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*, v. GALVESTON COUNTY, TEXAS, and HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, *Defendants.*	§	Civil Action No. 3:22-cv-57
UNITED STATES OF AMERICA, *Plaintiff*, v. GALVESTON COUNTY, TEXAS, GALVESTON COUNTY COMMISSIONERS COURT, and HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, *Defendants.*	§	Civil Action No. 3:22-cv-93
DICKINSON BAY AREA BRANCH NAACP, GALVESTON BRANCH NAACP, MAINLAND BRANCH NAACP, GALVESTON LULAC COUNCIL 151, EDNA COURVILLE, JOE A. COMPIAN, and LEON PHILLIPS,	§	Civil Action No. 3:22-cv-117

Plaintiffs,	§
	§
v.	§
	§
GALVESTON COUNTY, TEXAS, HONORABLE MARK HENRY, in his official capacity as Galveston County Judge, and DWIGHT D. SULLIVAN, in his official capacity as Galveston County Clerk	§
	§
Defendants.	§

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The United States respectfully submits this Opposition to Defendants' Motion to Dismiss the United States' First Amended Complaint. ECF No. 48.

INTRODUCTION

In this action, the United States alleges that Galveston County, Texas, the Galveston County Commissioners Court, and County Judge Mark Henry (collectively, "Defendants") violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by enacting a redistricting plan that eliminated an equal opportunity for Black and Hispanic voters to elect a candidate of their choice to the County's governing body—the commissioners court. The United States' First Amended Complaint (ECF No. 30) alleges that the redistricting plan for the commissioners court, adopted on November 12, 2021, violates Section 2 because the plan "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race[,] color, [or membership in a language minority group]." *Id*. § 10301(a), and because the plan was, at least in part, enacted for a racially discriminatory purpose. U.S. First Am. Compl. ¶¶ 121-22.

The United States' claims are justiciable, redressable, and present a live case and controversy; thus, this Court has jurisdiction to hear the case. The United States' First Amended Complaint plausibly alleges all of the required elements of a Section 2 "results" claim: (1) that Galveston County's Black and Hispanic citizen voting age population is sufficiently large and geographically compact to constitute a majority in a commissioners court precinct, (2) that Black and Hispanic voters in the proposed Commissioners Precinct 3 are politically cohesive and support the same candidates, (3) that non-Hispanic White voters tend to support other candidates and vote sufficiently as a

bloc to defeat Black and Hispanic voters' candidates of choice, and (4) that, based on the totality of the circumstances, Black and Hispanic voters in Galveston County have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice under the adopted plan. The United States' First Amended Complaint also sufficiently alleges that the redistricting plan was adopted, at least in part, for a discriminatory purpose. Defendants' motion to dismiss should therefore be denied.

FACTUAL BACKGROUND

The County initiated its 2021 redistricting cycle at its April 5, 2021, meeting, where every member of the commissioners court with the exception of Commissioner Stephen Holmes, voted in favor of retaining outside redistricting counsel. *Id*. ¶ 40; *see id*. ¶¶ 20-21. Public records are devoid of any indication that the commissioners court met again on any redistricting-related business until November 12, 2021, when it adopted the redistricting plan at issue in a special session. *Id*. ¶¶ 41, 62-63.

The adopted commissioners court plan completely redrew Precinct 3 and eliminated the only commissioners court district in which minority voters had long had the opportunity to elect a candidate of their choice. *Id*. ¶¶ 2, 39, 50-55, 86-88. It shifted Precinct 3 north and inland where the population is predominantly White. *Id*. ¶ 50-52. Of the 26 voting precincts in the previous plan's Precinct 3, just five remain in adopted Precinct 3. *Id*. ¶ 54. Moreover, the adopted plan split voting precinct 336, which had the largest Black voting age population and highest Black voting age population percentage in the County, between adopted Precincts 1 and 4. *Id*. ¶ 55. Adopted Commissioners

Precinct 3 contains the smallest population of Black and Hispanic citizens of voting age among the four precincts. *Id*. ¶ 85. None of the other adopted commissioners court precincts contains a combined Black and Hispanic citizen voting age population greater than 36.2%. *Id*. All four adopted commissioners court precincts are comprised of a majority-White citizen voting age population, resulting in the elimination of the sole commissioners court precinct in which Black and Hispanic residents had comprised a majority of the electorate and for the past 30 years had an equal opportunity to elect their preferred candidates of choice. *Id*. ¶¶ 53, 85, 88.

The commissioners court held no other public meetings, executive sessions, hearings, or workshops on redistricting. *Id*. ¶¶ 41-43. It adopted neither criteria nor guidelines on redistricting. *Id*. ¶¶ 44-45. Aside from static images of two proposed plans and an online form available on the County website beginning on October 29, 2021, just two weeks before the November 12 special session, the public had no opportunity to comment on the proposed plans except at the special session. *Id*. ¶ 56. Commissioner Holmes, who from 1999 until May 17, 2022, was the sole Black member of the commissioners court, and who remains the only elected minority member of the court, was also largely excluded from the redistricting process. *Id*. ¶¶ 3, 39, 46-48. *See* Defs.' Mot. 11-12. In addition, although Commissioner Holmes met with the County's redistricting counsel, he was not provided underlying data for the proposed plans nor was he part of the decision to post the maps on the County's website. *Id*. ¶ 58. The County's redistricting counsel entirely ignored Commissioner Holmes' suggestions prior to the special session. And the counsel and the other members of the commissioners court

similarly ignored his stated views concerning the proposed maps at the November 12 special session. U.S. First Am. Compl. ¶¶ 48, 57, 81-82.

Furthermore, the November 12, 2021, special session was held the day before plans were due to the Texas Secretary of State, sending a clear message that the commissioners court had already decided not to revise the proposed plans in response to any public comment that might be provided at the session. *Id*. ¶¶ 67-68. The special session took place in a small annex building in League City, approximately 25 miles from Galveston, rather than at the larger meeting room in the County Courthouse in Galveston, a room that was available at that time, where commissioners court meetings are typically held. *Id*. ¶¶ 69-70. The Galveston location that the commissioners court forsook also features ample parking, a sound system and microphones, and seating for approximately 250 people; the annex, on the other hand, could only seat 65 to 75 people, had no sound system and microphones, and construction hindered access to some of the location's 60 parking spaces. *Id*. ¶¶ 71-74.

At the special session, at least 40 of the 150 to 200 attendees spoke, overwhelmingly in opposition to the proposed plans, *id*. ¶ 79, which made major changes to the configuration of the electoral precincts. None of the commissioners who supported the proposed plans provided any justification or rationale for the changes proposed to any of the precincts. *Id*. ¶ 83. The commissioners court approved the proposed plan, Map 2, by a vote of 3-1. *Id*. ¶ 82. The county judge and two commissioners voted in favor of the plan, Commissioner Holmes opposed the plan, and one commissioner was absent. *Id*.

Defendants have moved to dismiss the United States' First Amended Complaint. Defs.' Mot. ECF No. 48.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (directing district courts to "accept all well-pleaded facts as true, viewing those facts most favorably to the plaintiff"). A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief," *Iqbal*, 556 U.S. at 679. Courts "draw all inferences in favor of the nonmoving party." *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009).

ARGUMENT

I. This Court Has Subject Matter Jurisdiction Over The United States' Claims

Defendants' principal argument for lack of subject matter jurisdiction over the United States' claims paradoxically turns on what *other* plaintiffs have alleged in their complaint. Their theory seems to be that because those consolidated plaintiffs' allegations include references to partisanship that in Defendants' view present a non-justiciable political question, the Court should dismiss the United States' First Amended Complaint for lack of subject matter jurisdiction as well. They make this argument even

though they admit that the United States' complaint contains no such references. Defs.' Mot. 10-11. In other words, Defendants seem to think that, at the point at which cases are consolidated, a plaintiff adopts the allegations and claims made by every other plaintiff in the consolidated action as if the plaintiff had made those allegations and claims in their own complaint. Defs.' Mot. 10 ("Although the United States does *not* plead the partisan preference of African American and Latino voters in Galveston County, in this consolidated action[,] the Petteway Plaintiffs do so plead . . . . Here, the United States does not dispute the Petteway Plaintiffs' allegations.") (emphasis added).

Defendants' argument fundamentally misunderstands black letter law. Although "[c]onsolidation is permitted as a matter of convenience and economy in administration, [it] does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933); *Hall v. Hall*, 138 S. Ct. 1118, 1125-31 (2018) (collecting cases and treatises).

Instead, each complaint stands on its own. Here, the United States' First Amended Complaint makes no claims regarding the partisan preferences of any voters. *See* U.S. First Am. Compl. ¶¶ 118-23. Rather, the United States claims the 2021 redistricting plan violates Section 2 because it results in denying Black and Hispanic voters, on account of their race, an equal opportunity to participate in the political process and to elect representatives of their choice by diluting their voting strength and was adopted, at least in part, for a discriminatory purpose. *Id.* ¶¶ 119-21. In support thereof, the United States alleges facts sufficient to constitute plausible allegations to establish the three

preconditions set forth by the Supreme Court in *Thornburg v. Gingles* ("*Gingles*"), 478 U.S. 30 (1986), U.S. First Am. Compl. ¶¶ 90-93; *see infra* Section IV, as well as facts sufficient to constitute a plausible allegation supporting a claim of intentional racial discrimination. U.S. First Am. Compl. ¶¶ 111-17; *see infra* Section V. Defendants concede, as they must, that such Section 2 claims are justiciable. Defs.' Mot. 9 ("[V]ote dilution claims under Section 2 of the Voting Rights Act" are justiciable). That should be the end of the argument.

As a secondary basis for the claim of lack of subject matter jurisdiction, Defendants assert that the United States has not "refer[red] to exogenous election studies involving primary elections to remove the partisan element of voting behaviors." Defs.' Mot. 10. Here again, Defendants misunderstand the black letter law. For more than twenty-five years, the Fifth Circuit has held that plaintiffs are not obligated to "disprove that factors other than race affect voting patterns." *Teague v. Attala Cnty., Miss.*, 92 F.3d 283, 290 (5th Cir. 1996). Instead, once a plaintiff establishes "that a 'consistent relationship' exist[s] between a voter's race and his voting preference," *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1397 (5th Cir. 1996), as the United States has alleged here, U.S. First Am. Compl. ¶¶ 92-93; *see infra* Section IV, it falls to the defendant jurisdiction to offer a non-racial explanation as a defense, *Teague*, 92 F.3d at 290; *see Gingles*, 478 U.S. at 63 ("[T]he reasons why black and white voters vote differently have no relevance to the central inquiry of § 2").[1]

[1] Defendants' reference to an article in *The Galveston Daily News* is also irrelevant and unavailing. Defs.' Mot. 10 n.7. As an initial matter, and as Defendants admit, the article

Neither of Defendants' arguments challenging this Court's subject matter jurisdiction over the United States' claims holds water. Accordingly, this Court should deny Defendants' motion to dismiss based on a lack of subject matter jurisdiction.

II. The United States' Vote Dilution Claim Is Not Moot

The recent temporary appointment of a Black commissioner to the commissioners court by a named defendant in this case has literally nothing to do with the United States' claim that the 2021 plan dilutes the voting power of the County's Black and Hispanic voters. To conclude otherwise would mean that defendants in a Section 2 vote dilution case can render a claim against them moot simply by appointing any minority member of their own choosing to the relevant governing body at any point during the pendency of the litigation so long as the defendants believe that said appointment would result in "proportional representation." *See* Defs.' Mot. 11-12. The Fifth Circuit rejected this line of reasoning more than fifty years ago:

> [W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote . . . . [S]uch success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds . . . . Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting . . . circumvent[ion]. This we choose not to do.

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is not properly before this Court. *Id.* Even if this Court could consider the article, however, it has no relevance as the United States has no control over what County residents say, nor does the United States have any control over what is printed in a newspaper.

Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *aff'd sub nom. E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

Dr. Robin Armstrong's appointment says absolutely *nothing* about the central issue in this case, namely, whether Black and Hispanic voters within the County have an equal opportunity under the new commissioners court redistricting plan to elect candidates of *their* choice. *See* U.S. First Am. Compl. ¶¶ 1-2, 89, 120. It is the minority community's opportunity to elect that the United States' complaint alleges has been taken away by the County's new commissioners court redistricting plan, and the temporary appointment of a new commissioner of a Defendant's choosing does not moot that allegation. The fact that newly-appointed Commissioner Armstrong is Black is not dispositive here where there are no facts showing nor is there any indication that he is the chosen representative of minority voters in the County. *See Gingles*, 478 U.S. at 68 ("[T]he fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry…[u]nder § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group,* not the race of the candidate, that is important.") (emphasis in original). Moreover, his temporary appointment to the commissioners court does not convert Precinct 4 into an opportunity-to-elect district, nor does it rid the adopted redistricting plan of its discriminatory result or intent.

The Supreme Court in *Gingles* likewise warned against drawing conclusions based on a minority candidate's electoral success where, as here, that success can be attributed to "special circumstances," including the pendency of litigation. *Gingles*, 478 U.S. 30 at 57, 76 (quotation marks omitted) (citation omitted); *Ruiz v. City of Santa Maria*, 160 F.3d

543, 556 (9th Cir. 1998). In such cases, the district court can "properly consider to what extent the pendency of [the] litigation might have worked a one-time advantage" for the minority candidate. *Gingles*, 478 U.S. 30 at 76 (quotation marks omitted) (citation omitted).[2] If anything, the putative defense is even weaker here than it was in the cases just cited. Dr. Robin Armstrong did not succeed "at the polls"; he was unilaterally appointed by a named defendant. Indeed, his appointment to the Galveston County Commissioners Court is the quintessential "special circumstance" as he was appointed by Defendant County Judge Mark Henry nearly two months after the United States filed its original complaint. *See* ECF No. 1. Dr. Armstrong's presence on the commissioners court is therefore not even of "limited relevance." *Clark v. Calhoun Cnty., Miss.*, 21 F.3d 92, 96-97 (5th Cir. 1994); *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1242-43 (4th Cir. 1989) (election of Black candidate was the result of "special circumstances" with the defendant "mayor stat[ing] that the election might moot the suit" and not dispositive of plaintiffs' vote dilution claim).

Accordingly, this Court should deny Defendants' motion to dismiss based on the argument that the case is now moot.

[2] Special circumstances such as the appointment or election of a minority candidate following the filing of a lawsuit are not an infrequent occurrence in Section 2 cases. *See*, *e.g.*, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 605 (E.D. Mich. 2019); *see also Benavidez v. Irvington Indep. Sch. Dist.*, No. 13-cv-0087, 2014 WL 4055366, at *18 (N.D. Tx. Aug. 15, 2014).

III. The United States' Injuries Are Redressable By Relief Against The Defendants

Contrary to Defendants' suggestion, a favorable decision by this Court will redress the United States' injuries. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61. Under the Texas Constitution, a county's commissioners court is responsible for determining and approving the boundaries of the county's four commissioners court precincts, and elections for that county's commissioners must be conducted under the map approved by the county's commissioners court. Tex. Const. art. V §18(b) ("Each county shall . . . be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner"); *id.* §18(a) (the "division or designation" into these precincts "shall be made by the Commissioners Court"); U.S. First Am. Compl. ¶ 22. Thus, the relief that the United States seeks depends entirely on Defendants' actions and not on the actions of some unnamed, absent third party.

This stands in sharp contrast to cases on which the Defendants rely. Defs.' Mot. 13-15. Those cases each involve a lawsuit against executive branch officials to challenge a measure enacted by a legislature and not, as here, a suit directly against the body that adopted the challenged measure. In *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), the governor and the attorney general of Louisiana were named as defendants in a challenge to a state law that established a "private tort remedy against the doctors who perform[ed] [] abortion[s]." *Id. at* 409. The *Okpalobi* plurality held that the plaintiffs had "fail[ed] to satisfy the 'redressability' requirement" because "no state official ha[d] any duty or ability to do *anything*" under the challenged statute. *Id.* at 426-27 (emphasis

in original). The court further explained that "the defendants ha[d] no authority to prevent a private plaintiff from invoking the statute in a civil suit." *Id.* at 427.

Jacobson v. Fla. Sec'y of State, 974 F.3d 1236 (11th Cir. 2020) is likewise inapposite. In *Jacobson*, plaintiffs sued the secretary of state of Florida, challenging a state law that required "the candidate of the party that won the last gubernatorial election to appear first beneath each office listed on the ballot, with the candidate of the second-place party appearing second." *Id.* at 1242. The Eleventh Circuit held that the plaintiffs' injuries were not redressable because the plaintiffs had failed to name Florida's 67 supervisors of elections as defendants. *Id.* at 1254. In arriving at this conclusion, the court reasoned:

> The Supervisors are obliged under state law to continue printing candidates' names upon the ballot in their proper place as provided by law regardless of what a federal court might say in an action that does not involve them . . . . Federal courts have no authority to erase a duly enacted law from the statute books.

Id. at 1255 (internal quotation marks omitted) (citations omitted). Here, by contrast, the United States has sued the parties that pursuant to the Texas Constitution adopted and will implement the challenged plan; and thus, are the appropriate parties in an action that is challenging the validity of the plan and seeking to enjoin its enforcement.[3]

[3] Defendants also repeatedly cite to *Voting for Am., Inc. v. Andrade*, 888 F. Supp. 2d 816 (S.D. Tex. 2012), *rev'd and remanded sub nom. Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013). Defs.' Mot. 13-15. In that case, however, this Court held that the defendants were the proper parties to the lawsuit. *Id.* at 833 ("Both [defendants] have a designated role to play in the interpretation and enforcement of the Election Code, and both are proper parties to any suit seeking to challenge its validity and enjoin its enforcement.").

In sum, the United States' injuries are redressable by a favorable decision from this Court.

IV. The United States Has Plausibly Alleged The Second And Third *Gingles* Preconditions

Under the Federal Rules of Civil Procedure, a complaint only needs to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A "complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Further, Rule 12 does not require providing evidentiary support for a claim to be plausible. *League of United Latin Am. Citizens v. Abbott*, No. 1:21-CV-00991-LY-JES-JVB, 2022 WL 174525, at *1 (W.D. Tex. Jan. 18, 2022) (hereinafter "*LULAC I*") ("Plaintiffs need not make evidentiary showings or demonstrate that they are likely to prevail.").

Here, the United States' First Amended Complaint plausibly alleges all three *Gingles* preconditions in support of the United States' claim that the 2021 Galveston County Commissioners Court plan violates the Section 2 results test. U.S. First Am. Compl. ¶¶ 2, 5, 21, 90-93, 109. Defendants do not contest that the United States has plausibly alleged the first *Gingles* precondition, and their arguments that the second and third preconditions are not plausibly alleged are unavailing.

With regard to the second *Gingles* precondition, the United States' First Amended Complaint makes "a showing that [a coalition of Black and Hispanic voters in Galveston County] tend[] to vote the same way." *LULAC I*, 2022 WL 174525, at *2. To begin, the

First Amended Complaint alleges both that "statistical analyses of voting patterns in Galveston County demonstrate that in illustrative redistricting plans in which Black and Hispanic citizens combined to constitute a majority of the citizen voting age population in one single-member commissioner district, Black and Hispanic voters in such a district would have voted for the same candidates," U.S. First Am. Compl. ¶ 92, and that in an illustrative plan drawn by shifting just a single voting precinct from the 2012 plan, statistical analyses of a number of exogenous statewide elections between 2014 and 2020 indicate that Black and Hispanic voters in Commissioners Precinct 3 would have supported the same candidate. *Id.; see also id.* ¶ 90. Further undergirding these allegations, the First Amended Complaint alleges that "the electorate in Galveston County's prior versions of commissioners court Precinct 3, in which Black and Hispanic persons form a majority, has elected a minority county commissioner for over three decades." U.S. First. Am. Compl. ¶ 109; *see id.* ¶¶ 2, 5, 21, 31. And the First Amended Complaint also alleges that there is only one other electorate in the County in which Black and/or Hispanic residents are a majority and that electorate is the only other one in which Black candidates have been successful—specifically, candidates for justice of the peace and constable[4]. *Id.* ¶ 109

These factual allegations more than suffice to constitute plausible allegations that the second *Gingles* precondition exists in the County. *LULAC I,* 2022 WL 174525, at *2 (concluding that plaintiffs plausibly alleged political cohesion between Black and

[4] Galveston County's justice of the peace and constable districts are coterminous. *See* U.S. First Am. Compl. ¶ 22.

Hispanic voters by listing the results of several recent elections in which minority-preferred candidates succeeded). Courts simply do not require any additional specialized or complex details that are normally within the realm of experts at the pleading stage. *See, e.g.*, *Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1313 (N.D. Ala. 2019) (discussing in Section 2 case what evidence is "necessary at the pleading stage" and observing how "[c]ourts hesitate to require a plaintiff to prove the elements of a claim at the motion to dismiss stage").

Indeed, Defendants' position that the United States' allegations regarding the second *Gingles* precondition are not sufficiently plausible rests entirely on cherry-picking a few quotations from a decision involving a challenge to Texas's congressional and legislative redistricting plans. Defs.' Mot. 16-17 (citing *League of United Latin Am. Citizens v. Abbott*, No. 1:21-CV-259-DCG-JES-JVB, 2022 WL 1631301, at *18 (W.D. Tex. May 23, 2022) ("hereinafter *LULAC II*"). There, the court found that the plaintiff group's allegations fell short of plausibly alleging the second *Gingles* precondition because the group had "allege[d] very little in support of the second *Gingles* precondition for its proposed districts," and the few allegations were "'[t]hreadbare recitals of [an] element[] of a cause of action;'" (citing *Iqbal*, 556 U.S. at 678-79), legal conclusions, or simple statements that the district at issue consistently elects the minority preferred candidate. *LULAC II*, 2022 WL 1631301, at *18.

The First Amendment Complaint here is entirely different. The United States' allegations concerning the second *Gingles* precondition and voting behavior in the County and Precinct 3 include facts about the Black and Hispanic citizen voting age

population, the set of recent elections analyzed, and the analyses showing that Black and Hispanic voters in Galveston County are politically cohesive. *See* U.S. First Am. Compl. ¶¶ 92; *see also id*. ¶¶ 5, 109. In the redistricting context especially, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Cox v. Kaelin*, 577 Fed. Appx. 306, 310 (5th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 679).

Defendants are just as mistaken with regard to the third *Gingles* precondition. The United States' First Amended Complaint does not simply "recite the cause of action." Defs.' Mot. 17. Rather, the United States alleges that racially polarized voting whereby Galveston County's non-Hispanic White voters vote sufficiently as a bloc to usually defeat the minority-preferred candidate was confirmed by reconstituted election analyses for statewide elections between 2014 and 2020 that showed that under the 2021 adopted Commissioners Court plan, the candidate of choice of Black and Hispanic voters was consistently defeated in all four adopted Commissioners Court districts, including the newly drawn Precinct 3. U.S. First Am. Compl. ¶ 93.

In sum, when the United States' factual allegations are taken as true and viewed in light most favorable to the Plaintiff, as this Court must do on a motion to dismiss, they are more than enough to make it plausible that the United States will satisfy the second and third *Gingles* preconditions. *Iqbal*, 556 U.S. at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *see also LULAC I,* 2022 WL 174525, at

*1 (citing *Innova Hosp. San Antonio L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018)).

V. The United States Has Plausibly Alleged A Claim of Intentional Discrimination Under Section 2

The United States has also adequately pled that the 2021 redistricting plan violates Section 2 because its adoption was motivated at least in part by a racially discriminatory intent.

The framework for analyzing a claim of discriminatory purpose is still "the familiar approach outlined in *Arlington Heights*," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021), which requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Veasey,* 830 F.3d at 230-31. To allege a plausible claim of intentional discrimination, plaintiffs may point to circumstantial evidence including recent history, departures from normal procedure, and legislative history to infer racially discriminatory intent. *See LULAC I*, 2022 WL 174525, at *3 (citing *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488–89 (1997)).

Defendants contend that the United States has not pled sufficient facts to plausibly allege a discriminatory intent, arguing that the allegations are "thin at best." Defs.' Mot. 17. In fact, the United States' First Amended Complaint sets forth substantial allegations, most of which are not only matters of public record, but are also even memorialized on video, with respect to each category of evidence *Arlington Heights* has identified as

relevant to inferring that race was "a motivating factor" behind the enactment of the 2021 redistricting plan. *Arlington Heights*, 429 U.S. at 266.

First, the United States' First Amended Complaint alleges that the impact of the 2021 Galveston County Commissioners Court redistricting plan will be to dilute minority voting strength in Galveston County. U.S. First Am. Compl. ¶¶ 2, 6, 85, 88-93, 112. The adopted plan not only dramatically reshapes Precinct 3 to cut the Black and Hispanic citizen voting age population by more than half (from nearly 58% in the previous plan to under 27% in the adopted plan), but also unnecessarily fragments the Black and Hispanic population among the three other commissioners precincts so that they constitute an ineffectual numerical minority in those districts as well. *Id*. ¶¶ 21, 85, 88. Quite notably, the adopted commissioners court plan splits voting precinct 336, which had the largest Black voting age population and highest percentage of Black voting age population in the County and was wholly located within the previous Precinct 3 for over twenty years. *Id*. ¶¶ 50, 55. The adopted plan moved voting precinct 336 entirely out of Commissioners Precinct 3 and split it between Commissioners Precincts 1 and 4 in the adopted plan. *Id*. ¶ 55.

Second, the history of redistricting in Galveston County supports an inference of a racial motivation. That history includes successful litigation challenging the County's redistricting plan for the election of several justice of the peace and constable districts and the interposing of Section 5 objections by the United States Attorney General in two of the last three redistricting cycles for the County's failure to meet its burden under Section 5 of the Voting Rights Act of showing that the submitted redistricting plans had

neither a discriminatory purpose nor a discriminatory effect. U.S. First Am. Compl. ¶¶ 7-8, 24-28, 113-14. In 1992, the Attorney General objected to the County's submission of its justice of the peace and constable districts. *Id*. ¶¶ 8, 24. In 2012, the Attorney General objected to the County's submission of its commissioners court districts and to the County's submission of its justice of the peace and constable districts. *Id*. ¶¶ 8, 26-28. Moreover, the United States' First Amended Complaint includes allegations that the 2021 commissioners court plan resulted in the elimination of Precinct 3 as a district in which minority voters could elect candidates of choice—a reprise of the County's proposal in 2012, which was blocked by the Attorney General's objection. *Id*. ¶¶ 27, 50-51, 88.

Next, the United States' allegations concerning the sequence of events and substantive and procedural departures from the norm that preceded the County's adoption of the 2021 commissioners court plan also plausibly support an inference of discriminatory intent. Most notably, the United States' First Amended Complaint includes allegations showing that the same procedural and substantive deviations that tainted Galveston County's 2012 redistricting process reappeared during the 2021 cycle, including the failure to adopted redistricting criteria, the deliberate and ongoing exclusion of the only minority commissioner from the process, and the elimination of the only district in which minority voters had an equal opportunity to elect candidates of choice. U.S. First Am. Compl. ¶¶ 3, 26-28, 39, 44-48, 58. Also set forth in the United States' First Amended Complaint are allegations detailing how the 2021 redistricting process departed from the normal procedural sequence of past redistricting cycles, including how

Defendants engaged in a process that was so abridged and exclusionary that it significantly curtailed any opportunity for meaningful participation by the public. *Id*. ¶¶ 4, 41-45, 57, 59-66, 68-78.

Lastly, the United States' First Amended Complaint sets forth allegations that the proffered rationale for the elimination of Precinct 3, the only district in which Black and Hispanic voters had an opportunity to elect, was pretextual. U.S. First Am. Compl. ¶¶ 5, 52, 83-84, 86-87, 117.

A. Past Section 5 Determinations By The Department of Justice Are Relevant Evidence In The *Arlington Heights* Discriminatory Intent Analysis

Despite Defendants' contentions to the contrary, the United States is not relying exclusively on the Department of Justice's 2012 Section 5 determination letter regarding Galveston County or on any of its other Section 5 determinations to support its claim of discriminatory intent, nor is the 2012 letter irrelevant to this Court's analysis. As detailed above, the allegations concerning the Attorney General's 2012 objection to the County's commissioners court and justice of peace and constable plans are just some of the several allegations in each category of relevant evidence under *Arlington Heights*. The Department of Justice's Section 5 determination with regard to the attempted revision to Commissioners Precinct 3 in 2012 is particularly informative as to the County's motivation when it adopted a redistricting plan in 2021 that sought an identical result—the elimination of the only commissioners precinct in which Black and Hispanic voters constituted a majority of the electorate and enjoyed the opportunity to elect candidates of their choice. U.S. First Am. Compl. ¶¶ 8, 26-28, 31-32, 113-14; and thus, are relevant

evidence of discriminatory intent. *See Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.")

Indeed, courts considering intent claims under Section 2, including the Fifth Circuit, routinely take into account and afford due weight to Section 5 determinations by the Department of Justice as part of the *Arlington Heights* inquiry into the historical background of the decision. *Veasey*, 830 F.3d at 230-31 (en banc) (considering as relevant in intentional discrimination analysis of a photographic voter identification law, circumstantial evidence of discriminatory intent, including past Department of Justice determinations regarding redistricting plans); *see also N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223-24 (4th Cir. 2016) (accounting for past determinations by the Department of Justice under the Voting Rights Act when undertaking the *Arlington Heights* inquiry into the historical background of the decision at issue and concluding that the evidence of past intent determinations "'reveal[ed] a series of official actions taken for invidious purposes'" and that evidence of discriminatory effects determinations provided "important context for determining whether the same decision-making body has also enacted a law with discriminatory purpose") (quoting *Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)).

B. The United States Is Not Required To Negate Alternative Theories At The Pleading Stage

In addition to challenging the sufficiency of the discriminatory intent allegations set forth in the United States' First Amended Complaint, Defendants proceed to dispute the individual facts pleaded in support of that claim. Defs.' Mot. 19-22.

At the outset, a motion to dismiss is not the appropriate means to challenge, much less resolve, disputed issues of fact. *See, e.g., Callaway v. City of Austin*, No. A-15-CV-00103-SS, 2015 WL 4323174 at *9 (W.D. Tex. July 14, 2015). Factual disputes are to be resolved at trial following discovery. Likewise, in order to plausibly plead a claim of discriminatory intent, plaintiffs need not negate alternative theories. *See LULAC II*, 2022 WL 1631301, at *13.

Defendants take issue with the veracity of certain allegations in the United States' First Amended Complaint such as whether the commissioners court adopted redistricting criteria during the 2021 redistricting cycle; that only one public hearing was held for County residents to provide input on the proposed plans; that the date, time, and place of the singular hearing, on November 12, 2021, provided no meaningful opportunity for public input on the proposed plans; that the proposed commissioners court plans posted online also did not provide sufficient opportunity for public comment[5]; and that

[5] While a court considering a Rule 12(b)(6) motion to dismiss may consider matters of which judicial notice can be taken, judicial notice may be taken only of a fact that 'is not subject to reasonable dispute.'" *Withrow v. Miller*, 348 Fed. Appx. 946, 948 (5th Cir. 2009) (citing *Taylor v. Charter Medical Corp.,* 162 F.3d 827, 829 (5th Cir.1998)); Fed. R. Evid. 201. Here, Defendants request this Court to take judicial notice of the information currently contained on the website https://www.galvestoncountytx.gov/our-county/county-judge/redistricting. Defs.' Mot. 8. Whether the content currently posted

Commissioner Stephen Holmes was effectively excluded from the 2021 redistricting process in much the same way as he was during the 2011 redistricting process. Defs.' Mot. 19-21. As detailed above, *supra* 18-20, the United States sets forth these allegations as part of the historical background and sequence of events leading up to the enactment of the 2021 plan, as well as part of the procedural and substantive departures from past redistricting cycles.

In an attempt to remove any inference that these factual allegations support a finding of intentional discrimination, Defendants offer various alternative explanations and theories. These include arguments that the commissioners court is not required to adopt redistricting criteria and that this was not a deviation from the norm, and that COVID-19-related circumstances led to the compressed timeframe for the 2021 redistricting process. Defs.' Mot. 19-20. Those claims are what a trial is for; they are not resolvable on a motion to dismiss.

The court in *League of United Latin Am. Citizens v. Abbott* recently rejected the defendants attempts there to present similar alternative theories at the motion to dismiss stage, while concluding that the plaintiffs' allegations of discriminatory intent were sufficiently plausible to survive a motion to dismiss, with the court concluding: "These explanations, though they are themselves plausible, do not on their own render

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on this website is the same as—let alone identical to—the content that was available on the website on October 29, 2021, when the proposed maps were first made available for public comment on the website, is a disputed issue of fact in this case. *Compare* U.S. First Am. Compl. ¶ 56, *with* Defs.' Mot 19-20. Accordingly, the Court should deny Defendants' request for judicial notice of this website, and further, should not consider its contents in the Court's review of Defendants' Motion to Dismiss.

[p]laintiffs' allegations implausible." *LULAC I,* 2022 WL 174525, at *4 (citing *Arnold v. Williams*, 979 F.3d 262, 268 (5th Cir. 2020)).

Finally, although Defendants do not challenge the sufficiency of the United States' allegations regarding the Senate Report factors and totality of the circumstances allegations, they do challenge the probative value of the specific allegations related to recent examples of racist incidents. Defs.' Mot. 21 n.9. According to Defendants, allegations of racist incidents that do not directly involve the commissioners court are of limited probative value concerning their liability under Section 2. *Id*. This assertion is not relevant to any of the arguments that Defendants present in support of their motion to dismiss, and thus it is irrelevant here. Furthermore, "[a]t the 12(b)(6) stage of litigation, it is inappropriate for a district court to weigh the strength of the allegations." *See Arnold v. Williams*, 979 F.3d 262, 268 (5th Cir. 2020) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007)).

This Court should not dismiss the United States' claims of intentional discrimination based on any of Defendants' arguments or any of Defendants' assertions of possible alternative theories.

VI. Any Dismissal Should Be Without Prejudice

Defendants' motion requests that this Court dismiss the United States' claims *with* prejudice. Defs.' Mot. 23 n.10. As set forth above, the United States maintains that this court has jurisdiction to hear this case and that the United States has plausibly alleged its claims; accordingly, dismissal of any of the claims in the United States' First Amended Complaint is unwarranted. However, if this Court decides to grant any part of

Defendants' motion to dismiss, it should do so *without* prejudice,[6] and further, grant the United States leave to amend.

First, where, as here, a defendant's motion includes arguments challenging the court's jurisdiction, the Fifth Circuit has uniformly held that dismissals for lack of jurisdiction must be ordered without prejudice. *See Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991) ("[S]ince the district court did not reach the merits of the case, it was incorrect to dismiss [it] with prejudice."); *Cox, Cox, Filo, Camel & Wilson, LLC v. Sasol N. Am., Inc.*, 544 Fed. Appx. 455, 456–57 (5th Cir. 2013) ("To dismiss with prejudice a case under 12(b)(1) is 'to disclaim jurisdiction and then exercise it. Our precedent does not sanction the practice, and we will not do so here.'").

Second, leave to amend would be particularly warranted here, because Defendants failed to comply with the notice requirement for motions to dismiss under Rule 12(b) set forth in Rule 6 of this Court's Rules of Practice. The only challenge to this Court's jurisdiction that Defendants previewed in their letter to the United States was a challenge that the "Court lacks jurisdiction pursuant to the political question doctrine." Ex. A at 1. Despite this unequivocal statement, Defendants devote three pages of their motion to

[6] The Fifth Circuit has consistently recognized that dismissal with prejudice is disfavored as "an extreme sanction that deprives a litigant of the opportunity to pursue his claim." *See Millan v. USAA General Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008) (*quoting Gonzalez v. Firestone Tire & Rubber Co.,* 610 F.2d 241, 247 (5th Cir. 1980). Further, a district court's "dismissal with prejudice is warranted only where 'a clear record of delay or contumacious conduct by the plaintiff' exists and a 'lesser sanction would not better serve the interests of justice.'" *Id*. (*citing Gray v. Fid. Acceptance Corp.,* 634 F.2d 226, 227 (5th Cir. 1981)); *see also Kirkendoll v. Entertainment Acquisitions, LLC*, Civil No. 17-cv-1701, 2018 WL 4431310 (M.D. La. Sept. 17, 2018).

dismiss to arguing that "[t]here are simply insufficient allegations against these three defendants to assure this Court that it has jurisdiction [and that] [a]ccordingly, this Court should dismiss for lack of jurisdiction." Defs.' Mot. 15; *see id.* at 12-15. Allowing Defendants to raise this entirely new argument undercuts this Court's twin goals of "advanc[ing] the case efficiently and minimiz[ing] the costs of litigation." Galveston D. R. Prac. 6. Thus, if this Court grants any part of Defendants' motion to dismiss, it should do so without prejudice.

CONCLUSION

For the above-stated reasons, Defendants' motion to dismiss should be denied.

Date: July 5, 2022

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** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification to all counsel of record in this case.

/s/ *Catherine Meza*
CATHERINE MEZA

Exhibit A

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

May 16, 2022

VIA: EMAIL

Catherine Meza
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RE: United States of America v. Galveston County, et al.
Case No.: 3:22-cv-93

Ms. Meza,

I hope this letter finds you well. This letter is being sent pursuant to Rule No. 6, Galveston District Court Rules of Practice, Judge Jeffrey V. Brown ("Rule No. 6"). Holtzman Vogel represents Defendants in the above referenced matter and we intend to file a Motion to Dismiss pursuant to Rules 12 (b)(1) & 12(b)(6) of the Federal Rules of Civil Procedure. Pursuant to Rule No. 6, Plaintiff has fourteen (14) days to file an amended complaint from the date of this letter if it so wishes.

In Defendants' upcoming Rule 12 Motion, Defendants will argue that the Court lacks jurisdiction pursuant to the political question doctrine. Further, Defendants will argue that Plaintiff has failed to state claims in that: (1) it has failed to plead sufficient supporting factual content or allegations to support its claims, and (2) it brought claims under Section 2 of the Voting Rights Act that do not contain private rights of action.

Should you wish to discuss this matter further, please do not hesitate to contact me.

Warmest Regards,

/s/ Dallin B. Holt

Dallin B. Holt

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