

**UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)**

BALTIMORE COUNTY BRANCH OF THE
NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs,

v.

BALTIMORE COUNTY, MARYLAND, *et al.*,

Defendants.

Civil Action No. LKG-21-03232

**PLAINTIFFS' RESPONSE TO DEFENDANT BALTIMORE COUNTY'S
SUPPLEMENTAL DECLARATIONS**

During the March 21, 2022, evidentiary hearing in this case, the Court requested that Defendant Baltimore County submit evidence to support its claim that the County's remedial District 2 is a "crossover" district. Yesterday afternoon, the County submitted new supplemental declarations (ECF 74), but those declarations amount to little more than anecdote and inapposite statistics; the County has still not presented any evidence that white voters in District 2 (or anywhere else in the County) will "cross over" to vote for Black candidates of choice. Even if the County's lack of evidence were not dispositive—and it should be—the empirical statistics detailed in Dr. Barreto's attached declaration conclusively establish that the County's remedial District 2 does not come close to functioning as a crossover district.

Instead of responding to the Court’s inquiry, the two declarations the County has presented suggest (at best) only that (i) Black and “Jewish”¹ voters in the County’s remedial District 2 will vote for a white Democrat in a contest against a white Republican, and (ii) they voted for a Black candidate in a single, *uncontested*, nonpartisan Board of Education election.

First, Dr. Barreto’s statistical analysis confirms that there is not sufficient crossover by white voters in the precincts of the County’s remedial District 2 to provide Black citizens a reasonable opportunity to elect candidates of choice. According to ecological inference analysis, in the 2016 *Democratic primary* (where, by definition, all voters belong to the same party), 97.2% of white citizens in those precincts voted for the white candidate Chris Van Hollen, while only 2.8% voted for Black candidate Donna Edwards. Black citizens supported Donna Edwards at a rate of 81.2%—an undisputed indicator that she was the Black candidate of choice. Barreto Fifth Decl. ¶¶ 11, 12. This stunning 2.8% white vote in the County’s remedial District 2 demonstrates extremely strong racially polarized voting -- the *opposite* of crossover voting.²

In another example of very strong racially polarized voting, 86.7% of Black voters in the County’s remedial District 2 voted in favor of Black Democrat Ben Jealous in November 2018. In contrast, 81.2% of white voters in the County’s remedial District 2 voted in favor of white Republican Larry Hogan. Barreto Fifth Decl. ¶ 10. Those figures show whites voting in high percentages against Black candidates of choice; they are *not* crossing over.

¹ Dr. Gimpel suggests he sources his claim about “Jewish voters” to the “State of Maryland voter files.” ECF 74-2 ¶ 3. Of course, Maryland voter files do not contain information about religious affiliation, as that would be unconstitutional.

² In his latest analysis, Dr. Gimpel asserts that his “ecological regression” controls for “the share of Democratic party registrants in each precinct.” ECF 74-2 ¶ 11. This makes no sense as applied to the Edwards-Van Hollen race, which was a Democratic primary where all voters were affiliated with the Democratic party. And as Dr. Barreto discusses, the academic literature and courts find that controlling for party affiliation is an inappropriate effort to “explain away” the role of race in voting patterns. Barreto Fifth Decl. ¶¶ 14-15.

Moreover, the County's prior submission (ECF 67 at 14) asserted that changing district lines will not impact election performance because 75% of County voters are registered as Democrats (according to Dr. Gimpel, most of the County's Republicans are concentrated in the County's north and east sides, while, on the west side, over 65% of voters are registered as Democrats and approximately 20% as independents or third-party; ECF 72-1 ¶ 12). But party alignment does not equate to racial voting pattern. White voters in the County's proposed District 2 did not follow the party ticket and vote for Mr. Jealous. Instead, only 18.9% of white voters voted for Mr. Jealous, meaning a significant portion of white would-be Democratic voters *crossed party lines* to oppose the Black candidate of choice Ben Jealous, abandoning the Democratic party when its candidate was Black. This is not a crossover district.

Second, the Court has already found the election of Cheryl Pasteur to carry little probative value given the circumstances of her election and the direction provided by *Gingles*:

Ms. Pasteur states in her Declaration to the Court that her election to the County School Board was unique for several reasons: (1) her opponent did not fundraise or spend any money on his campaign; (2) her opponent did not participate in most of the candidate events; and (3) her opponent did not receive any endorsements in the race. *See generally* Decl. of Cheryl Pasteur ("Pasteur Decl."), ECF No. 39-3. And so, Ms. Pasteur's Declaration indicates that, while this election was technically contested, the White candidate did not mount a serious campaign. *Id.*

"Because loss of political power through vote dilution is distinct from the mere inability to win a particular election . . . [the Supreme Court has recognized that] a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57. Given this, Ms. Pasteur's important, but singular, victory does not negate the significant evidence before the Court demonstrating racially-polarized voting in the County.

ECF No. 55 at 17-18. The Court's prior consideration of the evidence concerning Ms. Pasteur is entirely consistent with *Gingles*. The County's submission ignores the Court's prior analysis and

offers no credible reason why Ms. Pasteur's virtually uncontested election in a nonpartisan school board race should displace the overwhelming evidence of racially polarized voting.

Third, the County's reliance on the elections of Izzy Patoka in 2018 and Vicki Almond in 2014 does not demonstrate crossover voting. It is beside the point that Black voters in the County's remedial District 2 will vote for a white Democrat in a contest against a white Republican. Rather, the question the Court posed is whether there are *white* crossover voters, not *Black* crossover voters. These results do not demonstrate that *white voters* will cross over to vote for a Black candidate of choice (like Mr. Jealous, Ms. Edwards, or Mr. Brown).

Indeed, when looking at the precincts the County identifies as having "the largest Jewish populations" and supposedly full of crossover voters, only a miniscule percentage vote for Black candidates of choice. For example, one of the precincts Mr. Patoka described as having a large Jewish population was 003-007, which is over 80% white. ECF 74-1 ¶ 15. The percentage of voters in that specific precinct who voted for Ms. Edwards in the 2016 primary was 12%. Barreto Fifth Decl. ¶ 20. Put another way, almost 90% of voters in that nearly all-white precinct voted as a bloc *against* the Black candidate of choice. As explained by Dr. Barreto, this precinct is representative of the pattern seen throughout the precincts identified by Mr. Patoka as having large Jewish populations. Barreto Fifth Decl. ¶ 20. That demonstrates extreme racially polarized voting, not crossover voting.

Fourth, the County's suggestion that District 4 must stay above the 60-65% range to remain "safe" for a Black candidate is disproven by the history of District 4 itself, as discussed in Chairman Jones' testimony. The 2002 map that created District 4 as the first majority-Black district contained only 55% Black voting age population. ECF 68-1, Ex. A ¶ 4. That is well below

what the County now says is necessary to be “safe” to prevent Black candidates from splitting the vote and allowing a white candidate to emerge.

For example, in the 2002 primary election in District 4, six candidates competed, two of whom were white and four of whom were Black. Contrary to the County’s theory, although the Black voting age population was 55%, there had never been a Black councilperson elected in the history of Baltimore County, and there was no Black incumbent, a Black candidate easily won the primary.³ And in the general election, the Black Democratic candidate Kenneth N. Oliver received 80% of the vote.⁴ Similarly, in the 2010 primary election in District 4 (which remained the same district with a 55% Black voting age population), seven candidates competed, five Black and two white. Two popular Black candidates, Councilman Oliver and now-Councilman Jones, finished first and a close second, with the white candidates far behind.⁵ In the general election, Councilman Oliver won reelection with 88% of the vote.⁶

These elections show that a Black candidate in a newly created majority-Black district with 55% Black voting age population was able to *easily* defeat white candidates in the primary and general elections, even when popular Black candidates were running against each other and white candidates emerged. Plaintiffs’ proposed Map 6 would unpack the County’s proposed

³ 2002 Primary election results, accessed March 22, 2022, <https://resources.baltimorecountymd.gov/Documents/Elections/2002primaryresults.pdf>.

⁴ 2002 General election results, accessed March 22, 2022, <https://resources.baltimorecountymd.gov/Documents/Elections/2002generalresults.pdf>.

⁵ 2010 Primary election results, accessed March 22, 2022, <https://resources.baltimorecountymd.gov/Documents/Elections/2010/countywideresults101006.pdf>.

⁶ 2010 General election results, accessed March 22, 2022, <https://resources.baltimorecountymd.gov/Documents/Elections/2010/county101206.PDF>.

District 4’s “super, supermajority” while continuing to give Black voters a sizable margin to elect their candidates of choice. Fifth Barreto Decl. ¶ 19.

In sum, the County’s proposed remedial District 2 is nowhere close to being a crossover district. The County’s latest submission provides *no* evidence that white crossover voting in remedial District 2 will allow a Black minority of voters a meaningful opportunity to elect their candidates of choice.

Respectfully submitted,

/s/ Deborah A. Jeon
Deborah A. Jeon (Bar #06905)
Tierney Peprah (Bar # 21986)
AMERICAN CIVIL LIBERTIES UNION
OF MARYLAND
Clipper Mill Road Suite 350
Baltimore, MD 21211
(410) 889-8555
jeon@aclu-md.org

/s/ John A. Freedman
John A. Freedman (Bar #20276)
Mark D. Colley (Bar #16281)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, N.W.3600
Washington, D.C. 20001
(202) 942-5000
john.freedman@arnoldporter.com

/s/ Andrew D. Freeman
Andrew D. Freeman (Bar #03867)
BROWN GOLDSTEIN & LEVY LLP
120 E. Baltimore Street, Suite 2500
Baltimore, MD 21202-6701
(410) 962-1030
adf@browngold.com

Michael Mazzullo (admitted pro hac vice)
ARNOLD & PORTER KAYE SCHOLER LLP
250 W. 55th Street
New York, NY 10019
(212) 836-8000
michael.mazzullo@arnoldporter.com

Counsel for Plaintiffs

Dated: March 23, 2022

EXHIBIT A

DECLARATION OF MATTHEW A. BARRETO

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FIFTH DECLARATION OF MATT BARRETO, PH. D.

1. I have previously executed four declarations that were submitted in this action. The first was executed on January 18, 2022 (ECF 28-3), the second on February 7, 2022 (ECF 41-1), the third on March 10, 2022 (ECF 60-2), and the fourth on March 17, 2022 (ECF 68-2). Additionally, I testified via Zoom on February 15, 2022 and on March 21, 2022 as part of the Court's hearings on Plaintiffs' Motion for Preliminary Injunction and the parties' subsequent submissions.

2. As explained in my prior declarations, in this matter I have been working with Dr. Kassra Oskooii, tenured professor of Political Science at the University of Delaware.

3. I listened carefully to the questions posed by the Court at the hearing on March 21, 2022, and have gone back to reanalyze my data specifically for the County's proposed remedial District 2 to assess its ability to elect Black candidates of choice.

4. I have also read the supplemental declarations of Council Member Izzy Patoka (ECF 74-1) and Dr. James Gimpel (ECF 74-2) filed March 22, 2022 by the County.

5. It continues to be my conclusion that the County's proposed remedial District 2 would not provide Black voters with a meaningful opportunity to elect a Black candidate of their choice.

6. The County claims that 41% Black voting age population is sufficient for Black voters to comfortably elect candidates of their choice in its proposed remedial District 2 and simultaneously that District 4 needs to be maintained at 61% Black voting age population (actually 64% Any Part Black VAP, as Mr. Cooper has shown) in order to allow Black voters to comfortably elect candidates of their choice. There is a logical inconsistency here. If the County cannot reduce the Black population in District 4 to under 60%, then how can it credibly argue that a 41% Black district is sufficient? It cannot. Neither half of that argument is true. In fact, both District 4 and District 2 can allow Black voters a meaningful opportunity to elect candidates of their choice if they are majority Black and the Black citizen voting age population is approximately 10 percentage points higher than the White CVAP (as in the Plaintiffs' proposed maps, for which the margin between the Black and White VAPs is even larger).

7. To conduct racially polarized voting analysis and make conclusions about Black voters' cohesiveness, White bloc-voting against Black voters' candidates of choice, or White crossover voting, courts require statistical analysis to determine the extent of racially polarized voting. This analysis laid out in the *Gingles* decision requires ecological inference regression analysis to draw conclusions about voting patterns by race or ethnicity. The County has not offered any analysis at all of the extent of racially polarized voting (in District 2 or elsewhere).

8. I have conducted and presented racially polarized voting analysis that makes clear that Black voters in Baltimore County are cohesive and that White voters bloc-vote against Black candidates of choice. For that analysis, it is essential to examine contested elections in which a Black candidate emerges. In its decision of February 22, 2022, the Court concluded that the 2014 Hogan-Brown General Election; 2016 Van Hollen-Edwards Primary; and 2018 Hogan-Jealous General Election were the most probative of racial polarization in Baltimore County because they included a Black candidate versus a White candidate in a contested election. The County offers no evidence to rebut Plaintiffs' evidence, or the Court's findings, that voting patterns in Baltimore County are racially polarized (Table 2, first Barreto declaration).

9. Further, when we focus our analysis just on western Baltimore County, Council Districts 1, 2, 4, we find the same patterns of racially polarized voting with White candidates voting against Black candidates at very high rates. *Id.*, Table 3. In these contested Black vs. White elections, there is no evidence of ample White crossover voting to vote in coalition with Black voters. In fact, the evidence is to the contrary, demonstrating that Whites vote heavily against Black candidates of choice.

10. Based on the request from the Court on March 21, 2022, Dr. Oskooii and I have rerun our racially polarized voting analysis to focus just on the County's proposed remedial District 2. In this map, White voters undisputedly outnumber Black voters. In fact, when only concentrating on the citizen voting age population, Whites are a majority of all eligible voters within County remedial District 2, as shown in William Cooper's testimony and reports. Whether the County likes the U.S. Census Bureau's American Community Survey CVAP numbers or not, they can not argue that people who are not citizens are not eligible to vote, and that, according to

the U.S. Census Bureau, 37% of Hispanic adults are not citizens,¹ therefore reducing their share of voters. Meanwhile, 99% of White adults are citizens² and eligible to vote, therefore increasing their share of eligible voters. This further advantages Whites as a larger voting bloc in County remedial District 2.

11. The County argues that Black candidates of choice can still win, even though White voters are a majority. If there were ample White crossover voting, these voters would provide enough votes to Black voters' preferred candidates to create a coalition to elect a Black candidate of choice. Sadly, this is not the case in Baltimore County's proposed remedial District 2. According to ecological inference analysis, 81.2% of White voters in the County's remedial District 2 voted in favor of White Republican Larry Hogan in November 2018 – even if that meant crossing party lines in order to support the White candidate. In contrast, among Black voters in this same district, 86.7% voted in favor of Black Democrat Ben Jealous. The result is clear and uncontested; performance analysis of proposed remedial District 2 shows that despite very strong Black voting for Jealous, Whites bloc-vote against Jealous, so the Black candidate of choice would fail to win the County's District 2.

12. Further evidence of the lack of White crossover voting comes in the 2016 Democratic primary. Focusing only on the County's remedial map District 2, White Democrat Chris Van Hollen defeated Black Democrat Donna Edwards by 20 points. Looking at the

¹

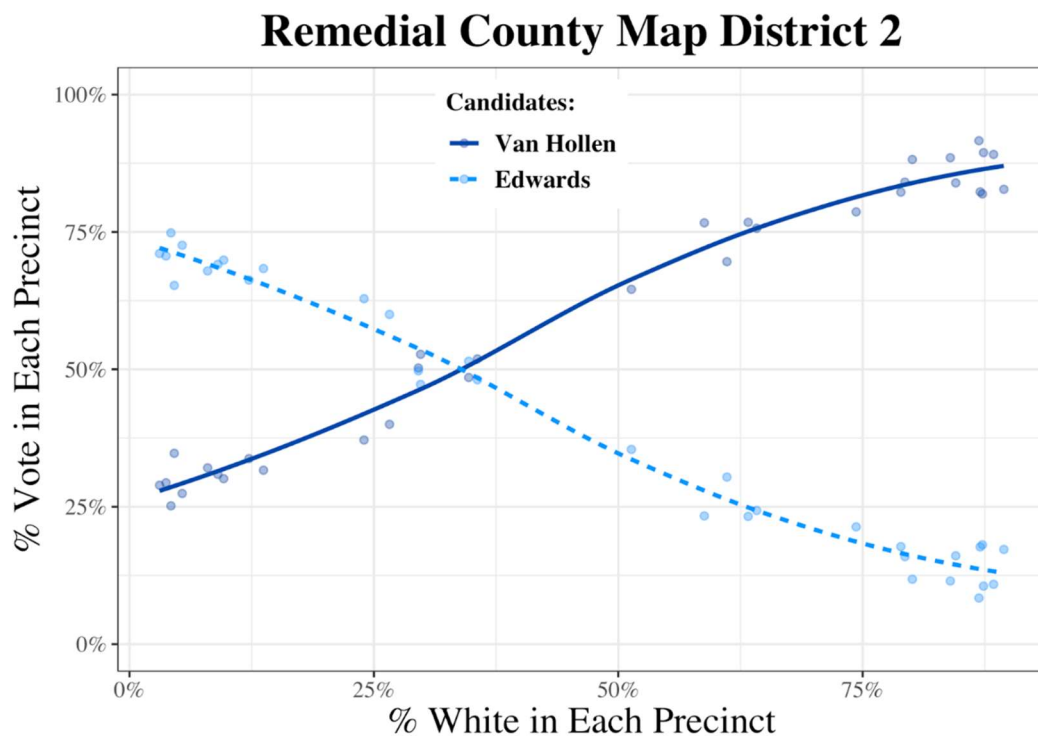
<https://data.census.gov/cedsci/table?q=B050031%3A%20SEX%20BY%20AGE%20BY%20NATIVITY%20AND%20CITIZENSHIP%20STATUS%20%28HISPANIC%20OR%20LATINO%29&g=0500000US24510>

²

<https://data.census.gov/cedsci/table?q=B05003H%3A%20SEX%20BY%20AGE%20BY%20NATIVITY%20AND%20CITIZENSHIP%20STATUS%20%28WHITE%20ALONE,%20NOT%20HISPANIC%20OR%20LATINO%29&g=0500000US24005>

ecological inference analysis, we find that White voters gave 97.2% of their votes to Van Hollen and only 2.8% to Edwards. In contrast, Black voters provided 81.2% of their votes to Edwards and just 18.6% to Van Hollen. This clearly demonstrates that there is not sufficient White crossover voting in the remedial district as drawn by the County to give Black voters a meaningful opportunity to elect Black candidates of their choice.

Figure 1: Visual example of Lack of White Crossover voting in Democratic Primary D2



13. Dr. Gimpel mistakenly attempts to “control” for party/partisanship in discussing racially polarized voting. But partisanship is irrelevant to the analysis of racially polarized voting. Indeed, Courts have historically only asked - do Black and White voters support different candidates, not *why* they support their candidates. Indeed, volumes of political science published literature suggests that it was racist attitudes which pushed more and more Whites into the Republican Party from the 1960s to today. The most recent analysis of voting patterns in modern

elections confirm that partisan voting is strongly driven by racial attitudes from the elections of Barack Obama to Donald Trump.¹ If partisanship can simply explain away racially polarized voting, then the implication is that no plaintiff could bring a successful voting rights case where Blacks vote Democrat and Whites vote Republican. Dr. Gimpel's analysis here is not only wrong, it is misguided and attempts to confuse the question posed by the Court.

14. In his newest declaration, Dr. Gimpel adds new analysis in which he reports for the first time ever, precinct level regression analysis, controlling the percent of Democrats in a precinct, while also controlling for the percent Black voters. This type of analysis is not racially polarized voting analysis recognized by courts, or outlined in numerous political science published research articles about how to conduct racially polarized voting analysis. In fact, courts have regularly rejected regression analysis that attempts to control for partisanship in an attempt to "explain away" the role of race in voting patterns. Likewise, I give this new analysis no weight at all in shedding light on how Blacks or Whites voted in these elections, the central inquiry in this case.

15. The same majority-White precincts that the County claims provide evidence of White crossover voting in favor of Cheryl Pasteur voted heavily against Donna Edwards in 2016 and voted heavily against Ben Jealous in 2018. As this Court found in its Memorandum and Order of February 22, 2022, in Ms. Pasteur's school board race, she had virtually no opponent, running against Anthony Glasser, who raised no money for his campaign, sought no endorsements, spent

¹ Tesler, Michael. 2013. "The return of old-fashioned racism to White Americans' partisan preferences in the early Obama era." *The Journal of Politics*. Abramowitz, Alan and Jennifer McCoy. 2018. "United States: Racial Resentment, Negative Partisanship and Polarization in Trump's America." *The ANNALS of the American Academy of Political and Social Science*.

no money on campaign advertising, and barely campaigned. Ms. Pasteur essentially ran unopposed. Thus, the far more relevant elections are the contested elections with a Black candidate running against a White candidate in a contested election. Dr. Gimpel's analysis of this election tells us nothing about how a Black candidate would do in the County's proposed remedial District 2 in a contested election against a white opponent.

16. In looking at one of the example precincts the County gives as evidence of so-called White crossover voting, the facts suggest otherwise. Precinct 03-006 Pikeville Middle Cafeteria, which is 87% White gave only 38.5% of the vote to Brown in 2014. By 2018 the degree of White crossover voting declined even further to only 27.7% for Jealous. Perhaps even more devastating to the County's argument, this same precinct provided only 10.6% of the vote to Edwards in the 2016 Democratic primary. When Black candidates of choice are present in contested elections, White crossover voting disappears.

17. The fact that Councilmember Patoka, a White Democrat, received large numbers of votes from Black voters when he had no Black opponent and was running against a White Republican (as he did in the 2018 election Dr. Gimpel analyzes), provides no indication as to whether he would be Black voters' candidate of choice were he opposed by a strong Black candidate. The same is true of Councilmember Vicki Almond's election victory over a White Republican in 2014 (the other contested election Dr. Gimpel analyzes). If the County were so confident that Black voters are ready to show strong support for Mr. Patoka as their candidate of choice, why not just go ahead and make District 2 majority-Black? The reason is that once they are a majority, Black voters will have a meaningful chance to elect their own Black candidate of choice, as our racially polarized voting analysis has clearly demonstrated.

18. Further, Dr. Gimpel has conducted no analysis of Jewish voting patterns in District 2. He claims to rely on Mr. Patoka's personal knowledge, but this is not a scientific inquiry and is not empirical analysis. Further, he has not proved that Whites as a group provide crossover voting, even if he can show that a subset of White Jewish voters support Democrats. There is no analysis whatsoever demonstrating that White voters, Jewish or otherwise, vote for Black candidates in an election in which they run against a White candidate. As noted above, many of these same precincts to which Dr. Gimpel points voted overwhelmingly against Ms. Edwards in 2016 and overwhelmingly against Mr. Jealous in 2018.

19. As made clear in my performance analysis of Plaintiffs' Map 6 District 4, that majority-Black district will continue to provide Black voters with a meaningful opportunity to elect Black candidates of choice. Indeed, in all elections analyzed, Black candidates win contested elections against White candidates under Plaintiffs' proposed map for District 4. The argument that it needs to be packed with well over 60% Black voting population is inconsistent with its own history, as District 4 easily elected a Black candidate of choice when it was previously only 55% Black. Plaintiffs' map provides two clear Black- majority districts, both of which provide Black voters a meaningful opportunity to elect Black candidates of their choice.

20. This pattern of voting strongly against Black candidates of choice is present across virtually all precincts which are super majority White in the list Mr. Patoka identifies. For example, precinct 03-007 which is over 80% White gave just 28% to Brown, 22% to Jealous and 12% to Edwards. Likewise, 03-013 which is 84% White gave just 35% to Brown, 28% to Jealous and 12% to Edwards. To the extent that some precincts on his list provide slightly higher support for Black candidates, it is only because those precincts have a sizable Black population, such as precinct 03-005 which is 38% Black or 03-011 which is 31% Black and as the full ecological

inference analysis shows, as the Black population percentage increases, the vote for the Black candidate of choice increases at a very similar rate, evidence of very strong racially polarized voting.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

A handwritten signature in black ink that reads "Matt A. Barreto". The signature is written in a cursive style with a horizontal line underneath it.

Matt Barreto
Agoura Hills, California

Executed on March 23, 2022