

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

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|-----------------------------------|---|-----------------------------|
| TERRY PETTEWAY, <i>et al.</i> , | § | |
| | § | |
| <i>Plaintiffs,</i> | § | |
| | § | |
| v. | § | |
| | § | Civil Action No. 3:22-cv-57 |
| GALVESTON, TEXAS, <i>et al.</i> , | § | |
| | § | |
| <i>Defendants.</i> | § | |

| | | |
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| UNITED STATES OF AMERICA, | § | |
| | § | |
| <i>Plaintiff,</i> | § | |
| | § | |
| v. | § | |
| | § | Civil Action No. 3:22-cv-93 |
| GALVESTON, TEXAS, <i>et al.</i> , | § | |
| | § | |
| <i>Defendants.</i> | § | |

| | | |
|---|---|------------------------------|
| Dickinson Bay Area Branch NAACP, <i>et al.</i> , | § | |
| | § | |
| <i>Plaintiffs,</i> | § | |
| | § | |
| v. | § | |
| | § | Civil Action No. 3:22-cv-117 |
| GALVESTON, TEXAS, <i>et al.</i> , | § | |
| | § | |
| <i>Defendants.</i> | § | |

**PETTEWAY PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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NATURE AND STAGE OF PROCEEDING

This case was filed by Plaintiffs Terry Petteway, Penny Pope, and Derreck Rose (“Petteway Plaintiffs” or “Plaintiffs”) to challenge the 2021 redistricting process for the Galveston County Commissioners Court.¹ Petteway Plaintiffs allege that Defendants have violated Section 2 of the Voting Rights Act (“VRA”), as well as the Fourteenth and Fifteenth Amendments of the U.S. Constitution. On June 8, 2022, Defendants filed a Motion to Dismiss, Doc. 46, which this Court granted as to former Plaintiff Michael Montez, but denied as to all remaining claims on March 30, 2023. Doc. 125. Discovery has closed,² and trial is set for August 7, 2023. Defendants now move for Summary Judgment on Counts 3, 4, and 5 of the Petteway Plaintiffs’ Second Amended Complaint. *See* Defs’ Br. at 1-2; Petteway Plaintiffs’ Second Amended Complaint (“SAC”), Doc. 42 at 30-32.

SUMMARY OF ARGUMENT

Defendants’ Motion for Summary Judgment should be denied. Defendants contend that Plaintiffs have failed to satisfy the three *Gingles* preconditions necessary to establish a violation under Section 2 of the VRA, and that they are entitled to summary judgment on Plaintiffs’ racial gerrymandering claim. Defendants are wrong on each score.

First, Petteway Plaintiffs have satisfied the first *Gingles* prong. Indeed, the County itself proposed a map in which Black and Hispanic voters formed the majority of eligible voters in the historical opportunity district, Precinct 3. Their own proposed map—

¹ Additional Plaintiffs Sonny James and Michael Montez have since been dismissed. *See* Docs. 100, 125.

² The depositions of Thomas Bryan and Dale Oldham have not yet occurred; Mr. Bryan provided only one day of availability in the next month for his deposition—June 20, 2023. This may necessitate a supplement to this opposition.

ultimately rejected by the Commissioners Court—thus defeats Defendants’ motion with respect to *Gingles* 1. Moreover, Petteway Plaintiffs’ expert, Mr. Tye Rush, drew several demonstration and alternative maps that satisfy *Gingles* 1, including several that retain a coastal precinct—the purported main redistricting objective of the majority-bloc of the Commission.

Second, Defendants’ contention that there are no disputed facts as to *Gingles* 2 and 3 is likewise misplaced. The record evidence shows that voting in Galveston County is highly racially polarized, specifically, that Black and Hispanic voters routinely vote cohesively for one set of candidates while white voters vote in polar opposition. Moreover, the record evidence shows that, in the absence of a district drawn to ensure an equal opportunity for Black and Hispanic voters, white voters usually defeat the preferred candidates of minority voters. Defendants incorrectly contend that the evidence shows that partisanship, not race, explains the voting patterns. As Plaintiffs’ experts, Dr. Matt Barreto and Mr. Michael Rios, show, partisanship is merely a proxy for race in Galveston County.

Third, substantial record evidence supports Plaintiffs’ racial gerrymandering claim. The evidence shows that, contrary to his claim otherwise, the Galveston County mapdrawer, Thomas Bryan, considered racial data in his mapdrawing process. Moreover, the three Commissioners responsible for adopting the plan did not list partisanship as a motivation, and two of the three have expressly stated that partisan considerations played no role in their choice. The record also contains powerful evidence of alternative maps that show that a coastal precinct could have—and would have— been drawn without surgically dismantling the existing majority-minority Precinct, demonstrating the pretextual nature of

the coastal precinct rationale. This evidence precludes Defendants' motion for summary judgment on Plaintiffs' racial gerrymandering claim.³

COUNTER-STATEMENT OF FACT

I. The 2020 Census revealed population growth among Black and Hispanic Galveston residents in the past decade.

The total population of Galveston County increased by more than 20 percent, from 291,309 residents in 2010 to 350,682 residents in 2020. SAC, Doc. 42 ¶ 48; Answer to SAC, Doc. 142 ¶ 48. Additionally, the Black citizen voting age population ("CVAP") in the County increased from 28,315 in 2010 to 30,190 in 2020. Ex. 2 (Decl. of Tye Rush; hereinafter "Rush Corrected Rep.") at 4. The Hispanic or Latino CVAP increased from 29,350 in 2010 to 42,775 in 2020. *Id.* As a result of this substantial growth in the County's minority population, the white share of the County's CVAP fell from 67.4 percent in 2010 to 64.1 percent in 2020. *Id.*

II. The Benchmark Plan.

The Benchmark Plan—the plan used for Commissioners Court elections from 2012 to 2021—contained one precinct, Precinct 3, in which Black and Hispanic voters formed a majority of the voting age population ("VAP"). Using 2020 Census data, the CVAP of Benchmark Precinct 3 is 33.17 percent Black and 33.94 percent Latino. Ex. 3 (Expert Decl. and Rep. of William S. Cooper; hereinafter "Cooper Rep.") at 123. As a majority-minority Commissioner district on both a VAP and CVAP basis, Precinct 3 in the Benchmark Plan

³ Defendants provide no argument as to the totality-of-circumstances factors. As Plaintiffs' expert Dr. Traci Burch demonstrates, Ex. 1 (Expert Decl. and Rep. of Traci Burch; hereinafter "Burch Rep.") at 21-38, Black and Hispanic residents in Galveston County easily satisfy the totality of the circumstances test.

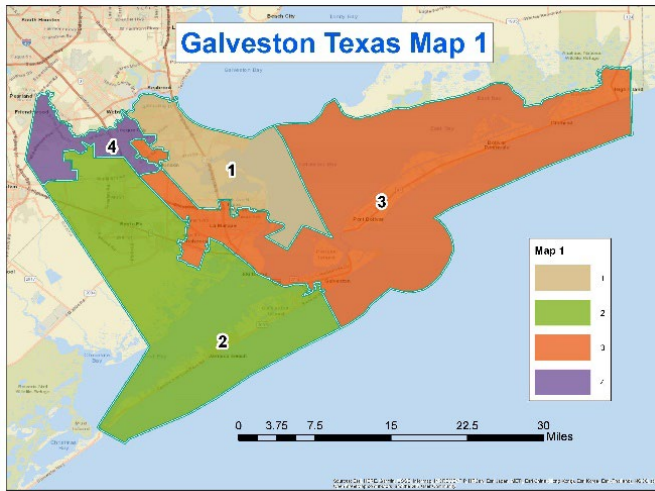
has long performed to provide Black and Hispanic voters the opportunity to elect their preferred candidate. *See, e.g., id.* ¶¶ 50-51, 123. Until the filing of this lawsuit,⁴ Precinct 3 was the only Commissioners Court district that elected a minority candidate, and remains the only district where a minority candidate has won a primary and contested general election. *See* Ex. 4 (Decl. of Dr. Matt A. Barreto and Michael Rios, MPP; hereinafter “Barreto Rep.”) ¶ 27, Table 2 at 14.

Based on population growth, the 2020 Census revealed that the Benchmark Plan was malapportioned. SAC, Doc. 42 ¶ 63; Answer to SAC, Doc. 142 ¶ 63. Shifting just one voting district in the Benchmark Plan, however, would have balanced the population to be within a legally permissive deviation. *See, e.g.,* Ex. 24 at DEFS00036191-36193.

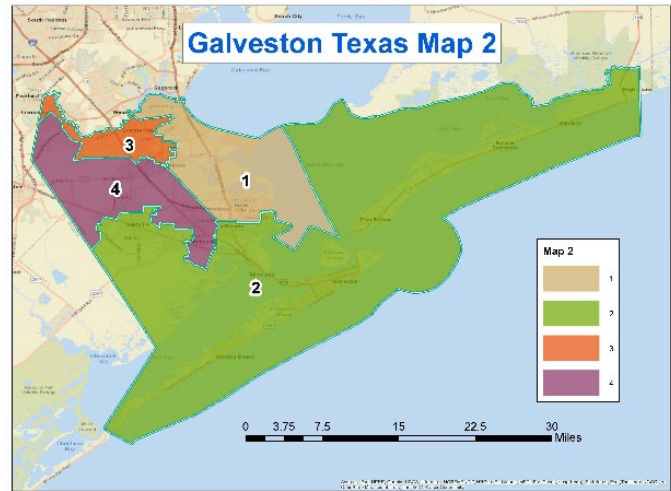
III. The 2021 redistricting process lacked consideration of community concerns.

Defendants ultimately proposed two redistricting maps to the public on October 29, 2021. Ex. 25 (Defs.’ Responses to United States’ Requests for Admissions) ¶ 45. The first proposal, Map 1, largely maintained the same lines as the Benchmark Plan, but added the mostly Anglo Bolivar Peninsula to Commissioner Precinct 3. *See* Doc. 176-31 at 43 (Ex. 28 to Henry Dep.) (displaying Proposed Map 1); SAC, Doc. 42 ¶ 72; Answer to SAC, Doc. 142 ¶ 72; Ex. 24 at DEFS00036191-36193. Under this proposal, Precinct 3 would have retained its status as a majority-minority VAP precinct, and Black and Latino voters would have constituted 55 percent of the precinct’s CVAP. Ex. 2 (Rush Corrected Rep.) ¶¶ 67-68.

⁴ During this litigation, Commissioner Ken Clark passed away, and Commissioner Robin Armstrong was appointed to his seat. Commissioner Armstrong ran unopposed in 2022, in the Precinct 4 primary and general elections.



Proposed Map 1



Proposed Map 2 (Enacted Plan)

The second proposal, Map 2 (“Enacted Plan”)—which was ultimately adopted—entirely dismantled Precinct 3 and fragmented Galveston County’s minority population evenly among all four Precincts. See Doc. 176-31 at 43 (Ex. 28 to Henry Dep.) (displaying Proposed Map 2); Ex. 26 at DEFS00018660.

No Commissioner precinct in the Enacted Plan is majority-minority. Ex. 4 (Barreto Rep.) ¶ 45, 14; Ex. 2 (Rush Corrected Rep.) ¶ 55. By spreading the County’s Black and Latino population across all four Commissioner precincts, the County has ensured that minority voters will have no opportunity to elect their preferred candidate in any precinct. Ex. 4 (Barreto Rep.) ¶ 45.

On November 12, 2021, the Commissioners Court held the first and only public meeting regarding the two proposed redistricting plans. SAC, Doc. 42 ¶ 76; Answer to SAC, Doc. 142 ¶ 76. It was set one day before the November 13, 2021 deadline to submit enacted plans to the Texas Secretary of State—even though Defendants had made plans to redistrict in early 2022, *see, e.g.*, Dep. of Tyler Drummond, Ex. 10 at 154:12-22; Dep. of

Mark Henry, Ex. 11 at 289:8-290:1, Ex. 27 at DEFS00013498; Ex. 28 (Ex. 17 to Henry Dep.) at 11; Ex. 29 at DEFS00029196; Ex. 30 at DEFS00011722, and were aware that redistricting needed to occur before the November 2021 candidate filing deadline for the next Commissioners Court election, *see* Henry Dep. Ex. 11 at 281:5-9. Indeed, evidence shows that it was always the Commissioners’ intent to adopt a plan the same day as the sole public hearing, originally intending to do so weeks prior to the deadline. *See, e.g.*, Ex. 31 at DEFS00036272 (“[W]e’re past our deadline on this project where we originally wanted to have a special meeting tomorrow [October 29] to discuss and possibly adopt.”).

During the November 12 hearing, the Commissioners Court heard public testimony on the adoption of the Enacted Plan. Many residents—and an overwhelming majority of speakers—expressed concern that the map would significantly dilute minority communities’ voting strength in the County and eliminate any opportunity for Black and Latino voters to elect their candidate of choice. *See generally* Nov. 12, 2021 Hearing Transcript, Ex. 32.⁵ Residents likewise alleged that Map 2 was drawn to ensure the electoral defeat of Precinct 3 Commissioner Stephen Holmes, who residents described as the only commissioner to represent the interests of the Black and Latino community. One Galveston County resident who spoke at the hearing explained that she was “against the

⁵ *See also* Dep. of Derreck Rose, Ex. 13 at 42:4-14 (noting that residents in attendance were “appalled” by the proposed maps because “they would not have a voice, a person of their choice that they could vote on, [and] have a voice in their community”); Ex. 1 (Burch Rep.) at 37 (observing that “29 people spoke against the redistricting plans in the November 12 special session, with only one person clearly supporting the plan”); Dep. of Darrell Apffel, Ex. 14 at 221:15-24. This does not include the more than 100 comments the commissioners received through the public comment portal expressing concerns about racial discrimination and minority vote suppression. Burch Rep. Ex. 1 at 35. Judge Henry and Commissioners Apffel and Giusti admit that they did not read all, or even most, of the more than 500 comments made through the online portal. *See* Dep. of Mark Henry, Ex. 11 at 273:19-274:16; Apffel Dep. Ex. 14 at 176:15-23, 187:7-12; Dep. of Joseph Giusti, Ex. 15 at 128:17-129:12, 135:3-9.

proposed maps” because they “annihilated Commissioner Holmes’ precinct, and I knew that would be detrimental to the community at large,” as “that was the only majority/minority area in the county where the voters felt that they could elect a candidate of their choice.” Dep. of Roxy Hall Williamson, Ex. 12 at 98:8-24.⁶

The commissioners did not respond to any concerns raised by members of the public at the November 12 hearing, or otherwise incorporate any public feedback into the Enacted Plan before voting to approve it. *See, e.g.*, Giusti Dep. Ex. 15 at 157:19-158:11 (admitting that there was no “consideration made by the commissioners either during or following the special session to tweak the plan in response to” public comments); *id.* at 273:21-274:9; Apffel Dep. Ex. 14 at 221:25-222:9. Only Commissioner Holmes objected to the proposed maps; he also introduced his own proposed alternative maps that maintained Precinct 3 as an opportunity district, which the commissioners did not discuss or put to a vote. *See* Nov. 12, 2021 Hearing Transcript, Ex. 32 at 76:3-16; Ex. 33 at Holmes 000323-346; Apffel Dep. Ex. 14 at 222:10:223:1.

Instead, the Commissioners Court voted 3-1 to adopt Map 2 at the November 12, 2021, hearing. *See* Nov. 12, 2021 Hearing Transcript, Ex. 32 at 81:5-12; Ex. 34 at DEFS00011471-11473 (order adopting map).⁷

⁶ *See also* Hall Williamson Dep., Ex. 12, at 54:3-5 (“currently Stephen Holmes is the favorite guy.... If it were not him, another person of color or person of their choice”); *id.* at 100:2-10; Giusti Dep. Ex. 15 at 258:18-259:10 (admitting that residents described effective representation by Commissioner Holmes and concerns that they “would not be as well represented with someone else”).

⁷ Commissioner Holmes voted against the map, while Commissioner Ken Clark was absent from the vote. *See* Ex. 34 at DEFS00011471-11473.

IV. Defendants intentionally diluted the votes of Black and Hispanic voters.

Under the Enacted Plan, Precinct 3's CVAP is now just 9 percent Black and 19 percent Hispanic. Ex. 4 (Barreto Rep.) at 14. The Enacted Plan visibly cracks the Black and Hispanic communities across all four Precincts, including splitting Black and Hispanic communities in the majority-minority cities of La Marque and Texas City. Ex. 2 (Rush Corrected Rep.) ¶¶ 55, 57-64.

The evidence shows that Defendants considered race during the redistricting process. To draw the proposed maps, the Commissioners employed the same attorneys who drew the maps denied preclearance by the Department of Justice in 2011.⁸ *See* Henry Dep. Ex. 11 at 74:12-21; 131:3-11; Ex. 35 at US0000017-20. Moreover, Defendants' mapmaker in 2021, Thomas Bryan, created multiple maps which explicitly considered race, generating a spreadsheet that contained detailed racial data of the maps. *See* Ex. 36 at DEFS00031696; Ex. 26 at DEFS00018660.

Judge Henry and Commissioners Giusti and Apffel have also testified to their knowledge of the County's racial demographics and concentration of minorities in benchmark Precinct 3. *See* Henry Dep. Ex. 11 at 268:24-269:1 (Q. "You have an idea of where, you know, minority populations live, right?" A. To some extent, I suppose."); *id.* at 225:23-226:1 (Q. "You were aware from the 2011 litigation, weren't you, that Precinct 3

⁸ This is also a fact which raised grave concerns among members of the public, with respect to the discriminatory nature of the proposed maps. *See, e.g.*, Dep. of Lucretia Lofton, Ex. 16 at 189:14-25; Dep. of Barbara Anders, Ex. 17 at 182:23-183:1 ("[T]he same people that drew these maps did the same ones in 2011 that tried to dilute the voting population of Black and Brown people in Galveston County."); *id.* at 243:7-12 ("[The commissioners] had all the statistics and stuff and what the map[] was going to do. They didn't put that out to the public so they could see it. So they were aware. They hired the map drawing people. They could ask them. They could see what the calls and what the effects would be when they had different scenarios.").

was the only majority/minority district in the whole county, right?” A. “Yes.”); Apffel Dep. Ex. 14 at 284:4-7 (Q. “And so, you have a rough idea of where certain ethnic groups and racial groups live... in the county currently?” A. “Yes.”); Giusti Dep. Ex. 15 at 165:20-166:8 (admitting that, benchmark Precinct 3 had a majority-minority Black and Hispanic voting age and registered voter population); *id.* at 174:2-6, 175:11-13.

Judge Henry and Commissioner Apffel have likewise both acknowledged seeing racial data prior to voting on the proposed plans. *See* Henry Dep. Ex. 11 at 54:15-20 (testifying that he sees demographic data “when we’re doing redistricting as it’s presented to me”); *id.* at 246:5-11, 261:13-16; Ex. 37 at US0001534 (Galveston Daily News article quoting Commissioner Apffel, “I saw [the racial makeup of the proposed maps], but just for a second.”); Apffel Dep. Ex. 14 at 227:3-5 (“So my recollection is I didn’t look at [racial data]. But maybe that’s saying I did. If I did, it was just for a second.”); *id.* at 230:9-231:25. Commissioner Apffel likewise testified to his understanding of the correlation between partisanship and race in Galveston County. *See* Apffel Dep. Ex. 14 at 294:1-5.

The County approved the Enacted Plan despite knowing that alternative map proposals would maintain Commissioner Precinct 3 as a majority-minority district. Defendants have offered several rationales for adopting the Enacted Plan, including: 1) compliance with federal law, 2) creation of a coastal precinct combining Bolivar Peninsula and Galveston Island, 3) compactness of the district lines, 4) minimizing splitting voting precincts, 5) incumbency protection, and 6) partisanship. Ex. 38 (Defs’ Second Supp. Responses to Petteway Plaintiffs’ Requests for Production and Interrogatories) ¶ 1; *see also* Ex. 2 (Rush Corrected Rep.) ¶ 28.

But Defendants could have adopted a plan that achieves these goals without dismantling Precinct 3 as a majority-minority district. *See* Doc. 176-6 (Am. Owens Rep.) at 3 (Defendants’ expert describing equal white population among all four Precincts as a feature of the Enacted Plan); Ex. 5 (Expert Decl. & Rebuttal of Tye Rush, hereinafter “Rush Corrected Rebuttal”) ¶ 16 (demonstrating compact coastal precincts that complied with Defendants’ principles); Ex. 1 (Burch Rep.) at 12-14, 47-51. As Plaintiffs’ expert Dr. Burch notes, “the purported desire for a ‘coastal precinct’ cannot explain the fragmentation of the minority population” where several alternatives existed that maintained Precinct 3 as an opportunity district, and where the community expressed virtually no interest in the creation of a coastal precinct. Ex. 1 (Burch Rep.) at 12-14; *see* also Hall Williamson Dep. Ex. 12 at 97:8-18 (“no one was in favor of [a coastal precinct]”). No Commissioner who voted for the maps expressed partisanship as a motivation. Commissioner Giusti did not mention partisanship as a goal when asked. Giusti Dep. Ex. 15 at 53:11-21, 88:4-15, 138:12-25. And Judge Henry and Commissioner Apffel both emphatically denied in their deposition testimony having any partisan motivation for choosing Map 2. *See* Henry Dep. Ex. 11 at 257:3-7; at 258:15-20 (Q. “[I]s [] one of the reasons that you like [the enacted] map[] [that] it would help keep Galveston County red?” A. “No. I already had that with three commissioners.”); Apffel Dep. Ex. 14 at 193:6-8 (Q. “[W]as . . . partisanship a factor in your evaluation of these maps?” A. “Not at all.”); *id.* at 258:24-259-8, 147:23-148:2, 221:1-4 (testifying that he would “absolutely” oppose any attempt at partisan redistricting).

V. Black and Hispanic voters in Galveston exhibit political cohesion.

Black and Hispanic voters in Galveston County have a long history of shared

political and social interests, which results in strong political cohesion between the groups. Experts for the Petteway Plaintiffs, Dr. Barreto and Mr. Rios, found evidence of overwhelming racially polarized voting, as Black and Hispanic voters voted together in every election for local, state, and federal office between 2014 and 2022, while white voters consistently voted together to defeat the candidate preferred by Black and Latino voters. Ex. 4 (Barreto Rep.) ¶¶ 22-25. Residents confirm the shared interests and political cohesion of Black and Hispanic voters. *See, e.g.*, Dep. of Penny Pope, Ex. 18 at 66:9-20 (testifying that Black and Hispanic voters tend to support the same or similar candidates); *id.* at 38:5-12, 40:19-24, 42:3-18, 43:3-13, 68:9-16, 97:19-98:8 (testifying that Black and Hispanic voters share interests with respect to education, employment, housing, and the criminal justice system); Dep. of Terry Petteway, Ex. 19 at 45:11-20 (testifying that he believes Black and Hispanic voters in the County usually vote for the same candidate); Rose Dep. Ex. 13 at 56:24-58:2 (describing a shared history of “[t]he Black and Brown community” with respect to policing and education).⁹

At the same time, Dr. Barreto and Mr. Rios found that “Anglo block voting appears to be uniform across elections from 2014 to 2022 with rates [of] over 85 [percent] opposition to minority-preferred candidates. Anglo voters demonstrate considerable block voting against Hispanic and Black candidates of choice, regularly voting in the exact

⁹ *See also, e.g.*, Anders Dep. Ex. 17 at 241:22-23; Dep. of Edna Courville, Ex. 20 at 207:14-20 (testifying that “Black and Latino voters have shared policy priorities regarding education”); Dep. of Joe Compian, Ex. 21 at 172:24-173:1 (“Present me a candidate that has issues that I agree with and we have a shared interest in certain areas, the Black and Brown voters, Latino voters.”); *id.* at 200:20-201:9, 213:11-214:12, 216:2-8 (describing how Black and Latino voters “share concerns and issues,” with respect to COVID, funding for public services, and government appointments); Appfel Dep. Ex. 14 at 199:24-200:7 (testifying to the shared interests of Black and Hispanic voters in juvenile justice and truancy issues).

opposite pattern of Hispanic and Black voters in Galveston.” Ex. 4 (Barreto Rep.) ¶ 24. And across all elections analyzed, there has never been a minority Republican candidate who won a primary for local office. Ex. 8 (Apr. 14, 2023 Rebuttal Decl. of Dr. Matt A. Barreto and Mr. Michael Rios; hereinafter “Barreto Rebuttal”) ¶ 17.

Finally, the totality of the circumstances demonstrates that, under the Enacted Plan, Black and Hispanic voters lack an equal opportunity to elect their candidates of choice and to participate in the political process. Petteway Plaintiffs’ expert Dr. Bruch demonstrates that, across all major socioeconomic indicators, “Black and Hispanic residents of Galveston County face disadvantages with respect to education, income, employment, health, housing, and criminal justice.” Ex. 1 (Burch Rep.) at 3; *see also id.* at 21-38.

STANDARD OF REVIEW

A court may only grant summary judgment if “no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 65(a); *Elizondo v. Spring Branch Indep. Sch. Dist.*, No. 4:21-cv-1997, 2023 WL 2466401, at *2 (S.D. Tex. Feb. 13, 2023), *report and recommendation adopted*, No. 4:21-cv-1997, 2023 WL 2465779 (S.D. Tex. Mar. 10, 2023). In determining whether summary judgment is appropriate, “[t]he court construes the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party’s favor.” *Elizondo*, 2023 WL 2466401 at *2 (citing *R.L. Inv. Prop., LLC v. Hamm*, 715 F.3d 145, 149 (5th Cir. 2013)). “[T]he Court does not weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence.” *Id.* (quoting *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987) (internal quotation marks omitted)).

ARGUMENT

I. Disputed issues of material fact preclude summary judgment on Petteway Plaintiffs’ Section 2 claim.

Disputed issues of material fact preclude summary judgment on Petteway Plaintiffs’ Section 2 claims.¹⁰ Moreover, because this Court is bound to apply en banc Fifth Circuit precedent permitting Section 2 coalition claims, it should reject Defendants’ invitation to do otherwise. Defs’ Br. at 17-19; *see also LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc).

a. *Gingles* Prong 1 is satisfied.

Gingles 1 is satisfied—or at the very least disputed material facts preclude summary judgment for Defendants. The first *Gingles* precondition requires plaintiffs to demonstrate that minority voters can constitute the majority of voters “in some reasonably configured [] district.” *Cooper v. Harris*, 581 U.S. 285, 301 (2017); *see also LULAC v. Perry*, 548 U.S. 399, 430 (2006). The “§ 2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.” *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (internal quotation marks omitted). The first *Gingles* precondition “does not require some aesthetic ideal,” *Houston v. Lafayette Cnty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995), but rather involves a “highly factual” analysis specific to the community at issue, *Fusilier v. Landry*, 963 F.3d 447, 458

¹⁰ Defendants conflate Petteway Plaintiffs’ Section 2 results and intent claims, but their frameworks differ. *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality op.) (explaining that, in requiring a majority-minority showing for *Gingles* 1, “[o]ur holding does not apply to cases in which there is intentional discrimination against a racial minority”); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) (“We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength.”).

(5th Cir. 2020); *see also id.* at 457-58 (affirming district court’s conclusion that *Gingles* prong 1 was satisfied despite “district’s contorted horseshoe shape” because it “maintained communities of interest, [was] contiguous [], protected incumbents, and respected the principle of one person, one vote.”)

i. Defendants’ own Map 1 satisfies *Gingles* 1.

The Court need not even reach Plaintiffs’ *Gingles* 1 demonstration plans because *Defendants* have drawn a plan that satisfies the first *Gingles* precondition. The County presented two maps to the public, “Map 1” and “Map 2 (Enacted Plan).” Doc. 176-36 (Bryan Decl.) ¶¶ 7-9. As Defendants’ redistricting counsel, Dale Oldham, testified before presenting these maps to the Commissioners, he “concluded that the maps comported with what my clients requested and complied with the U.S. Constitution and the Voting Rights Act.” Doc. 108-1 (Oldham Decl.) ¶ 15. Defendants’ mapmaker, Thomas Bryan, testifies that he “did not consider racial demographic data” in drawing Map 1. Doc. 176-36 (Bryan Decl.) ¶ 5. Map 1’s purpose was to be “least changes” from the existing map. Ex. 24 at DEFS00036193. By Mr. Bryan’s calculation, Precinct 3 under Map 1 would have a combined Black and Hispanic VAP of 58 percent. Ex. 26 at DEFS00018660 (Pop Pivot Tab).¹¹ Unless Defendants contend that Mr. Oldham’s and Mr. Bryan’s declarations about the legality of Map 1 are untrue, they cannot plausibly object to *their own* plan. Moreover, as Map 1 was drawn expressly to have the “least changes” from the Benchmark Plan, it

¹¹ According to NAACP expert, Dr. William Cooper, Precinct 3 under Map 1 would have a combined Black and Hispanic CVAP of 55 percent. Ex. 3 (Cooper Rep.) ¶ 73 & Figure 13.

necessarily would have “maintain[ed] communities of interest and traditional boundaries,” *Abrams*, 521 U.S. at 91, and “protect[ed] incumbents,” *Fusilier*, 963 F.3d at 458.

ii. Mr. Rush’s demonstration plans satisfy *Gingles* 1.

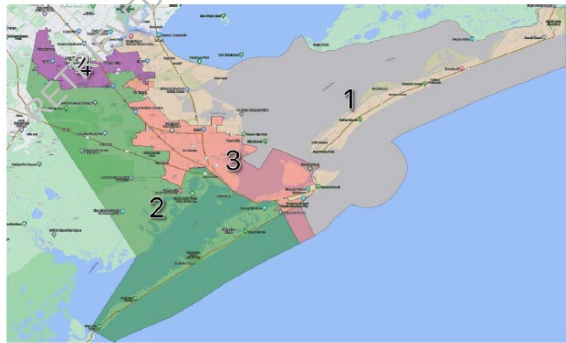
The maps drawn by Petteway Plaintiffs’ expert, Mr. Rush, likewise satisfy *Gingles*

1. Mr. Rush has drawn a total of seven maps¹² with a combined Black and Latino CVAP above 50% for Precinct 3. *See* Ex. 2 (Rush Corrected Rep.) at 10-16; Ex. 5 (Rush Corrected Rebuttal) at App. B; Ex. 1 (Burch Rep.) at 13-14 & App. B; Ex. 6 (5.15.23 Decl. of Tye Rush) ¶ 8 & attached Tex. Legislative Council Maps & Data.

Rush Maps 1, 2, 2b, and 3 are similar in configuration to Mr. Bryan’s Map 1, making minimal changes to the Benchmark Plan, and thus emphasizing “preservation of communities of interest, preservation of cores of prior districts, and incumbent protection.”

Ex. 2 (Rush Corrected Rep.) ¶ 32. For example, below is Rush Map 1:

Rush Map 1



Id. at 10. Mr. Rush’s demonstration plans have compactness scores comparable to the

¹² Rush maps 1, 2, 2b, 3 and the Alternative Maps 2, 3, and 4 that he drew for inclusion in Dr. Burch’s report all exceed 50 percent combined Black and Hispanic CVAP. *See* Ex. 2 (Rush Corrected Rep.) at 11, 13, 15; Ex. 5 (Rush Corrected Rebuttal) at 7-8, 18.

Enacted Plan. For example, Rush Map 1 has an average Reock¹³ score of 0.28, compared to the Enacted Plan’s Reock score of 0.27. *See* Doc. 176-8 (Am. Owens Rep.) at 16. Rush Map 1’s Reock score for Precinct 3 is 0.21, compared to 0.23 in the Enacted Plan. *Id.*; *see also* Dep. of Mark Owens, Ex. 22 at 236:15-237:22 (Defendants’ expert testifying that Rush Map 1 has similar or same compactness scores as Enacted Plan).

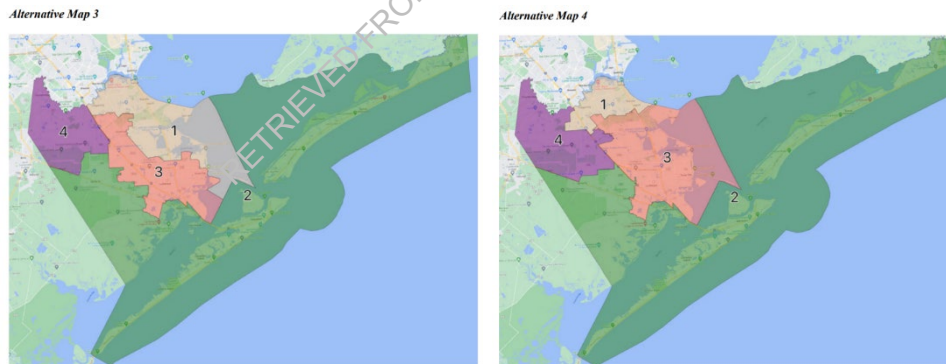
Defendants contend that Mr. Rush’s maps—and all other Plaintiffs’ demonstration plans—are racial gerrymanders that “drew misshapen boundaries and plainly subordinated race-neutral districting principles.” Defs’ Br. at 27. Moreover, and without evidence, Defendants contend that Mr. Rush “stated that [he] drew [his] illustrative plans with the express purpose of creating a majority Black and Latino . . . Precinct 3” *Id.* at 26. But the only thing Defendants cite is Mr. Rush’s recitation of the *Gingles* 1 majority-minority district requirement. *See* Ex. 2 (Rush Corrected Rep.) at 2. Had Defendants asked Mr. Rush at his deposition, they would have learned that Mr. Rush did not consider race *at all* while drawing any of the maps he submitted in this case, and instead checked their demographics *only after* drawing them. Ex. 7 (6.2.23 Decl. of Tye Rush) ¶ 1. Moreover, Defendants misleadingly quote from Mr. Rush’s deposition transcript to contend that he “was ‘instructed’ by counsel for the Petteway Plaintiffs to draw a map with a majority-minority precinct.” Defs’ Br. at 27. But Mr. Rush only testified that, in *assessing* the maps he drew for compliance with *Gingles* 1, he was “instructed” that *Gingles* 1 required a majority

¹³ Reock is a common mathematical compactness score that compares the area of a district to the area of the smallest circle that will encompass the district. *See, e.g.*, Doc. 176-8 (Am. Owens Rep.) at 6.

minority district. Dep. of Tye Rush, Ex. 23 at 192:6-22. The words “draw a map” appear nowhere on the pages cited by Defendants.

Defendants also criticize Rush’s Map 1 because it creates a passage in Precinct 3 to its northernmost territory in Dickinson. *See* Defs’ Br. at 26, 28, 33. But Rush Map 1 and Bryan Map 1 are *precisely the same* in this regard. *Compare* Ex. 2 (Rush Corrected Rep.) at 10-11 *with* Doc 176-31 at 43 (Ex. 28 to Henry Dep.) (Map 1). Indeed, as Defendants acknowledge, the factor motivating this aspect of the plan—in the Benchmark Plan, Defendants’ Map 1, and the Rush maps—is “a ‘bubble’ at the top to capture Commissioner Holmes’ house.” Defs’ Br. at 5. Including an incumbent in a precinct is a traditional districting criterion, not a racial gerrymander. *See Fusilier*, 963 F.3d at 457-58.¹⁴

Defendants entirely ignore the other Alternative Maps Mr. Rush drew, all of which satisfy *Gingles* 1, are more compact than the Enacted Plan, and include a coastal precinct.



See Ex. 1 (Burch Rep.) at App. B at 3-4. In both plans, Precinct 3 has a majority Black and Hispanic CVAP. *Id.*; *see also* Ex. 6 (5.15.23 Rush Decl.) ¶ 8 & Tex. Legislative Council

¹⁴ Defendants also complain about the length of Precinct 3 in Mr. Rush’s demonstration plans. *See* Defs’ Br. at 30-31. But this objection is peculiar given the even greater distance the Enacted Plan’s Precinct 2 spans. *See* Doc. 176-31 at 43 (Ex. 28 to Henry Dep.) (Enacted Plan); *supra* at Counter Statement of Fact, Part III.

Exhibits. And both plans adhere to Defendants’ professed desire for a unified coastal precinct. *See* Defs’ Br. at 34. Moreover, Precinct 3 under these two plans have compactness scores that exceed and, in the case of Alternative Plan 4 *double*, the compactness score of the Enacted Plan’s Precinct 3. *Compare* Ex. 5 (Rush Corrected Rebuttal) at Table 1 *with* Doc. 176-8 (Am. Owens Rep.) at 16-17. These maps easily satisfy *Gingles* 1 and beat the Enacted Plan on traditional redistricting criteria by any measure.

iii. Mr. Rush’s maps combine communities of interest.

Mr. Rush’s maps also join communities of interest. In *LULAC v. Perry*, the Supreme Court held that a Texas congressional district that spanned from the Mexican border to Austin was “noncompact for § 2 purposes” because of its geographic expanse and its combination of two Latino communities on either end with differing socioeconomic statuses and interests. 548 U.S. 399, 435 (2006). But the Court “emphasize[d] it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.” *Id.*

Defendants contend that Mr. Rush’s maps combine minority communities with different socioeconomic statuses, highlighting the fact that Black and Hispanic residents of League City have higher household incomes and home ownership rates, and lower poverty rates than Black and Hispanic residents of Dickinson, Texas City, and Galveston. But League City only comprises a tiny portion of Mr. Rush’s maps. For example, Rush Maps

1 and 3 include just 17 people from League City.¹⁵ Of those 17 people, none are Black and 7 are Hispanic. Ex. 7 (6.2.23 Decl. Of Tye Rush) ¶¶ 3, 6. Likewise, Mr. Rush’s coastal precinct Alternative Plan 4 includes 750 people from League City, of whom 74 are Black and 494 are Hispanic. *Id.* ¶ 10. That these League City residents could be removed from Mr. Rush’s maps without affecting their one-person, one-vote compliance illustrates how weak Defendants’ arguments are regarding League City minorities’ socioeconomic status.

Second, none of Mr. Rush’s maps include a Precinct 3 that spans an “enormous geographical distance.” *LULAC*, 548 U.S. at 435. Indeed, Mr. Rush’s iterations of Precinct 3 are geographically *smaller* than Precinct 2 in the Enacted Plan. Third, Defendants’ expert Dr. Owens, when shown Rush’s coastal precinct Alternative Plan 4 at his deposition,¹⁶ agreed that “Precinct 3 in [Rush Alternative Plan 4] doesn’t have any of the features that concern [him] about including Galveston Island” and that it “doesn’t have any of those socioeconomic differences that [he] w[as] concerned about with respect to some of the other plans [he] looked at.” Owens Dep. Ex. 22 at 263:23-264:14.

b. *Gingles* Prongs 2 and 3 are satisfied.

Gingles prongs 2 and 3 require Plaintiffs to demonstrate that the minority group in question is politically cohesive, and that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority group’s preferred candidate. *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1243 (5th Cir. 1988) (citing *Thornburg v. Gingles*, 478 U.S.

¹⁵ These League City residents are only included to balance population. Ex. 7 (6.2.23 Decl. Of Tye Rush) ¶¶ 3, 6.

¹⁶ Dr. Owens acknowledged that the Rush coastal precinct Alternative Maps were included in Dr. Burch’s report, which he reviewed, but that he did not respond to these maps in his report. Owens Dep. Ex. 22 at 269:5-22.

30, 49-51 (1986)). “The second and third parts, cohesion and majority bloc voting, are usually proven by statistical evidence of racially polarized voting.” *Id.*

i. Black and Hispanic voters are cohesive.

Plaintiffs have shown that there is political cohesion between Black and Hispanic voters in Galveston County. The relevant inquiry is “whether the minority group together votes in a cohesive manner for the minority candidate.” *Id.* at 1245. Political cohesion requires showing that a “significant number of minority group members usually vote for the same candidate,” and “may be demonstrated by statistical evidence of racial bloc voting or testimony from persons familiar with the community in question.” *Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 754-55 (S.D. Tex. 2013), *aff’d sub nom. Gonzalez v. Harris Cnty., Tex.*, 601 F. App’x 255 (5th Cir. 2015). Plaintiffs’ experts, Dr. Barreto and Mr. Rios, analyzed 29 local, state, and federal elections, and found that elections in Galveston County are racially polarized. Ex. 4 (Barreto Rep.) ¶¶ 10, 21. Specifically, Dr. Barreto and Mr. Rios conducted several Ecological Inference (“EI”) analyses which found that Black and Hispanic residents in Galveston County voted for the same candidates *in every election*, at a rate of approximately 75 percent of the voting population—an overwhelming demonstration of cohesion among Black and Hispanic residents. *See* Ex. 4 (Barreto Rep.) ¶¶ 21-25, Table 1 at 17-19; Ex. 8 (Barreto Rebuttal) Table 4 at 14-16.

Contrary to Defendants’ assertion, there is no bright-line rule for establishing cohesion: Defendants’ 75 percent threshold is fabricated—though Plaintiffs still satisfy it. *Cf.* Defs’ Br. at 38-39. The relevant legal inquiry is whether a “significant number” of minority voters usually vote for the same candidate, *see Rodriguez*, 964 F. Supp. 2d at 755,

and a bright-line threshold is inconsistent with this sort of fact-specific inquiry, Ex. 8 (Barreto Rebuttal) ¶¶ 6-11. Indeed, Defendants' expert, Dr. Alford, justifies the threshold merely because 75 percent is the "halfway point" between 50 percent and 100 percent. Doc 176-47 (Alford Rep.) at 2-3; Ex. 8 (Barreto Rebuttal) ¶ 8. And Defendants' other expert, Dr. Owens, acknowledges that 70 percent of minority voters voting for the same candidates would be sufficient to establish cohesion. Owens Dep. at 124:24-125:14. Moreover, even if this Court were to recognize Dr. Alford's arbitrary 75 percent threshold, Plaintiffs' experts Dr. Barreto and Mr. Rios show that Black and Hispanic voters in Galveston still clear this fabricated bar: Black and Hispanic voters, separately and together, vote for the same candidates at a "3-to-1 margin." Ex. 4 (Barreto Rep.) ¶¶ 10, 21.

Defendants additionally contend that there is no political cohesion between Black and Hispanic voters because the analyses showed "a gap larger than 10 [percent] between Black and Latino voters who voted for the Democratic Party candidate," but cite no source supporting why this arbitrary "gap" undermines evidence of cohesion. *See* Defs' Br. at 42. In any event, as Dr. Barreto and Mr. Rios explain, "analysis of actual vote history can be important in understanding Hispanic voting patterns with more precision," given the smaller pool of eligible Hispanic voters and their historically lower rates of voter registration and voter turnout. Ex. 4 (Barreto Rep.) ¶ 28. When analyzing actual vote history using Spanish Surname data from the Texas Legislative Council, Hispanic voters demonstrate overwhelming cohesion with Black voters. *See id.* ¶ 28, Table 1 at 17 (Barreto Rep.); Ex. 8 (Barreto Rebuttal) ¶¶ 35-38. Further, lay witness testimony establishes that Black and Latino voters in Galveston County share common interests with respect to

housing, policing, employment, and other interests, resulting in political cohesion. *See supra* at Counter Statement of Facts, Part V.

Defendants also wrongly contend that Plaintiffs have not shown the presence of racially polarized voting at the Precinct level. *See* Defs’ Br. at 21-22, 40. But Dr. Barreto and Mr. Rios *did* present statistical evidence showing that voting is racially polarized within each Precinct, in addition to County-wide. Ex. 8 (Baretto Rebuttal) ¶¶ 21, 33. And even if they had not conducted this precise Precinct-level analysis, the fair inference from County-level data—given the extreme nature of the polarization—is that polarization exists within each of the four Precincts.

In sum, there is, at a minimum, a genuine dispute of fact regarding the extent to which Black and Hispanic voters in Galveston County demonstrate political cohesion.

ii. White voters usually defeat the minority preferred candidate.

The evidence confirms that Plaintiffs have satisfied the third *Gingles* precondition, or at the very least there are genuine disputes of material fact that would require the Court to weigh the evidence presented by the parties’ experts. Neither Defendants nor their experts dispute that racially polarized voting exists, and that white voters consistently defeat minority-preferred candidates. *See, e.g.*, Ex. 8 (Baretto Rebuttal) ¶ 12; Defs’ Br. at 44. Instead, Defendants attempt to explain away the overwhelming evidence of racially polarized voting by attributing it to partisan politics rather than race.

Generally, “a white bloc vote that normally will defeat the combined strength of minority support plus white crossover votes rises to the level of legally significant white

bloc voting.” *Rodriguez*, 964 F. Supp. 2d at 757 (internal quotation marks omitted). As such, Defendants are flatly wrong that “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,” rather than political affiliation. Defs’ Br. at 44. Rather, the Fifth Circuit has expressly held that “courts should not summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation.” *LULAC No. 4434*, 999 F.2d at 860–61. Recognizing that “even partisan affiliation may serve as a proxy for illegitimate racial considerations,” the Fifth Circuit requires inquiry into: 1) the percentage of white voters that make up each political party in the jurisdiction, 2) the extent to which the Republican Party nominates minority candidates for office in the jurisdiction, and 3) any differences in the level of support among white Republican voters for minority or white Republican candidates. *Id.* at 860-62; *see also* Ex. 8 (Barreto Rebuttal) ¶ 15.

Plaintiffs’ experts Dr. Barreto and Mr. Rios demonstrate that, in Galveston County, partisan politics serve as a proxy for race, and the vast majority of white voters vote with the Republican Party to defeat minority-preferred, Democratic candidates. Specifically, the vast majority of Republican voters in Galveston County are white, and the vast majority of Democratic voters are minorities. Ex. 8 (Barreto Rebuttal) ¶ 16; *see also* Apffel Dep. Ex. 14 at 294:1-5 (acknowledging the correlation between race and partisanship in Galveston County). In the elections that Dr. Barreto and Mr. Rios examined, there was not a single minority Republican who has won a primary election for Galveston County Judge or County Commissioner, even though “the 2022 Democratic candidate for Galveston County

Judge (King) was Black, the 2020 Democratic candidate for Galveston County Sheriff (Salinas) was Hispanic, and the only two Black people ever nominated in a primary and subsequently elected to the Galveston County Commission have been Democrats.” Ex. 8 (Barreto Rebuttal) ¶ 17, Table 2 at 7. Finally, Dr. Barreto and Mr. Rios found that, even where minority Republican candidates have run in statewide elections, Black and Hispanic Republicans have been defeated in primary elections by white voters in Galveston County. *Id.* ¶ 17. Indeed, the only minority to win a statewide Republican primary, Ted Cruz, received the lowest vote share among Galveston County Republicans of any statewide Republican across all election cycles analyzed. *Id.* ¶¶ 19-20, 24. Lay witness testimony further confirms that Black and Hispanic voters do not typically vote Republican, nor do white voters vote Democrat, in Galveston County. *See supra* at Counter Statement of Facts, Part V. In sum, there is at least a genuine dispute whether partisan affiliation is a proxy for race in Galveston County, such that white (Republican) voters usually defeat minority-preferred (Democratic) candidates.¹⁷

II. Factual disputes preclude summary judgment on Petteway Plaintiffs’ racial gerrymandering claim.

Factual disputes further preclude summary judgment on Petteway Plaintiffs’ racial gerrymandering claim. It violates the Fourteenth Amendment where “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.” *Bethune-Hill v. Va. State Bd. of Elections*,

¹⁷ This Galveston County-specific analysis disproves Defendants’ contention that Dr. Barreto and Mr. Rios analyzed party as a proxy for race only at the national level. *See* Defs’ Br. at 47.

580 U.S. 178, 187 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). While a “conflict or inconsistency” with traditional districting principles “may be persuasive circumstantial evidence tending to show racial predominance,” *id.* at 190, “[r]ace may predominate even when a reapportionment plan respects traditional principles,” *id.* at 189. That is so because “[t]raditional redistricting principles . . . are numerous and malleable,” and mapdrawers can “deploy[] [them] in various combination and permutations . . . [to] construct . . . maps that look consistent with traditional, race-neutral principles,” but in which “race still may predominate.” *Id.* at 190.

Racial predominance may be shown by direct or circumstantial evidence. One “often highly persuasive” way to show that race, as opposed to some other purported motivation, explained the district lines is to proffer an “alternative districting plan” that achieves the purported goal “without moving so many members of a minority group.” *Cooper*, 581 U.S. at 317-18; *see also LULAC v. Abbott*, 601 F. Supp. 3d 147, 176-77 (W.D. Tex. 2022) (noting that “all nine Justices agree[] that [alternative] maps are helpful evidence of legislative intent”).

The record contains both direct and circumstantial evidence that race was the predominant motivating factor in both Mr. Bryan’s drawing of the Enacted Plan and in the Commissioner Court’s adoption of the Enacted Plan. Although Mr. Bryan asserts that he did not view racial data as he was drawing the plan, the racial makeup of the benchmark Precincts was known prior to his work commencing. *See Cooper*, 581 U.S. at 315 (“Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head . . . [the mapdrawer’s] denial of race-based districting r[ang] hollow.”)

(internal quotation marks omitted) (second brackets in original). Moreover, Mr. Bryan created multiple draft maps in an iterative process. For each, he generated a spreadsheet that contained detailed racial data, including the racial composition of *each Census block* within each proposed precinct in a sortable Excel column. Ex. 36 at DEFS00031696 (spreadsheet for first draft map). The breadth of the racial data Mr. Bryan added to his spreadsheet increased as he progressed. By the time he settled on Map 1 and Map 2 by October 21, 2021 to preview to the Commissioners, he had constructed a dedicated Tab within his analytics spreadsheet for the racial data:

| 14 | | 1519 | 2020 | 2020 | 2020 | 2020 | | | |
|----|--------------------|----------------|----------------|----------------|---------------|---------------|------------|------------|------------|
| 15 | Map 1 | CVAP Total | PL Total | PL VAP Total | PL VAP BNH | PL VAP HISP | | | |
| 16 | Row Label | Sum of acs | Sum of PL | Sum of PL | Sum of PL | Sum of PL | % BNH VAP | % HISP VAP | % Min VAP |
| 17 | 1.000000 | 61,608 | 87,659 | 66,625 | 4,589 | 15,017 | 7% | 23% | 29% |
| 18 | 2.000000 | 57,445 | 86,431 | 67,003 | 5,018 | 13,159 | 7% | 20% | 27% |
| 19 | 3.000000 | 59,948 | 86,633 | 68,547 | 19,235 | 20,371 | 26% | 30% | 58% |
| 20 | 4.000000 | 55,345 | 87,959 | 65,207 | 3,447 | 11,612 | 5% | 18% | 23% |
| 21 | Grand Total | 234,346 | 350,682 | 267,382 | 32,289 | 60,159 | 12% | 22% | 35% |
| 22 | | | | | | | | | |
| 23 | Low | -5.5% | -1.4% | -2.5% | | | | | |
| 24 | Average | 58,586 | 87,671 | 66,846 | | | | | |
| 25 | High | 5.2% | 1.1% | 2.5% | | | | | |
| 26 | | | | | | | | | |
| 27 | | 1519 | 2020 | 2020 | 2020 | | | | |
| 28 | Map2 | CVAP Total | PL Total | PL VAP Total | PL VAP BNH | PL VAP HISP | | | |
| 29 | Row Label | Sum of acs | Sum of PL | Sum of PL | Sum of PL | Sum of PL | % BNH VAP | % HISP VAP | % Min VAP |
| 30 | 1.000000 | 61,215 | 87,689 | 66,641 | 6,332 | 16,404 | 10% | 25% | 34% |
| 31 | 2.000000 | 63,802 | 87,697 | 71,389 | 9,254 | 16,431 | 13% | 23% | 36% |
| 32 | 3.000000 | 55,319 | 88,111 | 64,704 | 4,716 | 14,908 | 7% | 23% | 30% |
| 33 | 4.000000 | 54,010 | 87,185 | 64,648 | 11,987 | 12,416 | 19% | 19% | 38% |
| 34 | Grand Total | 234,346 | 350,682 | 267,382 | 32,289 | 60,159 | 12% | 22% | 35% |
| 35 | | | | | | | | | |

Ex. 26 at DEFS00018660 (Pop Pivot Tab). The columns in red and green are the “Black Not Hispanic” and “Hispanic” VAP for each Precinct in the benchmark plan, Map 1, and Map 2. *Id.* Mr. Bryan created a new column—not reported by the Census but instead the result of his own Excel commands—to calculate the combined minority VAP for each Precinct in all three plans. *Id.* Moreover, to visualize the racial distribution in each plan, he created “Conditional Formatting” rules to generate a heat map within the spreadsheet to create a colored gradient of red-white-green. *Id.* This special formatting allowed Mr. Bryan to display visually how far each Precinct’s racial composition was from the highest or lowest values among the Precincts. *Id.* For example, in both the Benchmark Plan and Map

1, Precinct 3 has a concentrated Black VAP, shown in green, while the other precincts have lower values shown in red. In Map 2, none of the Precincts have green shading for Black VAP, illustrating the fracturing of Black voters. *Id.* This special formatting was not part of Mr. Bryan’s earlier template, *see, e.g.*, Ex. 36 at DEFS00031696, belying his assertion that, in assessing the plan, he “considered total population, not race or ethnicity,” Defs.’ Ex. 17 (Bryan Decl.) ¶ 6.

Defendants cite Commissioner Apffel’s deposition testimony, in which he denies knowing the racial composition of the Enacted Plan’s Precincts and denies having been provided any demographic information other than total population in his meeting with Mr. Oldham. Defs’ Br. at 53; *see* Apffel Dep. Ex. 14 at 160:13-161:22. But Commissioner Holmes took contemporaneous handwritten notes of a November 9, 2021, phone call he received from Commissioner Apffel at 12:58 p.m., in which Commissioner Apffel celebrated the fracturing of the minority population in Map 2.

I informed him that map 2 was discriminatory to the minority voters currently in pct 3. He stated that the minority population currently in pct 3 was divided fairly evenly amongst all pcts in map 2 + that Dale Oldham told him this was a legal map. Also informed me that Mike Guarino

Ex. 39 at Holmes 000188 (Holmes Notes). Commissioner Apffel’s statement to Commissioner Holmes—among other evidence—directly contradicts his testimony disclaiming any knowledge of the plan’s racial demographics. Indeed, Commissioner Apffel’s testimony suggests that an important feature of Map 2 to him was that it split the

minority population across all four Precincts. Apffel Dep. Ex. 14 at 264:13-23; *see also Walters v. Boston City Council*, No. 22-12048-PBS, 2023 WL 3300466, at *1 (D. Mass. May 8, 2023) (enjoining plan as racial gerrymander where motivation was to achieve “racial balancing”). Punctuating that fact, at the end of the call, Commissioner Apffel asked if Commissioner Holmes had “sicked the NAACP on ‘em.” Ex. 39 at Holmes 000188.

Defendants also cite Commissioner Giusti’s deposition testimony asserting that he did not receive demographic data for Maps 1 or 2. Defs’ Br. at 53; Giusti Dep. Ex. 15 at 127:13-19. But Commissioner Giusti attended the same October 22, 2021, Zoom meeting with Mr. Oldham and Mr. Bryan as Commissioner Holmes, and Mr. Oldham and Mr. Bryan displayed the racial data for Maps 1 and 2 on the Zoom screen. Ex. 39 at Holmes 000184 (Holmes Notes); *see also* Giusti Dep. Ex. 15 at 175:9-17, 176:5-9 (describing where minority population is located, and expressing no concerns about Precinct 3 losing its majority-minority status).

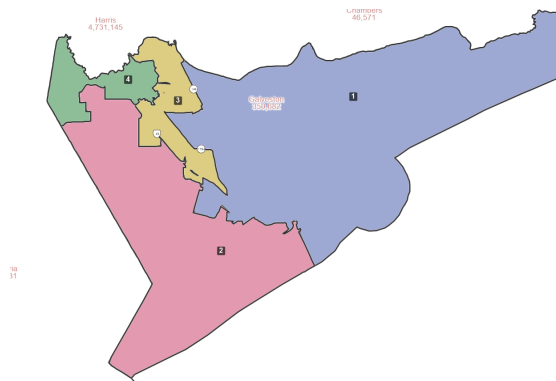
Although Defendants’ *counsel* has sought to defend the enactment of Map 2 as motivated by partisanship,¹⁸ none of the Commissioners who voted for the map have expressed partisan motivation. *See supra* at Counter Statement of Facts, Part IV. Their clients having disclaimed partisan motivation, Defendants are left to contend that a desire for a “coastal precinct” necessarily resulted in the fracturing of Precinct 3’s minority

¹⁸ A *post hoc* rationale offered by litigation counsel that contradicts their clients’ sworn testimony is not cognizable evidence. *See Abbott v. Equity Grp.*, 2 F.3d 613, 619 (5th Cir. 1993) (“[U]nsubstantiated assertions are not competent summary judgment evidence.”).

population across all four precincts. Defs’ Br. at 34. But the evidence shows that this is a pretextual explanation.

First, Commissioner Giusti testified that he was aware of no discussion among the commissioners about the creation of a coastal precinct, and that he was unaware of any other conversations with anyone about creating such a precinct. Giusti Dep. Ex. 15 at 106:10-109:13. Commissioner Apffel testified that *both* Map 1 and Map 2 created coastal precincts in his mind. Apffel Dep. Ex. 14 at 184:8-13.¹⁹ And Judge Henry testified that the *only* thing he cared about was creating a coastal precinct—that the remainder of the lines did not matter to him at all because they only affected the commissioners, not him. Henry Dep. Ex. 11 at 174:20-175:4 (“[T]o me, as long as we joined Bolivar, Galveston, and that’s really it, then the rest of the lines are not that important.”).

Second, if creating a coastal precinct were the overriding goal, one would expect Mr. Bryan to have been given that instruction out the gate. But his first draft map on October 15, 2021, created no coastal precinct—though it did subsume the minority population in central Galveston County with white voters from League City and Kemah.



¹⁹ See also Apffel Dep. Ex. 14 at 126:10-127:13, 138:8-22 (stating that his “only motivating factor” to draw the Bolivar Peninsula out of his district was that “it did not make sense for [him] – for a 20-minute meeting to drive four hours”).

Ex. 40 (map displaying DEFS00031696); Ex. 36 (DEFS00031696) (block assignment file for October 15, 2021 draft map).

Third, if creating a coastal precinct were really the motivation—and if the remaining precinct lines were irrelevant—then the Commissioners Court could have, and would have, done so without fracturing Galveston County’s minority population into four pieces and ensuring that each Precinct was two-thirds white. *See supra* at Counter Statement of Facts, Part IV; *see also Cooper*, 581 U.S. at 317 (describing alternative maps as “key evidence” in disproving stated intent).²⁰ Multiple district configurations are possible that create a coastal precinct without fracturing the minority population into three different precincts.²¹ Ex. 1 (Burch Rep.) at 12-14, 36-37, 38. Given Judge Henry’s purported view that the lines outside the coastal precinct were irrelevant to him, and the public outcry at the November 12 hearing, the Commissioners could have adopted a map that aimed to satisfy the Commissioners’ wants and the public’s concerns.²² The record evidence supports Petteway Plaintiffs’ claim that the Enacted Plan was drawn with the overriding goal of creating a two-thirds/one-third split between white and minority voters within each precinct.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants’ Motion for Summary Judgment.

²⁰ The *Cooper* Court discussed alternative maps as a tool to disentangle race and politics. Here, Defendants have disclaimed a partisan motivation behind the Enacted Plan. But the alternative maps have the same evidentiary value in disproving the “coastal precinct” rationale.

²¹ Two of those alternative maps, Rush Alternative Maps 3 and 4, are shown above. *See supra* at Argument, Part I.a.

²² In light of this evidence, Defendants’ contention that the Enacted Plan lacks bizarrely shaped districts is beside the point. *See Bethune-Hill*, 580 U.S. at 187.

Respectfully submitted this 2nd day of June, 2023.

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CERTIFICATE OF SERVICE

I certify that on June 2, 2023, the foregoing document was filed electronically and served on all parties of record via CM/ECF.

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