, Michelle	W	0	49.99	24.11	26.24	31.2%	28.8%	27.1%
1-Mar-22	Attorney General	Jaworski, Joe	W	Run Off	18.13	24.8	50.43	44.2%	34.3%	56.7%
1-Mar-22		Garza, Rochelle Mercedes	L	Run Off	43.57	7.34	26.65	21.6%	18.7%	18.5%
1-Mar-22		Merritt, Lee	B	0	15.97	41.57	13.08	14.5%	29.1%	12.0%
1-Mar-22		Fields, Mike	B	0	15.50	21.67	6.54	13.5%	13.8%	7.8%
1-Mar-22		Raynor, S. "TBone"	W	0	10.90	4.62	2.37	6.2%	4.1%	5.0%
1-Mar-22	Compt. of Public Accounts	Dudding, Janet	W	Run Off	23.58	45.9	61.21	46.7%	45.6%	49.9%
1-Mar-22		Vega, Angel Luis	L	Run Off	68.82	18.17	18.47	32.8%	30.1%	26.8%
1-Mar-22		Mahoney, Tim	W	0	8.91	35.42	20.09	20.5%	24.3%	23.3%
1-Mar-22	Comm. of General Land Off.	Martinez, Sandragrace	L	Run Off	86.11	25.22	26.97	42.3%	41.3%	31.2%
1-Mar-22		Suh, Jinny	W	0	19.82	30.73	22.14	18.7%	25.8%	25.0%
1-Mar-22		Kieberg, Jay	W	Run Off	5.47	5.64	33.01	25.0%	12.0%	27.5%
1-Mar-22		Lange, Michael	W	0	3.94	36.62	14.64	14.0%	20.9%	16.3%

DX 305 at 18 (emphasis added). As show above, using Dr. Trounstine’s techniques and definitions, Latinos and Blacks are cohesive in only 1 of 8 primary elections in Trounstine’s table. Day 10 Tr. 29:13-21; 30:9-17. Looking at Dr. Alford’s “Replication” of Trounstine’s work on the far right columns with a 75% cohesion requirement Black and Latino voters are cohesive in zero elections. Even using Dr. Trounstine’s lower cohesion limit, Black

and Latino voters are cohesive for the same candidate in 5 out of 8 primary elections; but in all of those 5 elections, Anglo voters are voting for the same candidates as Latino and Black voters. Day 10 Tr. 29:23-30:2. None of the primary elections on Table 2 (DX 305, at 18) show racially polarized voting. Day 10 Tr. 30:18-31:3. The problem with the 60% cohesion threshold Dr. Trounstine adopts, is that her Bayesian regression analysis does not prevent out-of-bounds results (meaning that adding up the estimates for each candidate in election could result in a number higher than 100). It is therefore difficult to determine where the cutoff should be. Day 10 Tr. 33:5-34:4. Additionally, it is problematic for Dr. Trounstine to call elections racially polarized where Black and White voters vote for candidate A while Latino voters vote for candidate B—since the claimed minority group in this case is a *coalition*. Day 10 Tr. 34:12-35:3. This problem is particularly glaring where Latino and Black voters choose different candidates, no matter how Anglo voters vote. Yet, Dr. Trounstine would categorize those elections as racially polarized. Day 10 Tr. 35:20-36:12. Regardless, the Court is tasked here with determining whether or not Hispanic-supported candidates receive Black support and vice-versa “in most instances.” *Brewer*, 876 F.2d at 453.

The Democratic primary results for Galveston County Commissioner and 1 out of 6 primary elections, using Dr. Trounstine’s definitions and techniques, suggest Latino and Black voters’ cohesion for the same candidate. Day 10 Tr. 31:23-25, 32: 1-2. And in the one election where Latino and Black voters were cohesive, Anglo voters also voted for the same candidate. Day 10 Tr. 32: 3-7. Under Dr. Alford’s technique, however, zero out of six elections are racially polarized. *Id.* at 32:11-14.

Table 4: Combined ‘RxC’ Estimates from Dr. Trounstine’s Tables on Pages A-22 through A-24 with Additional Replication Results

Galveston County Commissioner - Democratic Primary					Trounstine RxC EI Estimate			Replication RxC EI Estimate		
Election Date	Precinct	Candidate	Ethnicity	Won	Latino	Black	White	Latino	Black	White
12-Mar-02	2	Eddie Janek	W	1	39.36	59.69	61.21	52.6%	59.2%	65.3%
12-Mar-02	2	Rosie Morales	L	0	61.49	38.68	38.56	47.4%	40.8%	34.7%
9-Mar-04	1	Patrick Doyle	W	Run Off	19.92	31.54	55.74	34.5%	31.3%	51.0%
9-Mar-04	1	John Ford		Run Off	45.55	18.57	16.62	23.8%	24.5%	22.5%
9-Mar-04	1	Tom Butler		0	6.71	30.06	3.15	3.4%	4.3%	1.6%
9-Mar-04	1	Larry Edrozo	L	0	20.43	34.48	20.43	18.5%	17.8%	12.6%
9-Mar-04	1	Dianna Puccetti	W	0	25.09	52.43	25.09	19.8%	22.1%	12.3%
13-Apr-04	1	Patrick Doyle	W	1	33.65	48.73	74.11	58.5%	52.5%	69.7%
13-Apr-04	1	John Ford		0	66.10	51.52	25.9	41.5%	47.5%	30.3%
7-Mar-06	2	Bryan Lamb	W	1	39.19	34.87	58.41	57.5%	42.4%	59.2%
7-Mar-06	2	Robert Cheek	W	0	16.62	40.78	20.93	21.4%	18.6%	23.6%
7-Mar-06	2	Nick Stepchinski	W	0	16.48	34.1	14.03	12.5%	18.0%	11.7%
7-Mar-06	2	John Bertolino	W	0	49.80	28.74	2.05	8.6%	21.0%	5.5%
4-Mar-08	3	Stephen Holmes	B	1	36.28	53.1	66.53	50.1%	62.0%	51.2%
4-Mar-08	3	Eugene Lewis	B	0	32.40	48.25	12.28	25.0%	31.2%	24.3%
4-Mar-08	3	Robert Hutchins	W	0	20.45	1.6	29.34	24.9%	6.7%	24.5%
29-May-12	3	Stephen Holmes	B	1	77.88	95.35	85.81	85.1%	94.8%	85.1%
29-May-12	3	James Hobgood	B	0	22.10	4.66	14.24	14.9%	5.2%	14.9%

DX 305 at 18 (emphasis added).

To test whether her “conclusions were not dependent upon the presence of partisan labels,” Dr. Trounstine also analyzed ten nonpartisan general elections. Dr. Alford agreed with that reason. Day 10 Tr. 14-22. These elections are probative because turnout was much higher there than in primary elections: 14.9% (Latino voters), 33.6% (Black voters), and 30.6% (Anglo voters). PX 476 (Trounstine Second Corrected Report) at ¶57). Table 5 from Dr. Alford’s report depicts the results of Dr. Trounstine’s nonpartisan general election studies along with his replication. Using Dr. Trounstine’s liberal techniques and definitions of cohesiveness, Latinos and African Americans are cohesive for the same candidate in 5 out of 10 elections. Day 10 Tr. 39:24-40:22; DX 305 at 20, Table 5 (Appendix B). Using Dr. Alford’s replication, cohesiveness is not apparent between Black and Latino voters for a single candidate in the ten nonpartisan general elections. Day 10 Tr. 40:23-41:11. Importantly, these elections are both recent and comprehensive in that they include

populations from the most densely populated parts of the County. DX 305 at 20, Table 5; PX 386 at 8 Fig. 1, at 13 Fig. 4 (Cooper Report showing that League City, Galveston, La Marque and Texas City account for 235,488 of the County's 350,682 total population).

iii. Where Black and Latino voters support the same candidate, Anglo voters generally support the same candidate.

Dr. Alford next analyzed Dr. Oskooii's results and conclusion. Across primary elections in Galveston County, Anglo voters are generally voting consistently with Black and Latino voters. DX 305 at 14, Table 2 (Appendix C). But in elections where Anglo voters are not clearly supporting candidates supported by Latinos and African Americans, either the Anglo vote is split or the Latino/Black vote is split. *Id.* In the 2018 election for Comptroller, the Black vote was evenly divided between the Anglo candidate (Mahoney) and the Black candidate (Chevalier). The same is true for Anglo voters, with Anglo voters slightly preferring the Black candidate (Chevalier). *Id.* A similar pattern can be observed in the 2018 primary election for Commissioner Land Office between Suazo and Morgan. The Anglo voters supported the Latino candidate (Suazo) with 60.9% of the vote, while the Black and Latino vote were divided between the Latino candidate (Suazo) and the Anglo candidate (Morgan). *Id.* Also relevant is the 2018 Railroad Commissioner election between an Black candidate (Spellmon) and the Anglo candidate (McAllen). There, Black and Latino voters supported Spellmon, while Anglo voters were divided (but leaning towards Spellmon). *Id.* The Texas Supreme Court elections likewise follow this pattern. *Id.* In sum, of the ten primary elections that Dr. Oskooii studied, eight were racially contested. In these eight elections, Anglo voters voted for the minority candidate seven

times. *Id.* (2020 elections: Supreme Court Justices 8, 7, 6, 4; 2018 elections: Comptroller, Railroad Commissioner, Commissioner Land Office).

Additionally, using a 60% threshold for cohesion, Blacks and Latinos are cohesive for the same candidate in only 6 out of 10 elections, “a far different pattern from that seen in the partisan general elections.” DX 305 at 14. And again, unlike the partisan general elections, Anglo voters were generally agreeing with Latinos and Blacks. Dr. Alford concluded in his report that Anglo voters are certainly not blocking the Black and Latino candidates of choice. *Id.* Cohesion of Black and Hispanic voters is absent from primary elections in Galveston County.

iv. *Gingles* III – Separate Consideration of White bloc voting

Gingles III requires a challenger to prove an “amount of white bloc voting that can generally ‘minimize or cancel’ black voters’ ability to elect representatives of their choice.” *Gingles*, 478 U.S. at 56 (citations omitted). The question is not merely “whether white residents tend to vote as a bloc, but whether such bloc voting is ‘legally significant.’” *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) (citation omitted). “[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.” *Voinovich*, 507 U.S. at 158. That is, “[i]n areas with substantial crossover voting” a challenger cannot “establish the third *Gingles* precondition—bloc voting by majority voters.” *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality op.). The third *Gingles* precondition is to determine whether Anglo voters “thwart[] a distinctive minority vote *at least plausibly on account of race.*” *Allen*, 143 S. Ct. at 1503 (emphasis added).

“[D]iscriminatory effect under Section 2 is specifically defined and is sometimes difficult to meet.” *Abbott II*, 604 F. Supp. 3d at 492. “[P]artisan motives are not the same as racial motives.” *Brnovich*, 141 S. Ct. at 2349. Plaintiffs must show that a majority of the white citizen voting age population votes sufficiently as a bloc to enable it—absent special circumstances—to usually defeat the minority coalition’s preferred candidate; *i.e.*, evidence that the white bloc vote normally defeats the combined strength of minority support plus white “crossover” votes. *Rangel v. Morales*, 8 F.3d 242, 245 (5th Cir. 1993). Unlike for the second precondition, this must be proved in regard to the *challenged* map, not Plaintiff’s proposed map. *See LULAC v. Abbott*, 2022 WL 4545754, at *5 (W.D. Tex. Sept. 28, 2022) (explaining the second and third *Gingles* preconditions “are not mirror-image requirements for different racial groups” and a plaintiff “must show the second precondition for the minority population that would be included in its proposed district” while “the third precondition must be established for the challenged districting”). Minority electoral success and “racially polarized voting” are the two most probative factors in evaluating the merits of a Section 2 dilution allegation. *LULAC # 4552 v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 848 (5th Cir. 1997) (citing *Clark v. Calhoun Co.*, 88 F.3d 1393, 1397 (5th Cir. 1996)).

The third *Gingles* precondition requires a challenger to prove an “amount of white bloc voting that can generally ‘minimize or cancel’ black voters’ ability to elect representatives of their choice.” *Gingles*, 478 U.S. at 56 (citations omitted). The question is not merely “whether white residents tend to vote as a bloc, but whether such bloc voting is ‘legally significant.’” *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th

Cir. 1993) (en banc) (citation omitted).

1. Partisanship is the best explanation for majority voting behavior.

Partisan affiliation is the main driver of voter behavior, rather than race. *See Abbott I*, 601 F. Supp. 3d at 166. First, Dr. Oskooii's report contains examples of elections where Anglo voters vote at equivalent levels for both non-white and Anglo candidates, such as the 2018 election for the Commissioner of Texas General Land Office where Anglo voters voted for Republican George P. Bush, a Latino candidate, by generally equal or greater margins (87.8% in Precinct 1, 78% in Precinct 2, 92.% in Precinct 3, and 84.1% in Precinct 4) in comparison with other Anglo candidates on the ballot in that same election. *See Pls.' Ex. 356, Oskooii Rpt. at 20, Fig. 12.*)

Secondly, Dr. Alford testified that he interpreted the general election results analysis of Drs. Barreto, Trounstine, and Oskooii as depicting a pattern of partisan polarization that did not change based on the race of the candidate. Day 10 Tr. 68:24-69:9. Latinos and Blacks vote cohesively in general elections for Democratic candidates. Day 10 Tr. 14:23-15:17. Under Dr. Oskooii's general election analysis, Latinos consistently vote in general elections for Democrats in the low 70% range. Likewise, Blacks consistently vote for Democrats in the mid 90% range. Day 10 Tr. 49:16-50:2. Meanwhile, White voters vote for Republican candidates in the mid-80% range. Day 10 Tr. 14:23-15:17; 49:16-50:2. Dr. Alford testified that this shows polarization among these groups—but along party lines, not on account of race. Day 10 Tr. 51:12-19.

Dr. Alford testified that the stability of the partisan voting patterns in general elections remains the same regardless of the race of either the Republican candidate or the Democratic candidate. Day 10 Tr. 50:3-15. He noted two cues at issue in the general elections that Dr. Oskooii studied. One of those cues is party—i.e. the “D” or the “R” by the candidate which can produce “remarkably stable estimates.” The second cue is the race or ethnicity of the candidate “[a]nd it’s simply not producing any variation.” Day 10 Tr. 50:16-21. Again, the indicator shows a lack of voter concern for the race of the candidate. Dr. Alford concluded, the pattern of general election results that Dr. Oksooii analyzed demonstrates partisan polarization, rather than racial polarization. Day 10 Tr. 51:12-19. Figure 8 in Dr. Oskooii’s report clearly shows this. He notes that “it provides an opportunity for voting on the basis of race or ethnicity to be—to play out, as well as voting on the basis of the partisan identity of the candidates. And I don’t think the results are ambiguous.” Day 10 Tr. 51:20-52:3.

Dr. Alford concluded that, across general elections, the pattern that emerges from Dr. Barreto’s, Dr. Oskooii’s, and Dr. Trounstine’s analyses is that there is partisan polarization, not racial polarization in Galveston County. Day 10 Tr. 70:22-71:19. The only disturbances occur in the pattern of general election results when there is a corresponding disturbance in the two-party cue. Day 10 Tr. 20:20-22:5 (election between a Democrat and a Libertarian, 80.61% of the white vote goes to the Democrat; election between a Republican and an Independent, 62.18% of the Latino vote goes to the Republican).

Dr. Alford testified that Anglo voters in Galveston County are voting Republican at consistent rates, regardless of the race of the candidate. Day 10 Tr. 19:6-20:10. In the 2018

U.S. Senate election in Texas, Anglo voters voted for Latino candidate Ted Cruz over a White 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. Anglo voters had an opportunity “in the Republican primary to nominate someone other than Ted Cruz, but did not. He had Anglo opponents in the primary. ... I think he won about 85% of the vote in the Republican primary in Galveston County. So Republicans in Galveston County are willing to support Ted Cruz in the primary against Anglos and in the general election against Anglos.” Day 10 Tr. 53:1-16

Anglo voters voted for George P. Bush (a Latino Republican, and 2018 Republican nominee for Commissioner Land Office) at the same rates as other Anglo Republican candidates in that race. *See* PX 356, 366 (Oskooii Expert Report at 51, Figure 8 (Ex. C) (depicting Anglo votes for Republicans consistently between 80.1 and 86.5 with Anglo voters giving George P. Bush 84.6% of the vote).

Dr. Barreto’s analysis depicts the same pattern of partisan polarization in general elections. Day 10 Tr. 68:23-69:9. In short, partisanship is the most reasonable explanation for voter behavior. If “partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens,” then there is no “legally significant” racially polarized voting under the third *Gingles* precondition. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993). This is so because “[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party’s candidates.” *Id.* at 854 (emphasis added) (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361

(7th Cir. 1992)). Section 2 “is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats.” *Id.* On this point, Dr. Barreto tries to reframe what the data shows by asserting that partisan preferences are really racial preferences in disguise. He testified white Republican voters have negative racial views of Black and Hispanics. Day 3 Tr. 277:23-278:5. He did not look to any local data for that belief, or for a racial polarization claim. Day 3 Tr. 275:8-276:5; DX 306 at 708.

Republican voters in Galveston County are apt to vote with their party, regardless of name recognition on the ballot. Day 9 (Rough) Tr. 287:17-288:2. The protections of Section 2 of the VRA “extend only to defeats experienced by voters ‘on account of race or color.’” *Clements*, 999 F.2d at 850. That means that when “partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens” then there is no legally sufficient white bloc voting. *Id.*

Failures of a minority group to elect representatives of its choice that are attributable to “partisan politics” provide no grounds for relief. Section 2 is “a balm for racial minorities, not political ones.” *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (citation omitted).

In other words, the elections that matter for purposes of racially polarized voting are those where minority *candidates* are defeated by White candidates *because of* their minority status. *Citizens for a Better Gretna v. Gretna*, 834 F. 2d 496, 503-04 (5th Cir. 1987).²¹ Precedent makes this clear. “[I]mplicit in the *Gingles* holding is the notion that

²¹ Dr. Trounstine uses an unusual definition of “racially polarized voting,” claiming when white voters and Black voters vote cohesively for the same candidate, and Latino voters vote cohesively for a different

black preference is determined from elections which offer the choice of a black candidate.” *Id.* Without examining races featuring a minority candidate, it is impossible to know “the extent that candidates preferred by Black voters are consistently defeated because of their substantive political positions,” which makes them “casualties of interest group politics, not racial considerations.” *Clements*, 999 F.2d at 879. A Court must determine whether a Plaintiff has met their burden to show bloc voting is race-driven giving consideration to the fact that partisanship is often the cause for losses at the polls; otherwise, a “vote-dilution claims is a mere euphemism for political defeat at the polls.” *Lopez v. Abbott*, 339 F. Supp. 3d 589, 603 (S.D. Tex. 2018). Plaintiffs may not need to affirmatively show racial animus on behalf of the white voting bloc, but they must present evidence satisfying the Court that partisan affiliation was *not* the cause of any divergent voting patterns in the presented races. *Clements*, 999 F.2d at 879. It is unsurprising that there is partisan polarization in Galveston County when Dr. Trounstine testified that people vote based upon their political orientation. FOF ¶139.

D. The totality of the circumstances, or “Senate Factors,”²² weigh in favor of Defendants.

A totality analysis is a fact-intensive inquiry that “requires an intensely local appraisal of the design and impact of the contested electoral mechanisms.” *Harding*, 948 F.3d at 308-09. Additionally, what was relevant decades ago does not shed light on current conditions or needs. *See Shelby Cnty.*, 570 U.S. at 552-53.

candidate, there is a “racially polarized election.” Day 4 Tr. 217: 3-14. As far as Defendants are aware, no Court has characterized such elections as “racially polarized” for purposes of a Section 2 claim.

²² S. Rep. No. 97-417, at 28-29 (1982).

The VRA “imposes current burdens and must be justified by current needs.” *Nw. Austin v. Holder*, 557 U.S. 193, 202 (2009) (“Things have changed in the South. Voter turnout and registration rates not approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels”). As where the VRA’s coverage formula was based on stale data over 35 years old, and failed to consider current political conditions (such as the racial gap in voter registration and voter turnout rates), claims brought under Section 2 of the VRA cannot be based on stale facts. *See id.* at 203. Finally, in considering a Section 2 challenge, it is relevant to consider current conditions and how they have improved. *See Brnovich*, 141 S. Ct. at 2338-39 (“partisan motives are not the same as racial motives”).

With these guidelines in mind, the Senate Factors weigh in favor of Defendants.

Senate Factor 1 looks to the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process. **As detailed in Defendants’ findings, this factor weighs in favor of Defendants. FOF ¶¶532-560.** Galveston’s County Clerk is Hispanic, speaks Spanish, continues practices from the expired 2007 consent decree to ensure that voting is more accessible to minorities in the County, and engages in official outreach to minority voters with groups such as Plaintiff NAACP so there are no perceived barriers to voting. Day 10 Tr. 241:25-242:22. He takes voting machines to local schools to help educate about the electoral process and even run student council elections. Day 10 Tr. 242, 23-243:11. County-wide voting was adopted (after the County coordinated with LULAC). Day 10 Tr. 239:10-240:5. It is easy to register

to vote. Day 10 Tr. 245,12-15. Plaintiffs testified they vote regularly or, as Mr. Compian put it, “religiously.” Day 6 Tr. 63:23-64:4. Early voting lasts for 2 weeks. Day 1 at 155:23-157:1. Spanish language materials are available. Day 6 Tr. 82:3-6. And the County supports minority ‘get out the vote’ events like the Día de los Muertos event in front of the courthouse at 722 Moody, and Cinco de Mayo (organized by LULAC). Day 10 Tr. 235:17-25; 236:1; Day 9 Tr. 72:16-73:1.

Senate Factor 2 reviews the extent to which voting in the elections of the state or political subdivision is racially polarized. **As discussed above and in Defendants’ findings, this factor (which looks to the extent, not the existence of racially polarized voting), does not favor Plaintiffs, who have failed to give weight to primary and nonpartisan elections. FOF ¶¶561-563.**

Senate Factor 3 analyzes the extent to which the state or political subdivision has unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination. The election district is not unusually large; there must be 4 commissioner precincts under Texas law, and the County does not use tests or devices outlined in Senate factor 3, save for a state-mandated majority vote requirement, and does not use anti-single shot provisions. Day 10 Tr. 238:16-22. Constable Rose testified he is aware that voters cannot vote for more than one candidate per race (sometimes called “bullet” voting). Day 1 Tr. 84:9-13. **As discussed above and detailed in Defendants’ findings, this factor weighs in Defendants’ favor. FOF ¶¶564-566.**

Senate Factor 4 considers whether there is a candidate slating process and, if so,

whether the members of the minority group have been denied access to that process. **As discussed in Defendants’ findings, there is no candidate slating process in Galveston County. FOF ¶¶567-571.** This factor therefore weighs in favor of Defendants.

Senate Factor 5 considers the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which **hinder their ability to participate effectively in the political process.** Plaintiffs entered testimony about experiences under segregation, including in schools, at doctor’s offices, in restaurants and in public transportation. *See* Day 2 Tr. at 28:15-30:21 (Judge Pope); Day 6 Tr. at 218:1-13 (Rev. Randall). **They do not, as discussed in Defendants’ findings, connect this testimony to a hindrance of the ability to participate effectively in the political process. FOF ¶¶572-585.** Generic testimony “that individuals of lower socioeconomic status were not as likely to vote as individuals of higher socioeconomic status” does not meet the legal threshold. *Clark*, 88 F.3d at 1399. In *Clark*, the Fifth Circuit held that it was insufficient that an expert “based her conclusion on political science literature, not ‘an “intensely local appraisal” of the social and political climate’ of” the jurisdiction.” *Id.* at 1399. That is what Dr. Burch does here, and such evidence does not further a Senate 5 inquiry. Regardless, even if the Court finds Senate Factor 5 weighs in favor of Plaintiffs, that sole factor cannot control a totality finding.

Senate Factor 6 looks to whether political campaigns have been characterized by overt or subtle racial appeals .In the 20 years since Constable Rose has been politically active, he has not seen discriminatory campaigning in Galveston County. Day 1 Tr. 93:22-

94:2. Judge Pope testified her 1992 campaign for Justice of the Peace was enjoyable, without any mudslinging. Day 2 Tr. 18:5-14. Plaintiffs point to an isolated ad for a candidate who lost, and then cite, for example, a text message that was not part of a political campaign or a neighbor pulling a candidate's sign up from a yard. **As discussed above and detailed in Defendants' findings, that is not Senate 6 evidence, and the isolated event for a candidate who lost does not tip the Senate 6 scale in Plaintiffs' favor.** *See Clements*, 999 F.2d at 879 (5th Cir. 1993) (en banc) (two racial appeals, one of which resulted in the election of a Black candidate in both the Republican primary and the general election, were isolated incidents); **FOF ¶¶586-594.**

Senate Factor 7 looks to the extent to which members of the minority group have been elected to public office in the jurisdiction. As Judge Pope testified, minority candidates were elected before 1992 in the County. Day 2 Tr. at 16:11-20; *see also* DX 308. **As discussed in Defendants' Findings (Senate Factor 7), there are at least 39 minority representatives holding office across the County, at all levels of government, and at least 15 more who are former representatives. FOF ¶¶595-606.** To the extent Plaintiffs ask the Court to ignore any and all positions that are not at the County level, that would limit an important factor in a totality analysis to an unnecessary pinhole. *Gingles* requires a review of the Senate Factors "requires a searching practical evaluation of the past and present reality" of a jurisdiction's electoral system that is "intensely local," "fact-intensive," and "functional" in nature. 478 U.S. at 45-46, 62-63, 79. To truly consider the totality of the circumstances, and considering Plaintiffs' arguments span various jurisdictions throughout the County, considering all elections within Galveston County as

the challenged jurisdiction gives a fuller picture for a Senate factor analysis. *See NAACP v. Fordice*, 252 F.3d 361, 370 (5th Cir. 2001) (“district court was not barred from considering the Banks and Anderson elections in making its determination of minority electoral success regarding the offices of public service and transportation commissioner”); *see also Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1208, n.8 (5th Cir. 1989). Plaintiffs ask the Court to wear “judicial blinders” and limit the scope to County-wide elections. But the demonstrated success of minority candidates for County Clerk, judgeships, and Justice of the Peace positions illustrate to the broader electorate that circumstances are far different in Galveston County than they were six decades ago, and thereby creates a more favorable electoral environment for minority candidates. This is relevant and weighty evidence under a totality of the circumstances analysis. In Galveston County, extensive minority success is manifest and Senate factor 7 weighs in favor of Defendants.

Two enhancing factors have reduced weight in a totality analysis. The first looks to whether there is a *significant* lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. **This first factor is discussed below and detailed in Defendants’ findings. FOF ¶¶607-623.** Commissioner Giusti testified about County matching for La Marque roads and donations to Hitchcock. The County provides indigent healthcare and moved the indigency level from 25% to 100% of the federal poverty line. Day 6 Tr. 69:16-70:14, Day 7 Tr. (Rough) 234:17-23. The County spends approximately \$500,000 each year to keep all libraries within the County open to all County residents free of additional charge. Day 7 Tr. (Rough) 235:16-21. Plaintiffs’

references to a Confederate Statue and sending Constables to the border are not evidence of discriminatory intent. Rather, they evidence the Commissioners' resistance to removing history, especially where the plaque on the statue was removed (Day 9 Tr. 83:16-84:14), and the County's willingness to assist upon request from the State or when another County needs assistance. Day 7 Tr. (Rough) 238:13-239:4, Day 9 Tr. 85:23-86:8. The Kinney County Sheriff has expressed thanks for the help from Galveston deputies, who provide law enforcement help, which "a lot of it is really helping people," and the local ranchers have even volunteered their ranches to house the deputies. Day 9 Tr. 86:14-87:14.

The second enhancing factor, tenuousness, may have some relevance, namely whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. **This second factor is discussed below and detailed in Defendants' findings. FOF ¶¶624-636.** The 2020 Census numbers presented the County with a problem. Its four precincts had a total population deviation greater than 17% with Commissioner Precinct 3 being the most underpopulated at a -8.83% deviation, and a heavier population density in the northern part of the County. The population in the County had continued its northward movement, and the County needed a map that reflected that growth while still meeting the needs of those County residents on Galveston Island and the Bolivar Peninsula. Thus, there were many factors to consider. *See Chen v. City of Houston*, 206 F.3d 502, 507 (5th Cir. 2000) ("presentation of valid evidence of nonracial intent, which transforms the case into one of mixed motives, advances rather than hinders its case for summary judgment").

Among the factors considered was a request for a coastal precinct. As discussed in

Defendants' Findings, a coastal precinct would be more efficient by assigning one commissioner to interact with the various agencies involved with coastal issues, and makes more geographic sense. FOF ¶631. The 2021 Map has a 1.1% population deviation, meaning that every voter's vote is nearly as equal to the weight of other voters across the county. It also shifts the Commissioner Precinct boundaries north to account for the substantial population growth there. The 2021 Map minimizes voter tabulation splits which reduces both administrative confusion at the registrar's office as to where voters must be assigned for various elections and who the candidate is in each election for each voter. It also minimizes voter confusion so that they know which precinct they live in. The 2021 Map makes geographic sense. It does not look gerrymandered. It reflects County lines and reflects population growth. This enhancing factor weighs in Defendants' favor.

IV. Time Limitation For VRA Effects Claims

Section 2 of the VRA was a remedial statute for discrimination of other kinds, and from another time, and which are not implicated here and now. As with Section 5 and other forms of affirmative action, the racial sorting of voters required under Section 2 is too temporally distant from the wrongs it was built to remedy, and the lack of a temporal limit or termination mechanism in Section 2 no longer satisfies strict scrutiny. Racial classifications of voters are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). Racial distinctions under the VRA are therefore subject to strict scrutiny. *See id.* at 908. Remedying past or present racial discrimination may in the proper case justify a government's use of racial distinctions,

however, a generalized assertion of past discrimination is not adequate. *Id.* at 909-910. Citing *Hunt*, the Court struck down affirmative action in college admissions, requiring racial sorting “must be a temporary matter” with “reasonable durational limits.” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S.Ct. 2141, 2172-74 (2023). Similarly, in *Shelby County*, the Supreme Court struck down Section 5’s application to certain states based on an outdated coverage formula built on “decades-old data relevant to decades-old problems, rather than current data reflecting current needs.” 570 U.S. at 553. In *Allen v. Milligan*, Justice Thomas was joined by 3 other Justices in dissent, noting that these same principles should be applied to Section 2. 143 S.Ct. 1487, 1541 (2023) (noting Section 2’s lack of congruence between its commands and actionable constitutional wrongs, in part, for a lack of termination date, termination mechanism, nor spacial or temporal limit). Justice Kavanaugh’s concurrence specified that he had not considered the temporal limit argument because it had not been preserved. *Id.* at 1519. Had Kavanaugh considered the temporal limit argument under Section 2, a 5-justice majority might have reached a different result. Because Section 2 lacks a temporal limit, its application against Galveston County, requiring the racial sorting of voters on the basis of extinct discriminatory practices from decades past, is no longer constitutional.

CONCLUSION AND PRAYER

Plaintiffs have attempted to slow political inevitability in Galveston County for the past two decades. Their suit, however, does not rise to the level of Constitutional or VRA violation, and must be dismissed.

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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 11, 2023.

/s/ Angie Olalde _____

Table 2: Comparison of Citizen Voting Age Population, by Precinct and Illustrative Plan

	Cooper 1 HCVAP	Cooper 1 BCVAP	Cooper 1 WCVAP	Cooper 2 HCVAP	Cooper 2 BCVAP	Cooper 2 WCVAP	Cooper 3 HCVAP	Cooper 3 BCVAP	Cooper 3 WCVAP
Precinct 1	12848 (20.7%)	5103 (8.2%)	41979 (67.7%)	12542 (20.9%)	5154 (8.6%)	40429 (67.2%)	13882 (22.2%)	9075 (14.5%)	37490 (59.9%)
Precinct 2	9779 (15.9%)	4565 (7.4%)	44345 (72.2%)	10572 (16.5%)	4370 (6.8%)	46365 (72.2%)	8901 (14.6%)	2935 (4.8%)	45462 (74.5%)
Precinct 3	14591 (24.2%)	17717 (29.4%)	25700 (42.6%)	14848 (24.7%)	17590 (29.3%)	25553 (42.6%)	13663 (23.6%)	15309 (26.4%)	26684 (46.1%)
Precinct 4	8744 (15.7%)	3080 (5.5%)	39426 (70.9%)	8000 (14.6%)	3351 (6.1%)	39103 (71.2%)	9516 (16.4%)	3146 (5.4%)	41814 (72.4%)
Total	45962	30465	151450	45962	30465	151450	45962	30465	151450
Not in P3 (Pct of Total)	31371 (68.3%)	12748 (41.8%)	125750 (83.0%)	31114 (67.7%)	12875 (42.3%)	125897 (83.1%)	32299 (70.3%)	15156 (49.8%)	124766 (82.4%)

	Fairfax HCVAP	Fairfax BCVAP	Fairfax WCVAP	Rush 1 HCVAP	Rush 1 BCVAP	Rush 1 WCVAP	Rush 2 HCVAP	Rush 2 BCVAP	Rush 2 WCVAP	Rush 3 HCVAP	Rush 3 BCVAP	Rush 3 WCVAP
Precinct 1	12122 (20.1%)	5090 (8.4%)	41048 (68.0%)	11660 (18.8%)	5878 (9.9%)	42161 (67.9%)	11261 (18.9%)	4481 (7.5%)	41356 (69.4%)	11672 (19.4%)	4361 (7.2%)	41753 (69.3%)
Precinct 2	10183 (16.1%)	5073 (8.0%)	45186 (71.3%)	9876 (15.7%)	3927 (6.2%)	45740 (72.7%)	9707 (15.5%)	3843 (6.2%)	45565 (73.0%)	10050 (15.9%)	3817 (6.0%)	46008 (72.9%)
Precinct 3	14187 (24.3%)	17209 (29.5%)	24859 (42.6%)	15378 (25.6%)	16982 (28.2%)	25789 (47.6%)	16224 (25.3%)	18585 (29.0%)	27222 (42.5%)	15729 (25.2%)	18385 (29.5%)	26373 (42.3%)
Precinct 4	9470 (16.6%)	3093 (5.4%)	40337 (70.5%)	9048 (16.7%)	3678 (6.9%)	37760 (69.7%)	8770 (16.5%)	3556 (6.7%)	37307 (70.0%)	8511 (15.9%)	3902 (7.3%)	37316 (69.8%)
Total	45962	30465	151450	45962	30465	151450	45962	30465	151450	45962	30465	151450
Not in P3 (Pct of Total)	31775 (69%)	13256 (43.5%)	126591 (83.6%)	30584 (66.5%)	13483 (44.3%)	125,661 (83.0%)	29738 (64.7%)	11880 (39.0%)	124228 (82.0%)	30233 (65.8%)	12080 (39.7%)	125077 (82.6%)

Table 5: Combined ‘RxC’ Estimates from Dr. Trounstine’s Tables on Pages A-30 through A-35 with Additional Replication Results

Election Date	City	Position	Candidate	Ethnicity	Won	Trounstine RxC EI Estimate			Replication RxC EI Estimate		
						Latino	Black	White	Latino	Black	White
3-Nov-20	Galveston	City Council 1	Johnson, E.R.	B	1	47.86	46.03	62.13	36.3%	41.2%	54.6%
3-Nov-20	Galveston		Woods, Tarris L.	B	0	42.30	51.25	24.72	29.1%	41.7%	32.6%
3-Nov-20	Galveston		Godinich, Doug	W	0	27.36	27.27	15.85	34.7%	17.1%	12.8%
3-Nov-20	Galveston	City Council 4	Quiroga, Bill	L	1	51.71	52.06	64.42	75.5%	53.2%	47.8%
3-Nov-20	Galveston		Hardcastle, Jason	W	0	49.32	49.27	28.32	24.5%	46.8%	52.2%
3-Nov-20	Galveston	Mayor	Quiroga, Roger "Bo"	L	1	68.96	40.47	37.38	17.8%	19.3%	47.9%
3-Nov-20	Galveston		Brown, Craig	W	0	19.83	31.16	44.55	26.2%	18.5%	40.6%
3-Nov-20	Galveston		Guzman Jr., Raymond	L	0	8.78	17.5	4.73	22.9%	23.3%	4.9%
3-Nov-20	Galveston		Keese, Bill	W	0	4.72	10.09	5.89	19.3%	20.6%	4.2%
3-Nov-20	Galveston		Casey, James	W	0	3.09	2.52	5.65	13.8%	18.3%	2.5%
3-Nov-20	La Marque	City Council Dist B	Divine, Laura	W	1	53.84	21.06	43.18	27.1%	27.5%	53.1%
3-Nov-20	La Marque		Compian, Joe	L	0	68.01	54.01	3.75	35.1%	39.7%	31.4%
3-Nov-20	La Marque		Robinson, Raushida	B	0	15.12	22.48	26.93	37.8%	32.8%	15.4%
3-Nov-20	League City	City Council 5	Hicks, Justin	W	1	41.42	1.95	39.61	31.5%	36.6%	38.8%
3-Nov-20	League City		Chorn, Wes	W	0	36.48	93.6	28.14	32.0%	34.5%	33.1%
3-Nov-20	League City		Rogers, Fred	B	0	28.64	3.05	31.26	36.5%	28.9%	28.1%
3-Nov-20	Texas City	City Commission	Bowie, Thelma	B	1	9.78	82.23	12.15	22.4%	59.5%	19.6%
3-Nov-20	Texas City		Yackly, Kevin	W	0	48.08	3.47	31.83	23.4%	14.0%	30.8%
3-Nov-20	Texas City		Garza, Jr., Abel	L	0	9.95	23.38	25.31	29.1%	15.4%	24.8%
3-Nov-20	Texas City		Clawson, Bruce	W	0	48.13	4.72	19.73	25.2%	11.1%	24.8%
3-Nov-20	Texas City	City Commission 4	Clark, Jami	W	1	40.79	20.15	85.96	46.5%	50.0%	68.2%
3-Nov-20	Texas City		Gomez, Henry	L	0	79.99	46.17	10.9	53.5%	50.0%	31.8%
3-Nov-20	Texas City	Mayor	Johnson, Dredrick	B	1	88.23	81.71	34.53	46.5%	75.0%	50.9%
3-Nov-20	Texas City		Roberts, Phil	W	0	11.96	18.21	65.55	53.5%	25.0%	49.1%
8-Nov-16	League City	City Council 4	Kinsey, Todd	W	1	22.32	3.69	68.58	49.5%	50.7%	57.4%
8-Nov-16	League City		Salcedo, Rudy	L	0	77.55	96.26	31.45	50.5%	49.3%	42.6%
8-Nov-16	Galveston	Nav. & Canal Comm.	Byrd, Dennis	W	1	34.38	28.59	43.09	27.3%	23.6%	44.0%
8-Nov-16	Galveston		McDermott, Shane	W	0	18.13	21.78	22.27	25.2%	24.5%	21.9%
8-Nov-16	Galveston		Quiroga, Bill	L	0	34.45	68.55	2.99	25.7%	30.5%	16.1%
8-Nov-16	Galveston		Mihovil, Robert	W	0	25.60	15.93	19.97	21.9%	21.4%	18.1%

Based on these results, Dr. Trounstine concludes that “I determined that 90% (nine out of ten) of these elections were polarized with Black and Latino voters cohesively supporting different candidates than white voters” (page 12-13). This was corrected in the March 15th version of the report to read “Black or Latino voters,” and that change is important. While Black and Latino voters are nearly always cohesively supporting the same Democratic candidate in partisan general elections at or above Trounstine’s 60% level, the same is not true here. In fact, based on Dr. Trounstine’s assessment of cohesion, Blacks and Latino are only providing cohesive support to the same candidate in five out of the ten elections (but note that in the corrected estimations discussed below, it is zero out of ten).

In addition, Table 5 provides a clear illustration of the problem mentioned above in Trounstine’s mechanical reformulation of the minimal 60% threshold applied to contests with more than 2

Table 2: RxC Estimates for Democratic Primaries from Dr. Oskooii’s Figure 15 (with Anglo Estimate Added)

Dem. Primary Contest	LastName	Candidate Race/Ethnicity	From Trounstine Fig. 15		Added
			Black	Latino	Anglo
Chief Justice 2020	Zimmerer	Anglo	26.0%	41.3%	12.5%
Chief Justice 2020	Meachum	Anglo	74.0%	58.7%	87.5%
Supreme CT Justice 8 2020	Triana	Hispanic	56.1%	69.5%	75.7%
Supreme CT Justice 8 2020	Kelly	Anglo	43.9%	30.5%	24.3%
Supreme CT Justice 7 2020	Williams	Black	81.2%	62.1%	71.2%
Supreme CT Justice 7 2020	Voss	Anglo	18.8%	37.9%	28.8%
Supreme CT Justice 6 2020	Praeger	Anglo	21.2%	22.3%	15.3%
Supreme CT Justice 6 2020	Cheng	Asian	78.8%	77.7%	84.7%
CT of Appeals Justice 4 2020	Miears	Anglo	18.3%	39.4%	15.8%
CT of Appeals Justice 4 2020	Clinton	Asian	81.7%	60.6%	84.2%
US House District 2018	Bell	Black	92.0%	69.8%	85.2%
US House District 2018	Barnes	Black	8.0%	30.2%	14.8%
Lt Governor 2018	Cooper	Black	83.6%	72.9%	45.2%
Lt Governor 2018	Collier	Anglo	16.4%	27.4%	54.8%
Comptroller 2018	Mahoney	Anglo	50.9%	57.2%	47.1%
Comptroller 2018	Chevalier	Black	49.1%	42.8%	52.9%
Railroad Commissioner 2018	Spellmon	Black	71.7%	60.7%	50.9%
Railroad Commissioner 2018	McAllen	Anglo	28.3%	39.3%	49.1%
Commissioner Land Office 2018	Suazo	Hispanic	47.0%	50.9%	60.9%
Commissioner Land Office 2018	Morgan	Anglo	53.0%	49.1%	39.1%

Dr. Oskooii summarizes the results for the Democratic primary contest by noting that “preferences are not as strong for any one candidate as they are in general elections. Nevertheless, the vote point estimates for the analyses indicate that a majority of Black voters and of Latino voters shared the same candidate preferences in 9 out of 10 of the primary elections” (page 24). However, preferred candidate is not the same thing as cohesion. Using the 75% threshold, Black voters are cohesive in only 5 of the 10 elections, and Latino voters are cohesive in only 1 of the 10 elections. Even using the minimal 60% threshold, Black and Latino voters are both cohesive in only 6 of the 10 elections, a far different pattern from that seen in the partisan general elections. What Dr. Oskooii did not include for these primaries were the estimates for Anglo voters, something that was included for the general election analysis