

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

DICKINSON BAY AREA BRANCH	§	
NAACP, et al.,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	Civil Action No. 3:22-cv-117- JVB
	§	
GALVESTON COUNTY, TEXAS, et al.,	§	
	§	
<i>Defendants.</i>	§	

	§	
TERRY PETTEWAY, et al.,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	Civil Action No. 3:22-cv-57-JVB
	§	[Lead Consolidated Case]
	§	
GALVESTON COUNTY, TEXAS, et al.,	§	
	§	
<i>Defendants.</i>	§	

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

**NAACP AND PETTEWAY PLAINTIFFS' REPLY  
IN SUPPORT OF JOINT MOTION TO COMPEL PRODUCTION OF**

**TABLE OF CONTENTS**

I. The Work Product Doctrine Does Not Apply to the Challenged Documents. .... 3

II. Attorney-Client Privilege Does Not Apply to the Challenged Documents. .... 7

    A. Defendants cannot claim privilege over political, strategic, or policy decisions by outsourcing legislative duties to counsel. .... 7

    B. Documents that relay underlying facts are not privileged..... 11

    C. Defendants concede that implied waiver applies. .... 13

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Baldus v. Brennan</i> , 843 F. Supp. 2d 955 (E.D. Wis. 2012).....	5
<i>Baldus v. Brennan</i> , No. 11-CV-1011, 2011 WL 6385645, (E.D. Wis. Dec. 20, 2011). ....	6, 15
<i>Castillo v. Frank</i> , 70 F.3d 382 (5th Cir. 1995) .....	3
<i>EEOC v. BDO USA, L.L.P.</i> , 876 F.3d 690 (5th Cir. 2017) .....	9
<i>Exxon Mobil Corp. v. Hill</i> , 751 F.3d 379, 380–81 (5th Cir. 2014) .....	11
<i>Freiermuth v. PPG Indus.</i> , 218 F.R.D. 694 (N.D. Ala. 2003).....	11
<i>Galveston v. United States</i> , Case No. 1:11-cv-1837 (D.D.C. 2011) .....	7
<i>LULAC v. Abbott</i> , 342 F.R.D. 227 (W.D. Tex. 2022) .....	10, 11, 12
<i>LULAC v. Abbott</i> , No. EP-21-CV-00259, 2022 WL 3353409 (W.D. Tex. Aug. 12, 2022).....	5
<i>LULAC v. Abbott</i> , No. EP-21-CV-00259-DCG-JES-JVB, 2022 WL 2921793 (W.D. Tex. July 25, 2022).....	8, 9, 14, 16
<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).....	17
<i>Navigant Consulting, Inc. v. Wilkinson</i> , 220 F.R.D. 467 (N.D. Tex. 2004) .....	10
<i>Ohio A. Philip Randolph Inst. v. Smith</i> , No. 1:18-CV-357, 2018 WL 6591622 (S.D. Ohio Dec. 15, 2018).....	11, 16
<i>Petteway v. Galveston County</i> , No. 3:13-cv-308 (S.D. Tex.) .....	7

*S.C. State Conf. of NAACP v. Alexander*,  
No. 21-CV-3302, 2022 WL 2375798 (D.S.C. Apr. 27, 2022) ..... 12, 13

*United States v. Davis*,  
636 F.2d 1028 (5th Cir. 1981) ..... 14

*United States v. Reagan*,  
596 F.3d 251 (5th Cir. 2010) ..... 16

*Willy v. Admin. Rev. Bd.*,  
423 F.3d 483 (5th Cir. 2005) ..... 17

**Statutes**

Texas Open Meetings Act ..... 13

Voting Rights Act..... 4

**Other Authorities**

Federal Rules of Civil Procedure Rule 37(a)(3)(B)(iv)..... 3

Rule 26(a)(1)(A) ..... 7

NAACP and Petteway Plaintiffs submit this Reply in further support of their Joint Motion to Compel Production of Documents from Defendants, Doc. 102, pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure.<sup>1</sup>

Defendants' Opposition is based upon arguments that are legally baseless, factually unsubstantiated, and often irrelevant. Defendants try to convert *their* assertions of privilege to be *Plaintiffs'* burden, despite well-established law otherwise. *See* Opp. at 15. Defendants assert they anticipated litigation during the map-drawing process, but are unable to substantiate that with a single statement from Commissioners or their staff, resorting instead to the conclusory and self-serving declaration from their attorney and a third party's (irrelevant) testimony. *See* Opp. at 21–24.

Defendants also contend that their production of *other* documents in this litigation should allow them to unreasonably shield the communications most relevant to the key matters in dispute here—the process of drawing the 2021 Enacted Plan that dismantles a long-standing majority-minority district. But this misses the point. Defendants have withheld 270 documents from the key drafting period of October 15, 2021 to November 12, 2021. *See* Doc. 102-5 at Doc. IDs 59–329. And of the 992 documents from this period they have produced, nearly half (458) are public comments, and the remaining documents principally concern logistics of setting the November 12 special session, calendar invitations, and duplicative copies of the finalized map proposals and special meeting agenda. They have not produced *any* documents reflecting edits to the proposals, map-

---

<sup>1</sup> As a non-dispositive motion, the Court's ruling is subject to a "clearly erroneous" standard. *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995).

drawing rationales, or strategic considerations, and Defendants are also claiming privilege over substantive testimony that could shed light on how these final proposals came to be drafted. *See* Doc. 105 (Joint Dispute Letter re Deposition Testimony).

To compensate where they lack in legal purchase or facts, Defendants resort to scare tactics, contending that compelling production here would create a “sweeping rule that threatens to eliminate the attorney-client privilege for legislators.” *Opp.* at 9. The Court should reject that slippery slope argument here as the Western District of Texas already has in the statewide redistricting matter. *See LULAC v. Abbott (“LULAC I”)*, No. EP-21-CV-00259-DCG-JES-JVB, 2022 WL 2921793, at \*11 (W.D. Tex. July 25, 2022) (rejecting the argument that denying work product protection to documents created in the ordinary course of redistricting business would result in legislators “hav[ing] second-class status when it comes to obtaining legal advice and the associated protections accommodating the full and frank exchange of such advice for legislation”).

At bottom, it is Defendants, not Plaintiffs, who are asking this Court to deviate from established practice with their overbroad assertions of privilege. *Opp.* at 9. Accepting Defendants’ arguments would mean that legislative bodies need only follow a simple playbook to avoid accountability for their actions in redistricting: Just outsource legislative responsibilities entirely to a map-strategist who also has a law degree and have that person hire a demographer to draw the map. This would be a sure-fire way for a legislative body intent on depriving minority voters of their constitutional rights to shield the entire drafting process behind privilege, and later assert whatever redistricting factors best suit a defense at trial, knowing that the validity of those factors cannot be explored in discovery. The

Court should reject Defendants’ transparent attempt to exploit the attorney-client privilege and work product doctrine to “cloak the record” of the 2021 redistricting process “behind a charade masking as privilege.” *Baldus v. Brennan* (“*Baldus I*”), 843 F. Supp. 2d 955, 958–61 (E.D. Wis. 2012).

**I. THE WORK PRODUCT DOCTRINE DOES NOT APPLY TO THE CHALLENGED DOCUMENTS.**

Defendants have not satisfied their burden to show that the work product doctrine applies to the challenged documents. They cite to no testimony from Defendants that would establish that any of the challenged documents were prepared in anticipation of litigation and no evidence at all that the challenged documents would not have been prepared but for litigation. They have therefore failed to show that any challenged documents were created for the primary purpose of aiding in litigation.

The best Defendants can do is provide an affidavit from Dale Oldham that undermines, rather than bolsters, their assertions of work product. Oldham asserts without specificity that he (not his client) was “aware that litigation over redistricting” was “anticipated.” Opp. Ex. 1 ¶ 4. Even if Oldham’s *ipse dixit* were relevant to Galveston County’s anticipation of litigation (which it is not), it is plainly insufficient; a general anticipation does not trigger work product even if Defendants had “reasonably believed that litigation would result from its redistricting efforts.” *LULAC v. Abbott* (“*LULAC IIF*”), No. EP-21-CV-00259, 2022 WL 3353409, at \*5 (W.D. Tex. Aug. 12, 2022) (cleaned up). This holds true for documents pertaining to pending legislation because “[t]he [l]egislature could always have a reasonable belief that any of its enactments would result in litigation.

That is the nature of the legislative process.” *Baldus v. Brennan* (“*Baldus I*”), No. 11-CV-1011 JPS-DPW, 2011 WL 6385645, at \*2 (E.D. Wis. Dec. 20, 2011).

Importantly, in the remainder of his affidavit, Oldham *never* asserts that the primary motivating purpose for any of his communications, or the map-related documents generated during this period, was to aid in future litigation. Instead, Oldham asserts he engaged in communications to evaluate the “legal implications” of his work drafting maps and to ensure a “legally compliant map” by assessing what was “legally permissible.” Opp. Ex. 1 ¶¶ 8–18. Surprisingly, this makes sense. After all, Defendants *had* to enact new Commissioners Court precincts. That is their constitutional and legislative duty. The work that went into this—initial drafts, revisions, analyses, draft orders adopting the maps, and so on—was done to aid in the legislative process of redistricting. Oldham’s affidavit thus does little more than confirm that the primary purpose of his and Holtzman Vogel’s work was fulfilling the Commissioners Court’s constitutional duty to redistrict commissioners’ precincts, and therefore supports Plaintiffs’ position that these documents were created in the ordinary course of redistricting. *See* Doc. 102 at 9–12.

Defendants’ other arguments fare no better. They claim it is “self-evident” that litigation was anticipated in this matter due to separate litigation over Galveston County’s districts for justices of the peace and constables from last decade. *See* Opp. 18–20. But as Defendants themselves acknowledge, a Court has already held that the two matters are “not sufficiently related” to be in the same matter, Doc. 1, as justice of the peace and constable precincts are different from the commissioners’ precincts at issue here. In any event, trial

in that matter had concluded over seven years earlier,<sup>2</sup> as did the settlement in the pre-clearance litigation that did involve commissioners' precincts from 2013.<sup>3</sup> Defendants cite not even a single case to support their novel proposition that litigation over different districts from a prior redistricting cycle somehow cloaks all their internal map-drawing done in connection with redistricting efforts years later with work product protection.

The other "record evidence" Defendants' cite to is simply irrelevant. Opp. 21. It includes the testimony of Roxy Hall Williamson, a community advocate working with the NAACP to educate Galveston residents about redistricting in order to ensure they "had a voice" during the process,<sup>4</sup> *see* Ex. 1 (Williamson Dep. 25:4–26:10), and Commissioner Stephen Holmes' having discussed redistricting with his constituents.<sup>5</sup> *See* Opp. at 22–23.

Taking Commissioner Holmes first, Defendants can find no support for their anticipation of litigation mantra there for the simple reason that there is no suggestion that litigation was discussed at these two meetings attended by Commissioner Holmes, nor that Judge Henry or the other Commissioners were present during these meetings and as a consequence were put on notice of anticipated litigation. *See* Doc. 97–12; 97–13. Defendants do not cite any other record evidence or testimony from Commissioner Holmes that he anticipated litigation during the entirety of the redistricting process, or even that he

---

<sup>2</sup> *See Petteway v. Galveston County*, No. 3:13-cv-308 (S.D. Tex.).

<sup>3</sup> *See Galveston v. United States*, Case No. 1:11-cv-1837 (D.D.C. 2011).

<sup>4</sup> Defendants' complaints about Plaintiffs' disclosures in footnote 8 of their opposition are a red herring. NAACP Plaintiffs identified Ms. Williamson as a witness likely to have discoverable evidence, including her membership with the Galveston NAACP Branch, in full compliance with Rule 26(a)(1)(A).

<sup>5</sup> Defendants wrongly assert that Plaintiffs have waived the ability to counter these arguments by not addressing them in the initial motion. Given Plaintiffs' explanation that these arguments were irrelevant and inaccurate, *see* Doc. 97 at 2, Plaintiffs had no idea whether Defendants would raise them again here.

understood his interactions with Ms. Williamson as having anything to do with litigation as opposed to public education. Even if he had, it is hard to see how this could be imputed to Galveston County and others given that during the November 12, 2021 special session, Commissioner Holmes indicated that he was generally excluded from the process. *See* Ex. 2 (Nov. 12 Hr’g Tr. 64:23–25).

As for Ms. Williamson, she is a third party to Defendants whose views on any subject have no connection to Defendants’ assertions of work product privilege. Defendants have failed to cite (and Plaintiffs are unaware of) any cases holding that a third party’s anticipation of litigation can establish by proxy that Defendants created documents in anticipation of litigation. In any event, Ms. Williamson never testified to any specific anticipation of litigation beyond acknowledging a general possibility it could come to that. *See, e.g.*, Ex. 1 (Williamson Dep. 145:23–146:2, 194:7–195:10) (testifying she “didn’t have any idea what kind of litigation” might occur and that litigation “was not a foregone conclusion”). What’s more, Defendants point to no evidence showing that Ms. Williamson communicated any thoughts she might have had about litigation to Defendants.

Finally, and ironically, Defendants’ final justification of work product on the assertion that counsel was involved at “every step” of the redistricting process does not, as they claim, “strongly support[]” their work product assertions, *Opp.* at 20, but rather substantiates the fact that they always intended to misuse privilege to shield the legislative record from public view. Defendants inexplicably rely on *LULAC I* for this assertion, but that case makes clear that documents relating to the outside counsel and map-drawers “are not categorically shielded by work product doctrine simply because outside counsel is

involved”; instead, it is Defendants’ burden to “show[] these documents were created outside of the ordinary course of business or that their primary purpose was in anticipation of litigation.” *LULAC I*, 2022 WL 2921793, at \*7, \*12. As shown above, and for the reasons set forth in Plaintiffs’ Motion, Doc. 102 at 7–13, Defendants have failed to establish that the work product doctrine applies to any challenged documents here.

## **II. ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY TO THE CHALLENGED DOCUMENTS.**

In their Opposition, Defendants try to shed their burden to establish that attorney-client privilege applies to the wholesale withholding of relevant documents by arguing that Plaintiffs have “fail[ed] to substantiate their assertion that certain documents are ‘mixed purpose documents.’” Opp. at 15. But it is not Plaintiffs’ burden to prove that the privilege does not apply; it is *Defendants’* burden to prove that the privilege *does* apply. *See EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017). They have failed to do so here.

### **A. Defendants cannot claim privilege over political, strategic, or policy decisions by outsourcing legislative duties to counsel.**

Defendants’ Opposition is based upon a straw man. They assert that privilege applies to communications in which “legislators expressly seek or obtain legal advice from counsel during the drafting process.” Opp. at 9–10. But Plaintiffs have not challenged documents which, assuming Defendants have described them in good faith, reflect such communications. *See, e.g.*, Doc. 102-5 at Doc. ID 1 (“Communica[t]ion from Judge Henry to redistricting counsel requesting legal review of draft redistricting criteria.”).

The issue here is that Defendants outsourced their legislative duty to redistrict entirely to a map-drawing strategist who happens to have a law degree, who in turn hired

a demographer to carry out drafting at that map-drawing strategist's sole instruction. As Defendants concede, the drafts shown to the Commissioners Court remained unchanged after Oldham and Thomas Bryan met with Commissioners. *See* Opp. at 16 (noting shapefiles disclosed for proposed maps were "identical" to those made public on October 28, 2021). Oldham's declaration reinforces this point: He admits to working directly with Bryan to prepare the first draft maps at his direction pursuant to the Commissioners Court's "requests." Opp. Ex. 1 ¶ 10. In other words, the Commissioners Court did not merely seek legal advice from Oldham during the drafting process; they asked him to take over and complete that map-drawing process for them. It is now their burden to establish the *primary* purpose of any document withheld for attorney-client privilege was the provision of legal advice, not policy or strategic advice about where the lines should be drawn. *See LULAC v. Abbott* ("*LULAC IV*"), 342 F.R.D. 227, 232 (W.D. Tex. 2022).

But Oldham's declaration doesn't come close to meeting this burden. His conclusory assertions that he provided "legal advice" and "legal analysis," Opp. Ex. 1 ¶¶ 4, 7, 8, 10, 14, 18, are the same type of boilerplate assertions that courts routinely conclude are plainly insufficient to support privilege. *See* Doc. 102 at 14–15; *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 474 (N.D. Tex. 2004) ("Such a categorical approach to the attorney-client privilege is not proper."). These assertions are also belied by the representations Defendants have otherwise made about the map-drawing process.

Of the six "factors" Defendants assert in their interrogatory responses that Oldham and Bryan used in crafting the map proposals, just one (the first) has to do with legal considerations; the other five fall squarely within policy and strategic advice, such as which

areas to unify and what shape districts should be. *See* Doc. 102-11 at 7. Defendants’ last-ditch effort to remedy their deficient privilege log with an affidavit full of conclusory assertions is simply not enough to establish that legal advice was the primary purpose of any of the challenged documents. *See Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18-CV-357, 2018 WL 6591622, at \*4 (S.D. Ohio Dec. 15, 2018) (holding attorney cannot meet burden of establishing privilege “by stating in conclusory fashion that he sent and received the documents at issue in order to help him render legal advice”); *Freiermuth v. PPG Indus.*, 218 F.R.D. 694, 699 (N.D. Ala. 2003) (“An affidavit containing mere conclusory statements that a document was prepared for the purpose of obtaining legal advice will not suffice in meeting [respondent’s] burden.”) (citation omitted). To the extent Oldham may have discussed the rationale behind the configuration of commissioners’ precinct lines as related to any legal consequences with the Commissioners or other counsel, “questions about the rationale behind legislative choices do not necessarily transgress privilege, even if the answers have legal consequences or expose the legislature to legal liability.” *LULAC IV*, 342 F.R.D. at 235.

Defendants cannot find a safe haven in the non-redistricting case, *Exxon Mobil Corp. v. Hill*. *See* Opp. at 10, 15 n.4. In *Exxon*, the Fifth Circuit considered whether a memorandum written by *Exxon*’s in-house counsel was protected by attorney-client privilege in later litigation claiming damages over exposure to radioactive materials. 751 F.3d 379, 380–81 (5th Cir. 2014). The lack of applicability here could not be more apparent. *Exxon* is a private company that was undertaking contract negotiations, not a government body engaged in the legislative process. *Id.* The attorney who drafted the

memo at issue was consulted on the legal consequences of data disclosure by the Exxon employee who was actually engaged in negotiations at the time; she was not (as Oldham and other counsel were for the Commissioners Court) directly undertaking the business at hand herself as a corporate representative. *Id.* As such, the memorandum in *Exxon* could not “be mistaken for anything other than legal advice.” *Id.* at 382. And while the document in *Exxon* was a legal memorandum, not one of the challenged documents withheld by Defendants here is characterized as such. *See* Doc. 102-5 (Pl.’s annotated privilege log).

Defendants’ passing reliance on two redistricting cases is also misplaced. *See* Opp. at 11 (citing *LULAC IV*, 342 F.R.D. at 236; *S.C. State Conf. of NAACP v. Alexander*, No. 21-CV-3302, 2022 WL 2375798, at \*19 (D.S.C. Apr. 27, 2022)). In *LULAC IV*, the panel held that deposition testimony was properly withheld when it concerned a lawyer’s suggestions on a draft plan when asked by a legislator to “run the legal” on the bill. 342 F.R.D. at 236. As noted above, Defendants here did not simply ask Oldham or Holtzman Vogel to “run the legal” on a bill they drafted—they had their attorneys and a demographer draft it from start to finish. The other holdings in *LULAC IV*, which are much more applicable here, actually support granting the motion to compel here. The panel held the legislators could not refuse to answer other questions regarding enacted districts because “the rationale behind legislative choices do not necessarily transgress privilege, even if the answers have legal consequences or expose the legislature to legal liability.” *Id.* at 235.

Likewise, the court in *Alexander* found a legal research memo containing “legal analysis related to Sine Die Adjournment” privileged following *in camera* review, 2022 WL 2375798, at \*5, but otherwise ordered communications much more analogous to those

at issue in this matter to be produced. *See id.* at \*4–7 (ruling that (1) communications relating to outside counsel reviewing the state legislature’s “draft map room procedures” were “normal legislative business”; (2) attorney approval of a draft text regarding the timing of when session would be called for redistricting was “legislative strategy”; and (3) attorney advice to put up a “special order” to adopt a house resolution regarding the maps was “strategy as per procedural aspects of the special order”).

If Defendants truly wanted only legal advice from Oldham and his associates, they could have conducted the policy portions of redistricting themselves, as actually should have been done under state law per the Texas Open Meetings Act, *see* Mot. at 24–25, and then sought legal advice as to whether the policy decisions they were proposing complied with the law. But Defendants did not do that. Instead, Defendants chose to funnel the full map-drawing process—practical, policy, and legal compliance alike—through Oldham, Bryan, and Holtzman Vogel. *See, e.g.,* Ex. 3 (Henry Dep. 171:20–173:6, 214:19–215:5). To the extent any incidental legal advice appears to be primarily conveying political, strategic, or policy advice, that is a problem of Defendants’ making. They should not be rewarded by being permitted to assert attorney-client privilege over these communications.

**B. Documents that relay underlying facts are not privileged.**

Defendants acknowledge that “a document outside the attorney-client relationship is not privileged, even if sent to an attorney for legal review.” Opp. at 13 (citing *United States v. Davis*, 636 F.2d 1028, 1040–41 (5th Cir. 1981)). Indeed, *Davis* is clear that “documents created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client,” and it

focuses primarily on documents transferred from client to attorney. *Id.* at 1041. But Defendants go on to assert that “initial draft maps created, analyzed, and revised between October 15 and October 21, 2021” are *de facto* privileged while later versions created in the same process are not. *Opp.* at 14. They cite no cases in support of this proposition, because there are none.

Indeed, for all the reasons stated above, third party demographer Bryan’s initial draft maps were not client communications but rather inter-consultant communications. *See, e.g.,* Doc. 102-5 at Doc. IDs 59–76. These communications were not “fashioned exclusively within the attorney-client relationship” in a privileged manner because Bryan was a technical expert serving a redistricting consultant who was acting primarily in a policy and strategic capacity. When considering Bryan’s work for the Texas legislature in the 2021 redistricting cycle, the panel in *LULAC I* noted that “[s]uch technical work may well have been necessary in reviewing the legality of the proposed legislation and compliance with the Voting Rights Act. Nevertheless, just because attorneys are involved in the process does not automatically shield the work of such technical experts.” 2022 WL 2921793, at \*11.

At most, any legal advice implicated in the exchange of maps would require redaction. But the underlying draft maps themselves are not privileged and must be produced. Defendants describe the pre-October 21 maps as drawn after Oldham had met with Commissioners to ask “about the changes that they wanted to make to the boundaries of the Commissioners Court precincts.” *Opp. Ex. 1* ¶ 8. He then worked with Bryan to prepare baseline maps at his direction to follow through on those “clients’ requests.” *Id.* ¶¶

9–10. This is quintessentially technical work, and Defendants “may not shield the opinions and conclusions of an individual hired with taxpayer money, simply by funneling the hiring of that individual through outside counsel.” *See Baldus I*, 2011 WL 6385645, at \*1. Even Defendants’ self-serving and post-hoc description of the communications does not meet the primary purpose standard.

Defendants also acknowledge that underlying facts within the client’s knowledge are not privileged. *See Opp.* at 13. Plaintiffs are mystified by what Defendants mean when they say they have produced underlying facts to Plaintiffs, *see Opp.* at 2, especially when Defendants’ counsel have claimed privilege over their clients’ own understanding of redistricting obligations and criteria. *See Doc.* 105. Indeed, Oldham’s declaration describes conducting “fact-finding” conversations to “gather facts” from Commissioners Court members, *Opp. Ex. 1* ¶ 8, but no documents have been produced on those underlying facts within the Commissioners and Judge Henry’s knowledge. Documents that reflect such underlying facts, including from the legislative record, cannot be generated and then shielded from discovery by simply being emailed to counsel; they must be produced.

**C. Defendants concede that implied waiver applies.**

In their Motion, Plaintiffs argued that Defendants implicitly waived privilege because they impermissibly attempted to use privileged information as a sword and shield in this matter. *Mot.* at 23. Defendants’ brief fails to directly address Plaintiffs’ implied waiver argument or legal authorities, which abandons or concedes the applicability of this doctrine to this matter. *See United States v. Reagan*, 596 F.3d 251, 254 (5th Cir. 2010) (“[A] failure to brief . . . constitutes waiver.”).

At best, Defendants try to justify their reasons for withholding all shapefiles created before October 21, 2021. *See* Opp. at 16. As noted above, they fail to provide any legal basis for this distinction; furthermore, these documents are part of the legislative record where they were prepared following Oldham’s consultation with the Commissioners Court on their preferences, *see* Opp. Ex. 1 ¶¶ 8–10, and cannot be withheld merely because someone with a law degree was involved in drafting them. *See, e.g., LULAC I*, 2022 WL 2921793, at \*11 (“[J]ust because attorneys are involved in the process does not automatically shield the work of such technical experts, nor does it necessarily protect all communications between the parties.”); *Ohio A. Philip Randolph Inst.*, 2018 WL 6591622, at \*3 (finding that documents containing “only facts, data, and maps” are not protected by attorney-client privilege).

Indeed, Defendants’ brief only indicates they have doubled down on their usage of attorney-client privilege as both a sword and shield in this case. Oldham’s Declaration is literally “Exhibit 1” for this. He talks about the initial drafting of “baseline maps,” but thereafter provides no explanation of how Map Proposal 1 and Map Proposal 2 came to be from these. Opp. Ex. 1 ¶¶ 10–12. Again, Defendants disclose just enough to support their claims but withhold equally relevant information that would undercut them.

Additionally, Defendants’ continued reliance on their interrogatory responses, *see* Opp. at 7, only emphasizes this point. In these responses, Defendants list the six “factors” they assert were considered in enacting the 2021 Enacted Plan, with full knowledge that Plaintiffs’ will have to show at trial that Defendants “subordinated traditional race-neutral districting principles . . . to racial considerations” to prove their claims of racial

gerrymandering. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). By withholding the challenged documents, Defendants can successfully deprive Plaintiffs (and by extension the Court) of any ability to interrogate the validity of their responses on this point. But “[a] party may not use privileged information both offensively and defensively at the same time,” and fairness requires greater transparency over communications. *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 497 (5th Cir. 2005).<sup>6</sup>

\* \* \* \* \*

Defendants have failed to meet their burden to establish that the documents identified in Exhibit 16 to Plaintiffs’ Motion to Compel are protected by the attorney-client privilege and work product doctrine.<sup>7</sup> Plaintiffs respectfully request that the Court grant their motion to compel, order production of the documents identified in Exhibit 16 to the Motion, Doc. 102-1, and award reasonable attorneys’ fees incurred in making the Motion.

Respectfully submitted this 21st day of February, 2023.

/s/ Valencia Richardson

Mark P. Gaber\*

Simone Leeper\*

Valencia Richardson\*

Alexandra Copper\*

/s/ Sarah Xiyi Chen

**TEXAS CIVIL RIGHTS PROJECT**

Attorney-in-Charge

Hani Mirza

Texas Bar No. 24083512

---

<sup>6</sup> Defendants’ assertions that the Commissioners’ deposition testimony is an adequate substitute is plainly false. *See* Opp. at 7. As the joint dispute letter filed February 16 shows, Defendants’ counsel repeatedly made overly broad attorney-client privilege assertions and blocked their clients from testifying as to the policy rationales considered in the drafting of proposed maps. *See* Doc. 105; *e.g.*, Doc. 105-2 (Apffel Dep. 141:9–16); Doc. 105-3 (Giusti Dep. 297:23–298:1, 298:11–13).

<sup>7</sup> Defendants’ inappropriately request to “incorporate by reference” several portions of their Opposition to the United States’ Motion to Compel, *see* Opp. at 12, 25, thereby extending their brief far beyond the 25 page limit. Plaintiffs respectfully request the court either disregard these portions or permit Plaintiffs to incorporate by reference those arguments made by the United States in their Reply.

Campaign Legal Center  
1101 14th St. NW, Ste. 400  
Washington, DC 20005  
(202) 736-2200  
mgaber@campaignlegal.org  
sleeper@campaignlegal.org  
vrichardson@campaignlegal.org  
acopper@campaignlegal.org

Sonni Waknin\*  
Bernadette Reyes\*  
UCLA Voting Rights Project  
3250 Public Affairs Building  
Los Angeles, CA 90095  
Telephone: 310-400-6019  
sonni@uclavrp.org  
bernadette@uclavrp.org

Chad W. Dunn (Tex. Bar No. 24036507)  
Brazil & Dunn  
4407 Bee Cave Road  
Building 1, Ste. 111  
Austin, TX 78746  
(512) 717-9822  
chad@brazilanddunn.com

Neil G. Baron  
Law Office of Neil G. Baron  
1010 E Main Street, Ste. A  
League City, TX 77573  
(281) 534-2748  
neil@ngbaronlaw.com

***COUNSEL FOR  
PETTEWAY PLAINTIFFS***

*\*admitted pro hac vice*

Joaquin Gonzalez\*  
Texas Bar No. 24109935  
Sarah Xiyi Chen\*  
California Bar No. 325327  
1405 Montopolis Drive  
Austin, TX 78741  
512-474-5073 (Telephone)  
512-474-0726 (Facsimile)  
hani@texascivilrightsproject.org  
joaquin@texascivilrightsproject.org  
schen@texascivilrightsproject.org

**SOUTHERN COALITION FOR  
SOCIAL JUSTICE**

Hilary Harris Klein\*  
North Carolina Bar No. 53711  
Adrienne M. Spoto\*  
DC Bar No. 1736462  
1415 W. Hwy 54, Suite 101  
Durham, NC 27707  
919-323-3380 (Telephone)  
919-323-3942 (Facsimile)  
hilaryhklein@scsj.org  
adrienne@scsj.org

**WILLKIE FARR & GALLAGHER  
LLP**

Richard Mancino\*  
New York Bar No. 1852797  
Michelle Anne Polizzano\*  
New York Bar No. 5650668  
Andrew J. Silberstein\*  
New York Bar No. 5877998  
Molly Linda Zhu\*  
New York Bar No. 5909353  
Kathryn Carr Garrett\*  
New York Bar No. 5923909  
787 Seventh Avenue  
New York, New York 10019  
212-728-8000 (Telephone)  
212-728-8111 (Facsimile)  
rmancino@willkie.com  
mpolizzano@willkie.com

asilberstein@willkie.com  
mzhu@willkie.com  
kgarrett@willkie.com

JoAnna Suriani\*  
DC Bar No. 1645212  
Diana C. Vall-llobera\*  
DC Bar No. 1672102  
1875 K Street, N.W.  
Washington, DC 20006-1238  
(202) 303-1000 (Telephone)  
(202) 303-2000 (Facsimile)  
jsuriani@willkie.com  
dvall-llobera@willkie.com

**SPENCER & ASSOCIATES, PLLC**

Nickolas Spencer  
Texas Bar No. 24102529  
9100 Southwest Freeway, Suite 122  
Houston, TX 77074  
713-863-1409 (Telephone)  
nas@naslegal.com

***COUNSEL FOR NAACP PLAINTIFFS***

\*admitted *pro hac vice*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 21, 2023, the foregoing document was filed electronically (via CM/ECF), and that all counsel of record were served by CM/ECF.

/s/ Sarah Xiyi Chen

# **EXHIBIT 1**

*Excerpts of December 5, 2022, Deposition of  
Roxy Hall Williamson*



**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

Page 24

1                   So, those, I guess, to other people wouldn't  
2 seem so major; but to them those are major access points  
3 for them to get whatever they needed from the County. And  
4 Commissioner Holmes always made sure that they had these  
5 things in place.

6           **Q. So, the black nurses group, they relied on**  
7 **Stephen Holmes to provide those county resources?**

8           A. Well --

9                   MR. HOLT: Objection -- objection, form.

10          **Q. (By Ms. Richardson) You may answer.**

11          A. Okay. I would say not so much him providing the  
12 resources but he was definitely a touchstone. Even  
13 people -- a couple of people that I spoke to that didn't  
14 necessarily live in his precinct were concerned about his  
15 precinct because if they were not able to contact their  
16 commissioner, Commissioner Holmes' office was open to  
17 everyone in the county, not necessarily just his people in  
18 his precinct.

19          **Q. Can you describe any organizations you were**  
20 **associated with during the redistricting process in**  
21 **Galveston County?**

22          A. The NAACP, League of Women Voters. Trying to  
23 think who else. Those are the two I primarily worked in  
24 conjunction with.

25          **Q. And you mentioned being a fellow for SCSJ. Did**

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

1 that also involve the redistricting process?

2 A. It did. That was primarily what we did as  
3 fellows.

4 Q. Okay. Can you describe that fellowship?

5 A. Very interesting. We were trained to use our  
6 local resources to connect with the community in order  
7 for -- to build maps that the community felt were fair and  
8 equitable.

9 Q. My -- am I right the name of the fellowship is  
10 the CROWD fellowship?

11 A. CROWD fellowship, yes.

12 Q. Okay. And how long did you serve in that role?

13 A. A year.

14 Q. And what did you do as a CROWD fellow?

15 A. As a CROWD fellow we were trained with the  
16 Maptitude software as well as other free software like  
17 Dave's Redistricting to learn the logistics and the actual  
18 hands-on building of the maps with the -- with the  
19 software.

20 Q. And what were the goals of your fellowship?

21 A. The goals were to do our best to work with the  
22 community to build maps that the community felt were fair  
23 and equitable. That was basically -- that was basically  
24 the work.

25 Q. How would you describe fair and equitable maps?

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

Page 26

1           A.    Well, being sure that if we had any  
2   majority/minority districts that those districts were  
3   preserved as best as possible; making sure that if the  
4   current maps were not considered equitable by the  
5   community that the community had a voice in building a map  
6   that they felt expressed their -- their voices, that they  
7   were able to elect the candidates that they chose and that  
8   they wanted elect in their areas.

9                            And my work wasn't confined to Galveston  
10   County.  We worked with NAACP units throughout the state.

11           **Q.    Was your work -- did your work involve advocacy**  
12   **regarding the commissioners court maps in 2021?**

13           A.    It did.

14           **Q.    Okay.  Did you develop any community contacts in**  
15   **that role?**

16           A.    I did.

17           **Q.    How did you go about developing those contacts?**

18           A.    I was fortunate.  Again, my mother and her  
19   colleagues are very -- were very much about advo- --  
20   advocacy and made sure that they put me in touch with  
21   people like Miss Lucille McGaskey that were -- that are  
22   just like the stalwarts of the community that have  
23   actually been in the community for decades and decades and  
24   had all of the first-hand knowledge that I personally  
25   didn't have to contribute to the process of building the

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

Page 145

1 potential litigation conversations between her and her  
2 coalition, which includes the NAACP, during a time which  
3 she was employed by them.

4 Q. (By Mr. Holt) Okay. Aside from any conversations  
5 you had with the NAACP --

6 MS. PRATHER: Or her attorney.

7 Q. (By Mr. Holt) -- or your attorney or -- were you  
8 aware of any efforts to prepare for litigation?

9 MS. PRATHER: Objection, form.

10 MS. RICHARDSON: I'll also object to form.

11 MR. HOLT: I'm just -- I mean, she talks  
12 about preparing for litigation in this e-mail that she  
13 clearly sent to members that were not part of the NAACP.  
14 I'm just trying to explore what it is she's saying in this  
15 communication where she brings up litigation where there  
16 are many people that are not covered by NAACP's privilege.

17 MS. CHEN: You were asking about other  
18 communications, not this one involving litigation.

19 MR. HOLT: Okay.

20 Q. (By Mr. Holt) The litigation that is referenced  
21 in your e-mail, what type of litigation are you  
22 preparing -- that you reference in Exhibit 3?

23 A. And from my point of view and from this e-mail, I  
24 didn't have any idea what kind of litigation. All I knew  
25 was if litigation were to become necessary that my job was

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**

**Roxy Hall Williamson on 12/05/2022**

**Page 146**

1 to help the community get themselves together in order to  
2 be prepared for whatever was coming down the line.

3 Q. Okay. Your second asterisk here, you say: The  
4 Honorable Commissioner Stephen Holmes will be speaking on  
5 redistricting this evening.

6 Do you see that?

7 A. I do.

8 Q. Did you attend that meeting?

9 A. I did not actually. It wasn't a meeting that I  
10 coordinated. I want to say that was something that was  
11 done by the county chair, and she asked that I share the  
12 information.

13 Q. Was this a Zoom meeting?

14 A. I want to say it was a Zoom meeting.

15 Q. Do you know if anyone recorded this meeting?

16 A. I don't know.

17 Q. Who was it that set it up? You said the  
18 Democratic party chair?

19 A. I think Tierr'ishia Gibson set up that meeting.

20 Q. Okay. Who was it that arranged for Commissioner  
21 Holmes to speak at the meeting? Do you have that  
22 information?

23 A. I don't. All I know is I received the  
24 information from Tierr'ishia Gibson.

25 Q. If you turn to the next page, it says "talking

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

Page 194

1 sufficient method of addressing the concerns about the  
2 maps?

3 MR. HOLT: Objection, form.

4 A. I don't because, again, a lot of our elderly  
5 population did not have access to the Web site or  
6 computers in order for them to participate that way.

7 Q. (By Ms. Richardson) I'd like to go back to  
8 Exhibit 3 -- if I can find my copy of Exhibit 3. Here we  
9 go.

10 Ms. Williamson, I direct you to the first  
11 paragraph of that November 4th, 2021, e-mail at 3:08 p.m.  
12 starting with "For those of you." Do you see that?

13 A. Yes.

14 Q. Okay. Could you just read that paragraph for us?

15 A. Yes. "For those of you prepared to sign onto the  
16 advocacy letter, please forward your logos and signatories  
17 to me or Steph Swanson so we can update the letter  
18 illustrating the depth of our community support. This  
19 assists with establishing important information for  
20 litigation if necessary."

21 Q. What was the purpose of the advocacy letter?

22 A. The ad- -- the advo- -- eh -- advocacy letter --  
23 if I can say it -- was to show a concerted effort with the  
24 different grassroots groups in the area that were  
25 concerned about the redistricting and wanted to have some

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**  
**Roxy Hall Williamson on 12/05/2022**

Page 195

1 input.

2 Q. And that last clause in the last sentence, "if  
3 necessary," that signifies -- what does that signify?

4 A. For me at the time it was -- it was not a forgone  
5 conclusion that litigation would be necessary; but based  
6 on the information from the 2010-2011 redistricting  
7 experiences of the community that we were working with,  
8 though they -- it wasn't a forgone conclusion. They  
9 wanted to be more prepared than they were in the last  
10 decade to participate in the process.

11 Q. So, is it safe to say that the preference would  
12 not have been litigation?

13 A. No --

14 MR. HOLT: Objection to form.

15 A. No, the pro- -- the preference was that the map  
16 could have been a feasible map and one that the community  
17 would have had an opportunity to not only input but help  
18 build. And that's not what happened.

19 Q. (By Ms. Richardson) Earlier in your conversation  
20 with Mr. Holt, you also said that Commissioner Holmes  
21 could not provide any information to you through your  
22 e-mail correspondence. Am I recalling that correctly?

23 A. Yes.

24 Q. Okay. Why couldn't Commissioner Holmes provide  
25 any information to you?

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**

**Roxy Hall Williamson on 12/05/2022**

**Page 203**

1 UNITED STATES DISTRICT COURT  
2 FOR THE SOUTHERN DISTRICT OF TEXAS  
3 GALVESTON DIVISION

3 HONORABLE TERRY PETTEWAY, et al. )  
4 )  
4 Plaintiff )  
5 vs. ) C.A. No. 3:22-cv-00057  
6 GALVESTON COUNTY, et al. )  
7 Defendants. )

8  
9 REPORTER'S CERTIFICATE

10 ORAL VIDEO CONFERENCE DEPOSITION OF ROXY HALL WILLIAMSON  
11 DECEMBER 5, 2022

12  
13 I, Anne F. Sitka, the undersigned Certified Shorthand  
14 Reporter in and for the State of Texas, certify that the  
15 facts stated in the foregoing pages are true and correct.

16 I further certify that pursuant to Federal Rules of  
17 Civil Procedure, Rule 30(e)(1)(A) and (B) as well as Rule  
18 30(e)(2), that review of the transcript and signature of  
19 the deponent:

20 \_\_\_\_\_ was requested by the deponent and/or a party  
21 before completion of the deposition.

22 \_\_\_\_\_ was not requested by the deponent and/or a party  
23 before completion of the deposition.

24 I further certify that I am neither attorney or  
25 counsel for, related to, nor employed by any parties to

**HONORABLE TERRY PETTEWAY, ET AL. vs GALVESTON COUNTY, ET AL.**

**Roxy Hall Williamson on 12/05/2022**

**Page 204**

1 the action in which this testimony is taken and, further,  
2 that I am not a relative or employee of any counsel  
3 employed by the parties hereto or financially interested  
4 in the action.

5 SUBSCRIBED AND SWORN TO under my hand and seal of  
6 office on this the 3rd day of January, 2023

7

8

9

10



11

Anne F. Sitka, CSR, RPR

12

Texas CSR 7079

13

Expiration: 04/30/2023

14

HUSEBY INC.

15

Firm No. 660

16

2425 West Loop South, Suite 200

17

Houston, TX 77027

18

19

20

21

22

23

24

25

## **EXHIBIT 2**

*Excerpts of November 12, 2021,  
Commissioners Court Special Session  
Transcript*

-----  
Galveston County, Texas

COMMISSIONERS COURT SPECIAL SESSION

November 12, 2021

Available at:

<https://livestream.com/accounts/21068106/events/6315620/videos/227296657>

-----

AUDIO TRANSCRIPTION

LENGTH OF AUDIO FILE: 1:36:31

MAGNA LEGAL SERVICES

320 West 37th Street, 12th Floor

New York, New York 10018

(866) 624-6221

Reported by: Marissa Mignano

Job Number: 876364



1 Proceedings  
2 not discuss a particular map, they just  
3 called me names, mostly. Of the people  
4 who did choose a map preference, Map 1  
5 was -- received 64 responses. Map 2  
6 received 208 responses. So of those  
7 responding to a particular map, 76.4,  
8 Map 2. 23.5, Map 1.

9 With that, I'm going to make the  
10 motion to approve Map 2.

11 COMMISSIONER APFFEL: I second the  
12 motion.

13 COUNTY JUDGE HENRY: I have a  
14 second.

15 There's discussion.

16 Commissioner Holmes, I believe you  
17 have something to --

18 COMMISSIONER HOLMES: Yeah, I have  
19 something to say.

20 First of all, let me say -- first  
21 of all, thank you, everybody for coming.  
22 I didn't personally call anybody or ask  
23 anybody to come down here, but certainly  
24 for your comments -- I'm certainly  
25 overwhelmed at the number of people that

1 Proceedings  
2 showed up, I certainly appreciate that.  
3 But, you know, really, the truth of my  
4 matter is, it ain't about me. It's  
5 about Precinct 3, the power of the vote  
6 in Precinct 3.

7 So I would like to take a couple  
8 of minutes to discuss a couple of things  
9 here that have gone on over the past  
10 couple of months and redistricting and  
11 the process of redistricting. First of  
12 all, the normal process is you lay out a  
13 timeline so that we're not crunched  
14 against the gun to try to create a map,  
15 or try to approve a map at a certain  
16 time. So you lay out a timeline, you  
17 say, okay, we got to discuss maps on  
18 this day. We're going to discuss maps  
19 on this day. And we even should give  
20 voters an opportunity to submit your own  
21 maps so we know exactly what the  
22 timeline is.

23 Then we talk about when we're  
24 going to have public hearings on those  
25 maps. Now, normally, the right process

1 Proceedings

2 is to hold those public hearings in the  
3 evening in different communities. In  
4 the past, we've had one in the north  
5 county, we've had one in the mid county,  
6 we had one in Galveston, and one even on  
7 the Bolivar Peninsula in the past, so  
8 that everybody has an opportunity to  
9 allow their voice to be heard. We did  
10 this online thing, but not everybody has  
11 access to the internet.

12 I don't know if it's a contest or  
13 what. And I was out in the field the  
14 other day, and a couple of people  
15 mentioned it here today, where they're  
16 pushing out to keep the -- "keep of  
17 Galveston red," and go online and  
18 register to see -- that's a contest to  
19 see how many people go online. But I  
20 would rather have a contest to see,  
21 let's choose the map of the number of  
22 people that showed up here today.

23 But, you know -- and I don't know  
24 who chose the maps to go online. I  
25 don't know how they got designed. The

1 Proceedings

2 people aren't honest with me. I did  
3 have an opportunity to meet with the  
4 lawyer. But I knew the fix was in when  
5 the lawyer already knew what the deal  
6 was -- because he said, I want you to  
7 draw your own map. That's the same  
8 thing he did to me ten years ago. It's  
9 the same stuff. It's the same playbook.  
10 So it wasn't really any different, for  
11 me, the process, so the limited process  
12 that you have, and of course we have the  
13 public hearing across the county, but  
14 there were none.

15 The point of having it after work  
16 is so everybody doesn't have to take off  
17 work. The point of having it in  
18 people's communities is so they don't  
19 have to go as far when they come to give  
20 their public comments. And even this  
21 meeting was only 72 hours notice to try  
22 to get out, to try to get off work and  
23 to try to get here.

24 The second thing that was known to  
25 be done, they set up criteria that would

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

STATE OF NEW YORK )

: SS

COUNTY OF NEW YORK)

I, Marissa Mignano, a Notary  
Public within and for the State of New York,  
do hereby certify the within is a  
a true and accurate transcription of the  
audiotapes recorded.

I further certify that I am  
not related to any of the parties to this  
action by blood or marriage, and that I am  
in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have  
hereunto set my hand this 4th day of  
October 2022.

Marissa Mignano

MARISSA MIGNANO

## **EXHIBIT 3**

*Excerpts of January 17, 2023, Deposition of  
County Judge Mark Henry*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

HONORABLE TERRY )  
PETTEWAY, et al. )  
 ) Case No. 3:22-cv-00057  
VS. )  
 )  
GALVESTON COUNTY, et )  
al. )

ORAL AND VIDEOTAPED DEPOSITION OF MARK A. HENRY  
JANUARY 17, 2023

ORAL AND VIDEOTAPED DEPOSITION OF MARK A. HENRY,  
produced as a witness at the instance of the Plaintiff and  
duly sworn, was taken in the above styled and numbered  
cause on Tuesday, January 17, 2023, from 9:08 a.m. to  
6:07 p.m., before Janalyn Elkins, CSR, in and for the  
State of Texas, reported by computerized stenotype  
machine, via Zoom, pursuant to the Federal Rules of Civil  
Procedure and any provisions stated on the record herein.

1 violation.

2 Q. So what kind of things would you want to be  
3 conveyed to the other commissioners without committing  
4 an open meetings violation?

5 A. I'm sure I would have just asked them to  
6 provide input as to what they would like to happen --  
7 see happen in the redistricting process.

8 Q. All right. I want to switch gears a little  
9 bit. Just -- I'm going to ask you a few questions about  
10 your conversations with counsel but not the substance of  
11 them.

12 A. Okay.

13 Q. I'm just going to ask you about timing, so I  
14 don't want to know what you talked about.

15 Between when you -- when you retained your  
16 counsel in April 2021 and when the census was released  
17 in August 2021, how often, if at all, did you  
18 communicate with your redistricting counsel?

19 A. Probably not at all. I suspect that Paul would  
20 have just been once a month maybe saying we still have  
21 nothing work with.

22 Q. And what about after the census was released in  
23 August, how -- until -- let's say until October 29th, so  
24 between mid August and October 29th, how often would you  
25 have met -- communicated? And by "communicated," I mean

1 meeting, telephone, Zoom, any of that.

2 A. I would guess twice.

3 Q. Does that include email communication?

4 A. I don't think -- I don't recall emailing  
5 because I wasn't even sure of Dale's email address. I  
6 don't think I emailed Dale. So I would have just -- I  
7 would have talked to Paul because I see him generally  
8 every other week and he would have probably handled the  
9 communication to and from Dale.

10 Q. And how often would you talk to Paul about the  
11 2021 redistricting?

12 A. Often if there's something to talk about.

13 Q. And what about Tyler during that time? Again,  
14 I'm talking about August 2021 to October 29th.

15 A. It would be -- I'm guessing be the same answer.  
16 If there's something that needed to be conveyed or  
17 discussed, you know, we can speak on the phone. But I  
18 think there was large periods of time there was nothing  
19 going on.

20 Q. Did you ever meet one on one with other  
21 commissioners to discuss redistricting?

22 A. I met -- I was in a meeting with Commissioner  
23 Apfel.

24 Q. Do you remember when that was?

25 A. No. I'm thinking September because I -- may

1 have actually been October because I think that we had  
2 a -- potentially a draft map or at least he was giving  
3 us an idea of his concept maybe.

4 Q. Commissioner Apfel was giving an idea of his  
5 concept?

6 A. Dale was giving us an idea.

7 Q. And how did you decide that Commissioner Apfel  
8 should be in that meeting as opposed to another  
9 commissioner?

10 A. Probably availability.

11 Q. What about Commissioner Stephen Holmes, was he  
12 ever included in any meetings with you and redistricting  
13 counsel?

14 A. No one else was except Commissioner Apfel. I  
15 couldn't. That would be a quorum election.

16 Q. You mean, if there were three, it would be a  
17 quorum?

18 A. To even discuss it with him. If I have  
19 discussed it with Commissioner Apfel, for me to go  
20 discussing it with any other commissioners is an open  
21 meetings violation.

22 Q. So instead you had Tyler and Paul check in with  
23 the other commissioners; is that right?

24 A. To my understanding, the -- and was it Tyler or  
25 was it Jed at the time -- just made sure that they were

1 connected to Dale. But they all got meetings set up.  
2 And as far as I know, they all met with Dale at least --

3 Q. So you wanted Dale to speak with every  
4 commissioner --

5 A. Yes.

6 Q. -- about redistricting?

7 Was it ever shared with you what other  
8 commissioners had -- the preferences of other  
9 commissioners for redistricting?

10 A. Other than -- because I was in there with him,  
11 Commissioner Apfel had asked that we move one line like  
12 half of a block because he was either buying a house or  
13 owned a house. Other than that, no.

14 Q. So in that September 8th meeting, and I don't  
15 want to know the specifics of what was discussed, but  
16 you had -- you viewed maps in some manner on  
17 September 8th?

18 A. I think so.

19 Q. And Dale -- Commissioner Apfel was giving his  
20 preferences for where the line should be drawn?

21 A. I believe that to be correct, yes.

22 Q. Did you share preferences for how you wanted  
23 the lines to be drawn?

24 A. No. I'm county lines. I honestly don't care  
25 where the lines are.

1 Q. (Reading:) Please submit your support for  
2 proposed map 2. This map creates a much needed coastal  
3 precinct. Having a coastal precinct will ensure that  
4 those residents directly along the coast have a  
5 dedicated advocate on Commissioners Court.

6 So is it fair to say that by October 29th  
7 you had decided you're going to vote for Map 2?

8 A. Having had -- having no reason not to,  
9 probably.

10 Q. What do you mean, "no reason not to"?

11 A. In short of someone coming in and saying, hey,  
12 it turns out that Map 2 is out of population deviation,  
13 it's got a problem with something, some other problem,  
14 then, yes.

15 Q. Sorry. I'm just trying to eliminate questions  
16 we might have already covered. If you'll give me a  
17 moment.

18 A. Okay. That's fine.

19 Q. So is it true that the first time a quorum of  
20 commissioners met in the same room to discuss the draft  
21 maps was the November 12, 2021 hearing?

22 A. I believe that would be correct, yes.

23 Q. Is there any other possibility you can think of  
24 other than that hearing beforehand?

25 A. No, I don't think so.

1 Q. And you had taken great care to make sure that  
2 that was the first time everybody met to discuss the  
3 maps together, right?

4 A. Correct. We would not have been able to meet  
5 short of a posted meeting.

6 Q. Are you aware of whether any other commissioner  
7 prepared a proposed map that was not posted on this  
8 website?

9 A. At the November 12th meeting Commissioner  
10 Holmes introduced two maps that we saw -- all saw for  
11 the first time there.

12 Q. And when did you learn that Commissioner Holmes  
13 would have his own proposal?

14 A. When he stood up and introduced it.

15 Q. Are you -- do you know why that wasn't one of  
16 the drafts that Dale had put together in the beginning?

17 A. I do not know.

18 Q. Do you remember that Commissioner Holmes also  
19 passed out an RPV study at that November 12th hearing?

20 MR. RUSSO: Objection, calls for  
21 speculation. Vague and ambiguous.

22 MS. KLEIN: I will --

23 MR. RUSSO: At least ask him what that is.

24 Q. (BY MS. KLEIN) I'll clarify. Are you aware of  
25 what racially polaris voting study is?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATION  
DEPOSITION OF MARK A. HENRY  
TAKEN JANUARY 17, 2023

I, Janalyn Elkins, Certified Shorthand Reporter in and for the State of Texas, hereby certify to the following:

That the witness, MARK A. HENRY, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the original deposition was delivered to HILARY HARRIS KLEIN;

That a copy of this certificate was served on all parties and/or the witness shown herein on \_\_\_\_\_.

I further certify that pursuant to FRCP No. 30(f)(i) that the signature of the deponent was requested by the deponent or a party before the completion of the deposition and that the signature is to be returned within 30 days from date of receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefor.

I further certify that I am neither counsel for, related to, nor employed by any of the parties in the action in which this proceeding was taken, and

1 further that I am not financially or otherwise  
2 interested in the outcome of the action.

3 Certified to by me this 20th day of January  
4 2023.

5 

6 JANALYN ELKINS

7 Texas CSR 3631

8 Expiration Date 1/31/2023

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25