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

TERRY PETTEWAY, THE HONORABLE DERRECK ROSE, MICHAEL MONTEZ, SONNY JAMES and PENNY POPE,	§	
Plaintiffs,	§	Civil Action No. 3:22-cv-57
	§	[Lead Consolidated Case]
v.	§	
GALVESTON, TEXAS, and THE HONORABLE MARK HENRY, in his official capacity as Galveston County Judge,	§	
Defendants.	§	

PETTEWAY AND NAACP/LULAC PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT ON THEIR INTENTIONAL DISCRIMINATION AND RACIAL GERRYMANDERING CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

INTRODUCTION

In their Response to Plaintiffs' Motion for Entry of Judgment, Defendants fail to present any arguments that rebut the voluminous record evidence and this Court's extensive findings supporting Plaintiffs' intentional discrimination and racial gerrymandering claims. Instead, Defendants put forward faulty legal theories and rehash already-rejected arguments about the motivations underlying the Enacted Plan. Contrary to Defendants' assertions, Plaintiffs have demonstrated clear harm from Defendants' racially discriminatory redistricting; Defendants' post hoc partisan justification for the Enacted Plan is refuted by the record as surely now as it was when this Court issued its Findings of Fact and Conclusions of Law; and the Fifth Circuit's decision on coalition districts for Section 2 discriminatory effects claims did nothing to invalidate those Findings. This Court should reject Defendants' attempts to maintain "a textbook example of a racial gerrymander," ECF No. 250 at 6, and find in favor of Plaintiffs on their remaining claims.

ARGUMENT

I. Plaintiffs are injured by Defendants' racially discriminatory redistricting.

Defendants are incorrect that Plaintiffs' discriminatory intent claims allege harm only to a "political coalition" and that this case thus presents a nonjusticiable political question. ECF No. 289 at 5. Defendants cannot be inoculated from the statutory and constitutional bans on impermissible racial intent because *their* specific racial intent—and

ultimate effect—was for the Enacted Plan to deny Black and Latino voters the opportunity to affect the democratic process in Galveston County.[1]

1. As the Supreme Court recently reaffirmed, "[a] racial-gerrymandering claim asks whether race predominated in the drawing of a district 'regardless of the motivations' for the use of race . . . . The racial classification itself is the relevant harm in that context." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38 (2024) (citing *Shaw v. Reno*, 509 U.S. 630, 645 (1993)). There is, therefore, no question that Defendants' predominant use of race in the redistricting process harms Plaintiffs and confers standing; whether Defendants were targeting Black and Latino voters alone or together, any predominate racial classification makes their actions unconstitutional. Indeed, even if Defendants had a *partisan* motivation for their *racial* classification—which they have denied, *see infra*—that classification would still be in violation of the Constitution. *See, e.g.*, *Alexander*, 602 U.S. at 7 n.1 ("A plaintiff can also establish racial predominance by showing that the legislature used race as a proxy for political interests") (cleaned up). Defendants' invocation of *Rucho v. Common Cause*, 588 U.S. 684 (2019), is seriously misplaced given their express testimony denying that their actions were motivated by a desire to seek partisan advantage and given this Court's findings rejecting all other non-racial

[1] Defendants also argue that the Fifth Circuit's new interpretation that Section 2 discriminatory effects claims are limited to claims brought on behalf of a single minority group essentially grants governments the ability to racially discriminate against minorities in redistricting. Under Defendants' theory, race can predominate, and governments are given carte blanche to crack minority communities with the express intent to eliminate their voting power—so long as government is discriminating against more than one minority group at a time. *See* ECF No. 289 at 27–28. This cannot be so and is entirely at odds with expansive precedent on both racial gerrymandering and discriminatory intent claims.

justifications for the race-based line drawing. Indeed, Defendants' contention that Plaintiffs had a burden to disentangle race and politics here is puzzling, given their express denial that politics played a role. There is no need to disentangle race from politics in proving Defendants' motivation given that Defendants have directly testified that politics played no role.

2. For Plaintiffs' intentional discrimination claims, Defendants seem to argue that a discriminatory effect is merely a "political" harm if it injures voters of more than one race. ECF No. 289 at 7–8. This is so, they say, because the Fifth Circuit has now interpreted Section 2—as a matter of statutory construction—to set a higher standard for showing a discriminatory effect: there must be a sufficient number of voters of a *single* minority group to constitute a majority of eligible voters in an alternative district configuration. But this says nothing about whether unconstitutional discriminatory intent has its intended effect. "The intentional-vote-dilution analysis [] is derived from the Constitution, and the *Arlington Heights* framework deployed in that analysis states merely that effects are discriminatory when they 'bear[ ] more heavily on one race than another.'" *League of United Latin Am. Citizens v. Abbott* ("*LULAC*"), 601 F. Supp. 3d 147, 163 (W.D. Tex. 2022) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This Court already found that the Enacted Plan bears more heavily on Black and Latino voters than on white voters when it found that "the enacted plan disproportionately affects Galveston County's minority voters by depriving them of the only commissioners precinct where minority voters could elect a candidate of their choice" and "that the commissioners court was aware of that fact when it adopted the enacted plan." *See* ECF

No. 250 ¶ 158. That is, the Enacted Plan bears more heavily on Black voters than on white voters. And it bears more heavily on Latino voters than on white voters. The fact that it is harmful to *two* groups of minority voters in relation to white voters multiplies its racially discriminatory effect in the constitutional context.

Defendants' racial classification and discriminatory intent behind the drawing and adoption of the Enacted Plan thereby harms Plaintiffs and confers standing.

II. Plaintiffs' claims are not invalidated by Defendants' post hoc contention that the Enacted Plan was adopted for partisan purposes.

A. *Alexander* does not mandate a heightened burden for Plaintiffs where Defendants have disclaimed a partisan gerrymandering defense.

As to racial gerrymandering claims, the Supreme Court made clear in its *Alexander* decision that it is the assertion of a partisan-gerrymandering defense which "raises 'special challenges' for plaintiffs" making a racial gerrymandering claim. *Alexander*, 602 U.S. at 9. The Court repeatedly emphasized this point using different language, highlighting "the difficulties that plaintiffs must overcome *in this context*" and "*[a]fter the State asserted a partisan-gerrymandering defense*" as well as referencing the state's "*professed* partisan goals." *Id*. at 10 (emphasis added); *see also Cooper v. Harris*, 581 U.S. 285, 308 (2017) (explaining how courts assess evidence differently "where no one has raised a partisanship defense"). Here, a partisan gerrymandering defense was *expressly disclaimed* by Defendants, so Plaintiffs face no heightened requirements for their racial gerrymandering claims. *See* ECF No. 250 ¶ 289. Defendants' counsel may wish that their clients had not, in sworn testimony, disclaimed any partisan intent, but *they did*. And counsel cannot through argument undo their clients' testimony just because they prefer the legal test that

would apply if the very opposite of the facts in this case were true. Defendants' counsel would like for Plaintiffs to be required to "rul[e] out the competing explanation that political considerations dominated the[ir] redistricting efforts," *Alexander*, 602 U.S. at 9–10, but that is nonsensical given their clients' concession that there was no such competition.

The post hoc justification that *was* raised in testimony regarded the purported desire to create a coastal precinct, not an additional Republican precinct, and this Court has found—based in part upon the precise type of alternative map evidence endorsed by the Supreme Court in *Alexander*—that this justification is untrue and does not explain the racially motivated line drawing of the Enacted Plan. *See* ECF No. 250 ¶¶ 214, 286–87, 414.

As to intentional discrimination claims, regardless of the defenses raised, there is no heightened requirement to isolate racial goals from partisan ones to prove a discriminatory intent claim, for which "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the Fourteenth and the Fifteenth Amendments to occur." *Velasquez v. City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984) (internal citation omitted); *see also* ECF No. 250 ¶¶ 214, 286–87, 414 ("We are all aware that in 1962 there was much racial tension and that a racially discriminatory purpose may well have coexisted with political theory in the adoption of the at-large system at that time."). Similarly, for a Section 2 intent claim—and equally applicable to a constitutional discriminatory intent claim—Plaintiffs "bear[] the initial burden of proving that § 2 has been violated" and then "the court may draw reasonable inferences from this evidence unless defendants explain these inferences away." *United States v. Brown*, 561

F.3d 420, 434 (5th Cir. 2009). Defendants failed to explain away the reasonable inferences that racial intent was a motivating factor behind the Enacted Plan's adoption, with this Court rejecting as pretext every non-racial justification Defendants advanced at trial to explain the map's fracturing of Black and Latino voters across all four precincts and its conversion of Commissioner Holmes's majority-minority precinct into that with the lowest minority percentage. ECF No. 250 ¶¶ 214, 280–92.

B. Race, not partisanship, motivated Defendants to adopt the Enacted Plan.

No matter, Plaintiffs have demonstrated both that the Enacted Plan was adopted with racially discriminatory intent and that race was the predominant motivating factor behind the plan's adoption. In their renewed but no less invalid arguments that partisanship motivated the Enacted Plan, Defendants repeatedly present warped representations of the record before this Court, this Court's own Findings, and the legal precedent relevant to this Court's analysis.

First, Defendants repeatedly conflate evidence and this Court's findings regarding racial versus partisan motivations underlying *voting patterns* and racial versus partisan motivations underlying *redistricting*. *See generally* ECF No. 289 at 17–19. Setting aside Defendants' incorrect interpretation of that evidence, evidence related to racially polarized voting—an element of a Section 2 effects claim—does not undermine Plaintiffs' discriminatory intent and racial gerrymandering claims, for which racially polarized voting is *not* an element.

Second, Defendants' contention that "[t]here is no evidence . . . that race-neutral considerations were subordinated to racial considerations, or that Defendants subordinated

traditional principles to race," ECF No. 289 at 24, flatly ignores extensive record evidence and this Court's thorough findings. Plaintiffs' experts presented both analysis of the Enacted Plan and numerous alternative plans demonstrating that none of Defendants' purported redistricting criteria—which were, in fact, contrived during the litigation—could explain the configuration of the Enacted Plan, and this Court made Findings to that effect. *See, e.g.*, ECF No. 250 ¶¶ 214, 284–85; *see also* ECF No. 286-1 at 43–44; Pls.' Exs. 415–18. This Court found that the Enacted Plan was instead notable for the "stark and jarring" way that it "transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage." ECF No. 250 ¶ 420.

Third, Defendants fault Plaintiffs for failing to present an alternative plan that "maintained [a] minority-majority coalition precinct *and* created a Republican-majority precinct," claiming that *Alexander* required the creation of such a plan. ECF No. 289 at 30–31. But *Alexander* does not require Plaintiffs to create a map furthering *disclaimed* goals (*i.e.*, here, partisan advantage for Republicans). Rather, *Alexander* underscores the probative value of the Plaintiffs' alternative maps, which better achieve the redistricting goals actually proffered by Defendants than the Enacted Plan but without dismantling Precinct 3. *See Alexander*, 602 U.S. at 35 (holding that alternative maps alone can "carry the day" for Plaintiffs and, if produced, will "undermine[] the [government's] defense that the districting lines were 'based on a permissible, rather than a prohibited, ground'").

Finally, Defendants fail to refute, and mostly just ignore, the expansive evidence presented by Plaintiffs and findings by this Court related to the *Arlington Heights* factors. For example, Defendants assert that it is "critical to note the impact of COVID-19" on the

2021 redistricting process. ECF No. 289 at 29. But this Court did, in fact, consider the impact of COVID-19, including the delayed release of census data, and nonetheless found that the "delay does not account for the failure to include meaningful public participation or the rushed process." ECF No. 250 ¶ 249; *see also id*. ¶¶ 250–51 ("Demographers for the parties agree that it was feasible to create timely redistricting plans despite the COVID-19 delay."), 258 ("Even factoring in the COVID-19 pandemic, Dr. Burch opined that the dearth of public meetings in 2021 was unusual.").

Defendants' scattershot attempts to conflate, confuse, and heighten the standards for Plaintiffs' intentional discrimination and racial gerrymandering claims fail to overcome the evidence that Plaintiffs have, in fact, met their true burdens for each of their remaining claims. The Court should reject Defendants' latest attempts to refute Plaintiffs' evidence and revise history to assert a partisanship defense.

C. The presumption of legislative good faith is overcome.

The presumption of good faith usually enjoyed by governments is overcome "when there is a showing that a legislature acted with an ulterior racial motive." *LULAC*, 601 F. Supp. 3d at 181. Here, any presumption of good faith has been overcome because Plaintiffs have made a showing that Defendants acted not just with "*an* ulterior racial motive" but, in fact, with both *a* racially discriminatory motive (as required for the intentional discriminatory claims) and a *predominate* racial motive (as required for the racial gerrymandering claim). *See supra*. The inappropriateness of applying a presumption of good faith in this matter is underscored by Defendants' invention of false testimony after the fact—*on the topic of race*—to attempt to advance its legal defense. *See* ECF No. 286-

1 at 2–3, 9–10. Moreover, there is ample evidence in the record that Defendants were not acting in good faith during the public redistricting process. As this Court found, "[t]he circumstances and effect of the enacted plan were 'mean-spirited' and 'egregious' given that 'there was absolutely no reason to make major changes to Precinct 3.'" ECF No. 250 ¶ 420. Defendants orchestrated a process with a myriad of procedural deviations and transparency lapses, with the effect of "completely . . . extinguish[ing] the Black and Latino communities' voice on its commissioners court during 2021's redistricting." *Id.* ¶ 418. And, of course, a presumption of good faith can only be made in the first place when there is more than one plausible explanation for an action. There can be no good faith presumption regarding evidence that directly demonstrates intent to take a racially adverse action explicitly for the sake of its racially adverse impact; here there is such direct evidence. *See, e.g.*, ECF No. 242 at 14–17.

III. The Fifth Circuit's decision did not render irrelevant this Court's findings supporting Plaintiffs' statutory and constitutional intent claims.

Defendants claim that this Court's "Findings and record are subsumed by irrelevant, coalition based VRA evidence and argument that was never submitted to prove intent." ECF No. 289 at 32. While much evidence was presented regarding Plaintiffs' Section 2 discriminatory effects claim, Plaintiffs also of course presented voluminous evidence related to their statutory and constitutional intent claims and racial gerrymandering claim, including evidence from two experts testifying to indicia of discriminatory intent and the *Arlington Heights* factors. *See, e.g.*, ECF No. 250 ¶¶ 10, 56–60, 64–67. The Court ultimately declined to make legal conclusions with respect to those intentional

discrimination and racial gerrymandering claims because "the relief the plaintiffs seek is not broader than that which they are entitled to under § 2." ECF No. 250 ¶ 428. However, this Court also issued many findings highly relevant to and specifically identified as supporting Plaintiffs' intent claims, including numerous findings issued on the presence of the *Arlington Heights* factors, which go directly to Defendants' intent. *See id.* ¶ 159 ("For intentional-discrimination claims, the Fifth Circuit follows the framework in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* to determine whether a legislative body passed a redistricting plan with discriminatory purpose. . . . The court will identify the factual findings that pertain to each framework as it presents those findings."). *See generally* ECF No. 250 ¶¶ 160–292.

These findings are not "based on the incorrect legal theory that Galveston County had a duty to preserve a coalition district." ECF No. 289 at 33. Rather, they are relevant to a finding that Defendants intentionally dismantled a performing majority-minority precinct with at least *a* purpose to diminish voting power *because* of race. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality) ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments");[2] *see, e.g.*, ECF No. 250 ¶ 192 (Judge Henry commencing the process by asking whether the County "had to draw a majority[-]minority district.").

[2] The questions are even more serious than *Bartlett* identifies where it is not merely a white-majority *crossover* district that is intentionally destroyed, but rather a majority-minority district in which white voters were a small minority.

Moreover, Plaintiffs' motion highlights additional trial evidence that is particularly relevant to their intent and racial gerrymandering claims. Plaintiffs take no issue with Defendants' call for this Court to "carefully review its Findings" to assess which apply to Plaintiffs' remaining claims. In so doing, this Court should find that Plaintiffs have met their burden to prove their discriminatory intent and racial gerrymandering claims.[3]

CONCLUSION

Plaintiffs respectfully request that this Court enter judgment in their favor on Counts 1, 2, 3, and 5 of Petteway Plaintiffs' Second Amended Complaint and Counts 1, 2, and 3 of NAACP/LULAC Plaintiffs' First Amended Complaint.

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[3] Nor are Plaintiffs' Section 2 discriminatory intent claims foreclosed. Because the Fifth Circuit declined to clarify its judgment as to whether the United States' Section 2 intent claim remained to be decided on remand, Defendants now claim that Petteway and NAACP Plaintiffs cannot pursue *their* Section 2 intent claims. But this argument flouts the clear language of the Fifth Circuit's remand, which explicitly remanded for this Court "to consider the intentional discrimination and racial gerrymandering claims brought by the Petteway Plaintiffs and the NAACP Plaintiffs." *Petteway v. Galveston Cnty.*, 111 F.4th 596, 614 (5th Cir. 2024). Those claims, of course, include the intentional discrimination claims Plaintiffs brought under Section 2. The clear language of the Fifth Circuit's remand and well-established precedent regarding when remand is appropriate—*see, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc) ("Since the record does not permit only one resolution of the factual issue, and there is evidence that could support the district court's finding of discriminatory purpose, we must remand for a reweighing of the evidence.") (internal quotation marks omitted)—far outweigh Defendants' concern that the remand of those claims is "incongruous," ECF No. 289 at 33. Further, as Plaintiffs have explained at length, Plaintiffs' Section 2 *intent* claims are not eliminated because their Section 2 *results* claims were premised upon a coalition theory to satisfy the first *Gingles* precondition. *See* ECF No. 286-1 at 25–28.

But even if the Court concludes that Judge Ho's concurrence in the denial of the United States's motion on appeal suggests that a majority of the en banc court thought—but would not say explicitly—that its decision also forecloses a Section 2 discriminatory *intent* claim, that has no bearing on Plaintiffs' constitutional claims and this Court must, as the en banc court indicated, decide Plaintiffs' constitutional claims.

Respectfully submitted this 24th day of October, 2024.

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CERTIFICATE OF SERVICE

I certify that on October 24, 2024, the foregoing document was filed electronically and served on all parties of record via CM/ECF, and that the document complies with the page limitations set out by the Court.

/s/Valencia Richardson

Valencia Richardson