IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

TERREBONNE PARISH BRANCH NAACP, *et al.*, *Plaintiffs*, v. PIYUSH ("BOBBY") JINDAL, the GOVERNOR of the STATE OF LOUISIANA, in his official capacity, *et al.*, *Defendants*.	Civil Action. No. 3:14-cv-69-JJB-SCR

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND PRELIMINARY STATEMENT

This lawsuit aims to provide Plaintiffs, Terrebonne Parish Branch NAACP ("Terrebonne NAACP"), Reverend Vincent Fusilier, Sr., Lionel Myers, Wendell Desmond Shelby, Jr., and Daniel Turner (collectively, "Plaintiffs"), and other Black voters with the equal opportunity to elect the candidates of their choice to the 32nd Judicial District Court ("32nd JDC"), which has jurisdiction over Terrebonne Parish, Louisiana ("Terrebonne"). Since, at least, the passage of the Voting Rights Act of 1965 ("VRA"), and despite 30 years of advocacy for a nondiscriminatory electoral system, Defendants[1] have used an at-large voting method to deny Black voters of their opportunity to elect their preferred candidates to the 32nd JDC, in violation of Section 2 of the VRA ("Section 2"), and the voting guarantees of the Fourteenth and Fifteenth Amendments of the U.S. Constitution ("Fourteenth and Fifteenth Amendments"). In the past decade alone, at-large voting has protected a sitting white judge of the 32nd JDC from electoral defeat, enabling him to be reelected without opposition, even after the Louisiana Supreme Court suspended him for wearing blackface, an orange prison jumpsuit, handcuffs, and an afro wig as part of his apparent parody of Black criminal defendants who appeared before him. *In re Ellender*, 889 So. 2d 225, 227-29, 234 (La. 2004).

The undisputed material facts demonstrate that, in conjunction with racially polarized voting ("RPV"), the at-large electoral method for the 32nd JDC has the impermissible *effect* of diluting the voting strength of Terrebonne's Black citizens. The undisputed material facts also show that Louisiana officials have *intentionally* maintained this illegal electoral method with a discriminatory purpose, despite overwhelming evidence that district-based voting is a means of

[1] Defendants are Piyush ("Bobby") Jindal, the Governor of the State of Louisiana, in his official capacity, and James D. ("Buddy") Caldwell, the Attorney General of the State of Louisiana, in his official capacity. Plaintiffs also filed suit against Tom Schedler, the Secretary of State, in his official capacity, but subsequently voluntarily dismissed him as a defendant in this action. Doc. 69.

providing equal electoral opportunity for Black voters in Terrebonne. Accordingly, and for the reasons detailed below, summary judgment as to Plaintiffs' Section 2 and Fourteenth and Fifteenth Amendment claims is appropriate. *See* Fed. R. Civ. P. 56(a).[2]

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). In response, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Id.* "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." *Brown v. City of Houston,* 337 F.3d 539, 541 (5th Cir. 2003).[3]

ARGUMENT

PLAINTIFFS HAVE PROVEN A SECTION 2 VIOLATION BY SHOWING THAT, BASED ON THE TOTALITY OF CIRCUMSTANCES, DEFENDANTS' AT-LARGE ELECTORAL METHOD RESULTS IN RACIAL DISCRIMINATION

The Supreme Court has "long recognized" that at-large voting may "operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Thornburg v.*

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[2] Pursuant to Local Rule 56(a), Plaintiffs also have submitted a Statement of Uncontested Material Facts, which delineates the undisputed, material facts that, as this Memorandum of Law demonstrates, support summary judgment in favor of Plaintiffs' claims.

[3] Partial summary judgment may be granted on any subsets of material facts that are not in dispute. *See* Fed. R. Civ. P. 56(a), (g); *see also United States v. Charleston County*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002) (granting motion for partial summary judgment in a Section 2 case).

Gingles, 478 U.S. 30, 47 (1986). "The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48.

A successful Section 2 vote-dilution claim has two components. *First*, Plaintiffs must satisfy three preconditions: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district" (*Gingles* one); (2) the minority group is "politically cohesive" (*Gingles* two); and (3) the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate" (*Gingles* three). *Id.* at 50-51. *Second*, Plaintiffs must, under the totality of circumstances, "demonstrat[e] that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991); *see* 52 U.S.C. § 10301(b). There is no genuine dispute that Plaintiffs satisfy these requirements.

I. There Is No Genuine Dispute That Plaintiffs Satisfy the *Gingles* Preconditions

A. Terrebonne's Black Population Is Sufficiently Large and Geographically Compact to Constitute the Majority in a Single-Member District (*Gingles* one)

There is no genuine dispute that Plaintiffs satisfy the first *Gingles* precondition. Plaintiffs' expert, William S. Cooper,[4] shows that Terrebonne's Black voting-age population ("VAP"): (a) is approximately 18%, Ex. 1 ¶ 13 (Cooper Decl.); (b) is concentrated in three areas of Terrebonne – Houma, Gray, and Schriever, *id.* ¶ 19; and (c) is "sufficiently numerous and geographically compact . . . to comprise a majority . . . in at least one district under a 5-district plan for the 32nd Judicial District," *id.* ¶ 46. In particular, Cooper demonstrates, through an

[4] Since 1986, Cooper has developed state and local electoral plans for at least 700 jurisdictions in about 40 states, including in Louisiana. *See* Ex. 1 ¶¶ 3, 8, Ex. A (Cooper Decl.). In particular, since the release of the 2010 Census, Cooper has developed several statewide legislative plans and about 150 local redistricting plans. *See id.* ¶ 4. He has testified at trial as an expert witness on redistricting and demographics in federal courts in about 35 voting rights cases. *See id.* ¶ 2. Two federal courts recently granted summary judgment on *Gingles* one based in part on Cooper's testimony. *See id.* ¶ 7; *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1390-1401 (E.D. Wash. 2014); *Pope v. County of Albany*, No. 11-736, 2014 WL 316703, at *12-13 (N.D.N.Y. Jan. 28, 2014).

Illustrative Plan, the feasibility of a single-member district plan for electing members of the 32nd JDC in which Black voters constitute a majority (at 50.81%) of the VAP in one district. *See id.* ¶ 42; *see also Clark v. Calhoun County*, 88 F.3d 1393, 1406 (5th Cir. 1996) ("Plaintiffs typically attempt to satisfy [*Gingles* one] by drawing hypothetical majority-minority districts.").

1. Plaintiffs' *Illustrative Plan* Satisfies the Requirement of Numerosity

The first *Gingles* precondition of numerosity is a strict "majority-minority rule [that] relies on an objective, numerical test: Do minorities make up more than 50 percent of the [VAP] in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). There is no dispute that the Black population in Terrebonne meets this criterion: Black voters constitute 50.81% of the VAP in District 1, the hypothetical majority-Black district, in the *Illustrative Plan*. Ex. 1 ¶ 42 (Cooper Decl.).

The testimony of Dr. Ronald E. Weber and Bruce L. Adelson, the experts retained by Defendants to opine on *Gingles* one, is inadmissible under Federal Rule of Evidence ("FRE") 702 for the reasons set forth in Plaintiffs' separate motions to exclude their testimony. *See* Fed. R. Civ. P. 56(c)(1)(B) (there is no genuine dispute when "an adverse party cannot produce admissible evidence to support the fact"). Even if their testimony were admissible, there still would be no dispute that Black voters are sufficiently numerous in Terrebonne: Dr. Weber and Adelson agree that Plaintiffs' *Illustrative Plan* satisfies this criterion. *See* Ex. 2 ¶ 48(2) (Weber Rep.); Ex. 3 at 86:23-87:23 (Weber Dep.); Ex. 4 at 28 (Adelson Rep.); Ex. 5 at 233:8-22 (Adelson Dep.).

2. Plaintiffs' *Illustrative Plan* Is Sufficiently Compact and Otherwise Complies With Traditional Redistricting Principles

"The first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the [B]lack population be sufficiently compact to constitute a majority in a single-member district." *Clark v. Calhoun County*, 21 F.3d 92, 95 (5th Cir. 1994). "[T]he question is not whether the plaintiff residents' proposed district [is] oddly shaped, but whether the proposal demonstrate[s] that a geographically compact district *[can] be* drawn." *Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995) (emphasis in original); *see also Clark*, 21 F.3d at 95 (noting that a "plaintiffs' proposed district is not cast in stone" because its purpose is "to demonstrate that a majority-[B]lack district is feasible").

"While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (internal quotation marks and citations omitted). Here, there is no genuine dispute that Plaintiffs' *Illustrative Plan* is sufficiently compact and otherwise complies with traditional redistricting principles ("TRPs"), including contiguity, one person, one vote, maintaining communities of interest, respecting traditional boundaries, and non-dilution of minority voting strength. Ex. 1 ¶¶ 45-46 (Cooper Decl.); Ex. 6 ¶¶ 2-17 (Cooper Supp. Decl.).

a. *Geographical Compactness/Shape*

Statistical measures of compactness and a visual comparison confirm that District 1, the majority-Black district in Plaintiffs' *Illustrative Plan*, is geographically compact. Ex. 6 ¶ 2 (Cooper Supp. Decl.). District 1 compares favorably to other districts in Louisiana in terms of its

Reock and Polsby-Popper scores.[5] *Id.* ¶¶ 3-4. District 1 has a Reock score of .39, which is higher than or equal to the Reock score of 54% of current State House districts. *Id.* ¶ 3. In particular, State House District 52, which encompasses parts of Terrebonne, has a lower Reock score of .28. *Id.* District 1 also scores better than four of the six Congressional districts in Louisiana on the Reock test. *Id.* ¶ 4. Likewise, District 1 scores higher than three of the Congressional districts under the Polsby-Popper test. *Id.* ¶ 6. And, a visual comparison of District 1 to other districts in Louisiana confirms that its shape and compactness compares favorably. *Id.* ¶¶ 7-8 (comparing District 1 to State House District 52; Congressional Districts 2 and 6; Judicial Subdistrict E within 23rd Judicial District; West Feliciana Parish Council districts; and St. Martin Parish Council districts 1, 5, and 8). Thus, there is no genuine question that District 1 is geographically compact. *See, e.g.*, *Montes*, 40 F. Supp. 3d at 1393-96 (holding that the illustrative district was geographically compact as confirmed by "looking at the maps of the proposed districts" and a comparison of its Reock scores to those of other districts).

Because the contrary opinions of Defendants' experts regarding the compactness of District 1 are wholly unsubstantiated, they do not generate a genuine issue. Dr. Weber and Adelson take issue with the compactness of District 1 and claim that its shape is "odd." Ex. 2 ¶ 17 (Weber Rep.); *see also id.* (criticizing District 1 for "wrapping around" other districts); Ex. 4 at 28-30 (Adelson Rep.) (adopting Dr. Weber's opinion); Ex. 5 at 233:23-234:17 (Adelson Dep). However, this opinion "is almost wholly conclusory and is not supported by sufficient facts." *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220, 224 (5th Cir. 1991). Neither Dr. Weber nor Adelson ran any statistical measures of compactness for District 1 or

[5] The Reock score is the ratio of the area of the district to the area of the circle that encloses the district. *See* Ex. 6 ¶ 3 n.2 (Cooper Supp. Decl.). The Polsby-Popper score is the ratio of the area of the district to the area of a circle that has the same perimeter as the district. *See id.* ¶ 5 n.3. For both types of scores, the measure is between 0 and 1, with 1 being the most compact. *See id.* ¶ 3 n.2, ¶ 5 n.3.

otherwise compared District 1 to any existing districts in Louisiana, either in terms of its compactness scores or its shape. *See* Ex. 3 at 93:7-94:2, 95:9-96:24 (Weber Dep.) (compactness scores); *id.* at 96:25-98:23 (shape); Ex. 5 at 235:19-25 (Adelson Dep.) (compactness scores); *id.* at 236:21-237:1 (shape).

The complete absence of any support for Dr. Weber's or Adelson's testimony that District 1 is insufficiently compact renders their opinion *ipse dixit* (*i.e.*, an unsubstantiated assertion) that fails to create a genuine issue.[6] *See Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) ("A claim cannot stand or fall on the mere *ipse dixit* of a credentialed witness."); *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 418 (5th Cir. 2003) (summary judgment was appropriate given that expert testimony was "largely speculative and bereft of supporting [evidence]"); *Chen v. City of Houston*, 206 F.3d 502, 508 (5th Cir. 2000) ("Even on a motion for summary judgment, we are not required to take heed of an ill-reasoned expert opinion."); *see also Little*, 37 F.3d at 1075 (summary judgment cannot be defeated by "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence" (internal citations and quotation marks omitted)); *Brown*, 337 F.3d at 541 ("Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment").[7]

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[6] The failure of Dr. Weber and Adelson to provide any basis for their opinion that the shape of District 1 is "odd" is significant because *Gingles* one does not involve a beauty contest. *See, e.g.*, *Clark*, 21 F.3d at 95 (holding that "[t]he first *Gingles* precondition does not require some aesthetic ideal of compactness"); *Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) ("By compactness, *Thornburg* does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute such as symmetry or attractiveness. An aesthetic norm, by itself, would be . . . an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met.").

[7] Dr. Weber also opines that "[a]ny deviation in the proposed illustrative sub-district 1 lines to create a more compact district is likely to reduce the African-American [VAP] majority for the sub-district . . . to less than 50 percent." Ex. 2 ¶ 17 (Weber Rep.). This is wholly speculative because Dr. Weber conceded that he did not attempt to draw a majority-Black district in Terrebonne. *See* Ex. 3 at 107:15-108:7 (Weber Dep.). Separately, Dr. Weber and Adelson note that the concentrations of Black voters in Houma, Gray, and Schriever are not contiguous. Ex. 2 ¶ 17 (Weber Rep.); Ex. 4 at 29 (Adelson Rep.). This is immaterial, however, because there is no requirement under *Gingles* that concentrations of minority voters be contiguous. *See, e.g.*, *Ewing v. Monroe County*, 740 F. Supp. 417,

b. *Contiguity*

There is no genuine dispute that District 1 is contiguous. *See* Ex. 6 ¶¶ 9-10 (Cooper Supp. Decl.). This is demonstrated by the maps of Plaintiffs' *Illustrative Plan* and confirmed by the contiguity check run in the software used by Cooper to develop that plan. *See id.* Dr. Weber does not dispute this. *See* Ex. 2 ¶ 17 (Weber Rep.). While Adelson remarks in passing that District 1 is not contiguous, he offers no evidence for that opinion. *See* Ex. 4 at 30 (Adelson Rep.); *see also Guile*, 422 F.3d at 227 (*ipse dixit* fails to create a genuine issue of fact).

c. *One Person, One Vote (Population Equality)*

There is no genuine dispute that Plaintiffs' *Illustrative Plan* adheres to the one person, one vote principle. Judicial districts are not required to comply with this principle as a matter of constitutional law, *see Wells v. Edwards*, 347 F. Supp. 453, 455-56 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973); *see also Voter Information Project v. City of Baton Rouge*, 612 F.2d 208, 211 (5th Cir. 1980), but population equality is an equitable consideration in the judicial redistricting context. *See Clark v. Roemer*, 777 F. Supp. 445, 453 (M.D. La. 1990). The Supreme Court's "decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10%" is consistent with the principle of one person, one vote. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also White v. Regester*, 412 U.S. 755, 761-64 (1973).

Plaintiffs' *Illustrative Plan* satisfies this criterion: the total population deviation from the ideal district is 5.20%. *See* Ex. 1 ¶ 43 (Cooper Decl.). Neither Dr. Weber nor Adelson disputes this. *See* Ex. 3 at 115:20-116:11 (Weber Dep.) (acknowledging that the general standard for local and state redistricting is ±5%); Ex. 4 at 27-32 (Adelson Rep.) (same); *see also* Ex. 5 at 252:17-23 (Adelson Dep.) (same).

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419 (N.D. Miss. 1990) (rejecting Dr. Weber's testimony that the concentrations of Black residents "are non-contiguous and therefore not sufficiently compact to constitute a single-member district with a majority black voting age population"); *see also* Ex. 3 at 98:18-99:9 (Weber Dep.) (conceding this point).

d. *Maintaining Communities of Interest*

There is no genuine dispute that District 1 contains a community of interest of Black residents. In particular, District 1 encompasses parts of Houma, Gray, and Schriever, the areas of Terrebonne that have the highest concentrations of Black residents. *See* Ex. 1 ¶ 19 (Cooper Decl.); *see also* Ex. 5 at 237:11-16 (Adelson Dep.). Census data demonstrates that Black residents in these areas share similar socioeconomic characteristics, in terms of educational attainment, poverty rates, household and per capita incomes, receipt of food stamps, and lack of health insurance. *See* Ex. 6 ¶ 12, Ex. G (Cooper Supp. Decl.). Moreover, as discussed *infra*, there is no dispute that Black residents in these areas vote cohesively in Terrebonne elections. *See infra*. Consistent with these facts, parts of Houma, Gray, and Schriever already are joined to form various districts, including the majority-Black Parish Council District 2, the majority-Black School Board District 2, as well as State House District 51 and State Senate District 21. *See* Ex. 6 ¶ 13 (Cooper Supp. Decl.); Ex. 5 at 238:10-239:9 (Adelson Dep.).

Moreover, Black residents in Houma, Gray, and Schriever, and included in District 1, also: share schools and places of worship and recreation; belong to the same civic organizations; shop together; and, importantly, are bound together by a greater than two-decade struggle for district-based voting for the 32nd JDC. *See, e.g.*, Ex. 7 at 157:1-14 (Boykin Dep.) (noting that District 1 in Plaintiffs' *Illustrative Plan* is "mostly composed of two minority districts that we now have, District 1 and District 2 of the Parish Council and Parish School Board," and "the people in [District 1] have a lot in common when it comes to the various churches in that community, when it comes to where they shop, where they eat, where the parks are in that community, where they go to school"); Ex. 8 at 65:17-66:23 (Shelby Dep.) (noting that the community to which he belongs includes "people that go to the same churches as me, the people

that attend the same events as me or go to the same parks, the same community service," and that this community "ha[s] a geography," namely the areas encompassed by Parish Council districts 1 and 2); Ex. 9 at 13:17-14:8 (Turner Dep.) (noting that "a lot of Black people . . . exist in certain areas in Terrebonne Parish," and that "[w]e have a community of interest"); Ex. 10 at 17:15-18:18 (Fusilier Dep.) (noting that his "peers reside" in Houma, Gray, and Schriever, which are "the areas [where] the minorities reside," and that his peers include "those people that you go to church with every Sunday, you shop with in the grocery stores, go to school with, [and attend] meetings. Everyone is in the same areas that we know of real well").[8] Neither Dr. Weber nor Adelson dispute that District 1 reflects a community of interest. *See* Ex. 2 ¶ 17 (Weber Rep.); Ex. 4 at 27-32 (Adelson Rep.).[9]

e. *Minimizing Split Precincts*

There is no genuine dispute that the districts in Plaintiffs' *Illustrative Plan* generally follow existing boundaries. As Cooper explains, the *Illustrative Plan* splits 12 of 86 precincts (14%) that were in place for the November 2014 elections in Terrebonne. Ex. 6 ¶ 14 (Cooper Supp. Decl.). These precinct splits can be accommodated with lockouts,[10] which are common in

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[8] *See also, e.g.*, Ex. 8 at 17:2-7 (Shelby Dep.) (noting his membership in the Terrebonne NAACP); Ex. 9 at 50:21-25 (Turner Dep.) (same); Ex. 10 at 8:19-23 (Fusilier Dep.) (same); Ex. 11 at 19:25-20:2 (Myers Dep.) (same); Ex. 8 at 27:5-38:13 (Shelby Dep.) (describing district-based voting advocacy efforts in connection with House Bill 582 in 2011, discussed *infra*); Ex. 7 at 53:24-55:6 (Boykin Dep.) (describing legislative advocacy for district-based voting since 1996); *see also id.* at 59:18-64:17; 65:1-66:15; 68:1-70:3.

[9] Dr. Weber acknowledged that communities of interest are defined "primarily [by] socioeconomic characteristics," Ex. 3 at 110:8-111:7 (Weber Dep.), and that he had no basis to dispute that Black residents in District 1 share similar socioeconomic profiles, *id.* at 103:4-11. Dr. Weber also testified that it "has been appropriate and continues to be appropriate . . . to take politics into account [in drawing districts]," *see id.* at 113:1-22, and that he had no reason to dispute that Black voters in District 1 vote cohesively, *see id.* at 102:25-103:3; *see also id.* at 236:21-25.

[10] A lockout is a mechanism in a precinct that ensures that "persons who are allowed to vote at the polling place, but who do not live within the judicial subdistrict" cast their votes only in the election(s) in which they may participate. *See* La. Att'y Gen. Op. No. 02-189, 2002 WL 1483936, at *3 (2002) (advising the use of lockouts in the context of judicial subdistricts); *see also* La. Att'y Gen. Op. No. 06-0262, 2006 WL 3898216, at *1 (2006) (noting the order of the U.S. District Court for the Western District of Louisiana directing the redrawing of election districts for the Avoyelles Parish School Board that would allow "the minority population to elect a 'candidate of its choice'" in three districts and that would "requir[e] new lockouts for existing precincts").

Terrebonne and elsewhere in Louisiana. *Id.* ¶¶ 14-15. In 2013 and 2014, Terrebonne had 10 precinct lockouts in the November general election, and in 2014, other parishes had substantially higher percentages of precinct lockouts. *Id.*; *see also id.* ¶ 15 (63.5% in East Baton Rouge, 41.9% in Iberville, 31.6% in East Feliciana, and 25.3% in St. Landry). To the extent that split precincts are an issue, they can be eliminated after the 2020 Census. *See id.* ¶ 16 (noting that between 2010 and 2014, ten new precincts were created, and one was eliminated, in Terrebonne). Plaintiffs' *Illustrative Plan* clearly falls within the norm in terms of precinct splits. Neither Dr. Weber nor Adelson suggests otherwise. *See* Ex. 2 ¶ 17 (Weber Rep.); Ex. 4 at 27-32 (Adelson Rep.).

f. *Compliance with Section 2*

Finally, there is no question that Cooper developed Plaintiffs' *Illustrative Plan* to comply with Section 2 and provide a potential remedy for vote dilution under at-large voting for the 32nd JDC. *See* Ex. 1 ¶ 45 (Cooper Decl.); Ex. 6 ¶ 17 (Cooper Supp. Decl.). The *Illustrative Plan* includes a majority-Black district that *could* provide Black voters with an equal opportunity to elect the candidates of their choice for the 32nd JDC. *See* Ex. 1 ¶ 40 (Cooper Decl.).

In sum, Plaintiffs' *Illustrative Plan* appropriately considers TRPs, and demonstrates that a functional majority-Black single-member district "*[can] be drawn*" in Terrebonne. *Houston*, 56 F.3d at 611. Dr. Weber and Adelson suggest that Plaintiffs' *Illustrative Plan* does not sufficiently adhere to TRPs and that, as a consequence, the Black population in Terrebonne is not sufficiently compact to constitute a majority in a single-member district. *See* Ex. 2 ¶ 17 (Weber Rep.) (opining that "the African-American population in Terrebonne Parish is not geographically concentrated enough to be a majority of voters in a judicial sub-district drawn using fair traditional districting principles"); Ex. 4 at 29, 32 (Adelson Rep.) (opining that "Plaintiffs'

proposed plan is not drawn to accommodate [TRPs]" and adopting Dr. Weber's opinion that the Black population is not "geographically concentrated enough").

However, as indicated above, the only TRP that Dr. Weber and Adelson contest is the geographical compactness and shape of District 1. Neither Dr. Weber nor Adelson genuinely dispute that Plaintiffs' *Illustrative Plan*: (1) includes contiguous districts; (2) reflects permissible population deviations; (3) maintains communities of interest; (4) minimizes precinct splits; or (5) complies with Section 2.[11] Their narrow focus on the geographical compactness and shape of District 1 is unpersuasive because this factor, standing alone, is not determinative. *See Houston*, 56 F.3d at 611 (reversing district court for focusing "only on the shape of the districts in the plaintiff residents' specific proposals"). Moreover, as discussed *supra*, Dr. Weber's and Adelson's opinions with respect to the geographical compactness and shape of Plaintiffs' *Illustrative Plan* are "wholly conclusory and [are] not supported by sufficient facts." *Orthopedic & Sports Injury Clinic*, 922 F.2d at 224. Thus, their opinion that Plaintiffs' *Illustrative Plan* fails to adhere to TRPs "constitutes the type of 'conclusional allegations' and 'unsubstantiated assertions' that are never sufficient to defeat summary judgment." *Reaves Brokerage Co.*, 336 F.3d at 418.[12]

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[11] Moreover, Adelson's opinion that Plaintiffs' *Illustrative Plan* does not comply with TRPs is entirely "speculative," *Reaves Brokerage Co.*, 336 F.3d at 418, because he conceded that he was unaware of Louisiana's TRPs. *See, e.g.*, Ex. 5 at 243:8-9 (Adelson Dep.) ("I can't tell you what all requirements are of Louisiana state law"); *id.* at 245:20-21 ("I'd like to see [TRPs], what they are in Louisiana."). Adelson opines that Plaintiffs' *Illustrative Plan* "is not drawn to accommodate any judicial administration or case load considerations." Ex. 4 at 30 (Adelson Rep.). However, Adelson conceded that he is unaware whether, in Louisiana, a judicial redistricting plan must be drawn to reflect this factor. *See* Ex. 5 at 241:1-242:9 (Adelson Dep.). Dr. Weber does not mention this purported consideration in his report. *See generally* Ex. 2 (Weber Rep.).

[12] Adelson also opines that Plaintiffs' *Illustrative Plan* "[u]ses race as the predominant redistricting or districting criterion," Ex. 4 at 29-30 (Adelson Rep.), and, thus, runs afoul of *Shaw v. Hunt*, 517 U.S. 899 (1996), and its progeny. Ex. 5 at 235:7-14 (Adelson Dep.); *id.* at 248:8-15; 254:24-255:8; 272:25-273:7; 287:25-288:10. In *Shaw*, the Supreme Court held that a redistricting plan in which race is the "dominant and controlling consideration" is unconstitutional unless there is a "strong basis in evidence" that the plan represents an effort "to comply with the [VRA]." 517 U.S. at 905, 910-11 (citations and internal quotation marks omitted). Similarly, Dr. Weber stated in passing that Plaintiffs' *Illustrative Plan* "might be called an affirmative gerrymander." Ex. 3 at 91:8-18 (Weber Dep.). These contentions fail as a matter of law for at least four reasons.

B. Terrebonne's Black Population Is Politically Cohesive, and Its Elections Are Characterized by RPV (*Gingles* two and three)

In addition to satisfying *Gingles* one, Plaintiffs satisfy the second and third *Gingles* preconditions because there is no genuine dispute that Terrebonne's Black population is politically cohesive and that elections in Terrebonne are characterized by RPV.

Plaintiffs' expert, Dr. Richard L. Engstrom,[13] demonstrates that Terrebonne elections are characterized by stark patterns of RPV. *See* Ex. 12 ¶ 33 (Engstrom Rep.). Dr. Engstrom analyzed

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First, these racial gerrymander arguments rely upon equal protection cases such as *Miller v. Johnson*, 515 U.S. 900 (1995), and *Shaw*, which are inapplicable during the liability phase of this case. The Fifth Circuit has squarely rejected the notion that this equal protection inquiry should be used to assess the first *Gingles* precondition. *See Clark*, 88 F.3d at 1406-07 (holding that "*Miller* and its progeny [did not] work a change in the first *Gingles* inquiry" and rejecting the argument that "a proposed district that violates *Miller* does not satisfy the first *Gingles* factor per se."). Thus, contrary to Adelson and Dr. Weber's assumption, "*Miller* is [not] relevant to the first *Gingles* factor." *Id.* at 1406; *accord Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998) ("The district court's attempt to apply authorities such as *Miller* to this Section Two case . . . is unpersuasive because the *Miller* and *Gingles* . . . lines [of cases] address very different contexts.").

Second, the record reveals that the opinions of Adelson and Dr. Weber on this question are actually "equivocal [and thus] simply insufficient to preclude summary judgment." *Stahl v. Novartis Pharm. Corp.*, 283 F.3d 254, 272 (5th Cir. 2002). Both Adelson and Dr. Weber refuse to opine unambiguously that Plaintiffs' *Illustrative Plan* constitutes a racial gerrymander. Adelson was only willing to suggest that "there's a *possibility* of a racial gerrymander." Ex. 5 at 288:3-12 (Adelson Dep.) (emphasis added); *see also id.* at 235:1-6 (stating that Plaintiffs' *Illustrative Plan* "*appear[s]* to be *potentially* a racial gerrymander" (emphasis added)); *id.* at 255:2-5 ("[T]here are issues of whether or not this is a racial gerrymander."). Dr. Weber similarly testified that Plaintiffs' *Illustrative Plan* "*might be* called an affirmative gerrymander." Ex. 3 at 91:8-18 (Weber Dep.) (emphasis added). Such "equivocal statements are insufficient" to create a genuine dispute of fact. *Guidry v. Aventis Pharm., Inc.*, 418 F. Supp. 2d 835, 843 (M.D. La. 2006).

Third, even assuming the appropriateness of applying *Miller* in the context of *Gingles*, and even assuming that either Adelson or Dr. Weber unequivocally stated that race predominated in the development of Plaintiffs' *Illustrative Plan*, there is insufficient evidence to support such a claim. As noted *supra*, both Adelson and Dr. Weber narrowly focused on the compactness and shape of District 1, and their opinion on that subject reflects nothing but *ipse dixit*. Moreover, neither disputes the numerous other ways in which Plaintiffs' *Illustrative Plan* adheres to TRPs, including contiguity, one person, one vote, maintaining communities of interest, minimizing precinct splits, and compliance with Section 2. As a result, the evidence fails to show that race was the predominant factor in the development of Plaintiffs' *Illustrative Plan*. *See Miller,* 515 U.S. at 919 (holding that the plan was a racial gerrymander because "*every* objective districting factor that could realistically be subordinated to racial tinkering in fact suffered that fate" (internal quotation marks, alterations, and citations omitted) (emphasis added)).

Fourth, even if the evidence showed that every TRP was subordinated to race in Plaintiffs' *Illustrative Plan*, *Miller* holds that such a plan does not automatically fail, but is subject to strict scrutiny, which it can survive if it furthers a compelling state interest. *See id.* at 920. The Fifth Circuit has recognized that "compliance with § 2 of the [VRA] constitutes a compelling governmental interest." *See Clark*, 88 F.3d at 1405.

[13] Dr. Engstrom has conducted extensive research into the relationship between election systems and the ability of minority voters to participate fully in the political process and to elect their candidates of choice. *See* Ex. 12 ¶ 2 (Engstrom Rep.). Three articles that he authored or co-authored were cited with approval by the Supreme Court in *Gingles*. *See* 478 U.S. at 46 n.11, 49 n.15, 53 n.20, 55, 71.

seven endogenous and exogenous elections[14] in Terrebonne featuring at least one Black candidate and one white candidate (*i.e.*, biracial elections)[15] competing against each other at-large over a 20-year period including the: (1) 2014 election for Houma City Court; (2) 1994 election for the 32nd JDC; (3) 1993 election for the First Circuit Court of Appeal; (4) 2014 election for Houma City Marshal; (5) 2012 election for U.S. President; (6) 2011 election for Tax Assessor; and (7) 2008 election for U.S. President. *See id.* ¶¶ 16-29.

In each of these elections, Black voters were cohesive in their preference for the Black candidate. *See id.* Black voters' support for the Black candidates ranged from 71.4% to 99.8%, with an average of 87.1%. *See id.* By contrast, non-Black voter support for the Black candidates was minimal, ranging from 1.1% to 13.7%, with an average of 7.8%. *See id.* As a result, the candidate of choice of Black voters was defeated in each of the seven elections analyzed, regardless of whether the candidate ran as a Democrat, Republican, or otherwise; for a judicial or non-judicial office; or for a local, state, or federal office. *See id.*

For example, in the 1994 election for the 32nd JDC, Black voters overwhelmingly preferred the only Black candidate, Anthony Lewis, who received 72.8% of Black voter support. *Id.* ¶¶ 18-19. Lewis, however, received the support of only 1.1% of non-Black voters. *Id.* As a

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[14] Endogenous elections are those concerning the office at issue, here the 32nd JDC, while exogenous elections are those for other offices. *See Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502-03 (5th Cir. 1987). While exogenous elections are considered less probative of RPV than endogenous elections, *see Clark*, 21 F.3d at 97, they may not be excluded from the analysis, particularly where there are few, as here, or no endogenous elections to analyze. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1209-10 (5th Cir. 1989) (holding that district court "erroneously declined to consider evidence of racial bloc voting derived from [exogenous] elections"); *Citizens for a Better Gretna*, 834 F.2d at 502-03 (affirming district court's consideration of exogenous elections because of "sparse relevant statistical data" from endogenous elections).

[15] RPV can be meaningfully assessed only in the context of biracial elections. *See Westwego*, 872 F.2d at 1208 n.7 ("[T]he evidence most probative of [RPV] must be drawn from elections including both black and white candidates. . . . [W]hen there are only white candidates to choose from it is virtually unavoidable that certain white candidates would be supported by a large percentage of . . . black voters. Evidence of black support for white candidates in an all-white field, however, tells us nothing about the tendency of white bloc voting to defeat black candidates.") (internal citation and quotation marks omitted)); *see also Campos v. City of Baytown,* 840 F.2d 1240, 1245 (5th Cir. 1988) ("[T]he district court was warranted in its focus on those races that had a minority member as a candidate."); *Citizens for a Better Gretna*, 834 F.2d at 503-04 ("[I]mplicit in the *Gingles* holding is the notion that black preference is [to be] determined from elections which offer the choice of a black candidate.").

consequence, Lewis was defeated by the five white candidates. *Id.* Similarly, in 2014, Black voters overwhelmingly supported the only Black candidate to run for the Houma City Court, Cheryl Carter, providing her with 85.1% of their support. *Id.* ¶¶ 16-17. However, only 8.3% of non-Black voters supported Ms. Carter. *Id.* As a result, Ms. Carter lost the election, even though, like her two white opponents, she was a Republican. *Id.*

Simply put, evidence of RPV is "overwhelming" in this case. *See, e.g.*, *Teague v. Attala County*, 92 F.3d 283, 289, 291 (5th Cir. 1996) (holding that "evidence of racial polarization" was "overwhelming," given that on average across eight elections, Black candidates received 87% of Black voter support but only 15% of white voter support, and reversing district court's contrary finding as clearly erroneous); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1113, 1118-20 (5th Cir. 1991) (holding that the evidence "unmistakably demonstrates" RPV and reversing the district court's contrary finding as clearly erroneous; in the only endogenous election, the Black candidate received 89% of Black voter support and 16% of white voter support, and exogenous elections similarly "exhibited racial polarization").

The testimony of Dr. Weber—the only expert retained by Defendants to conduct a RPV analysis, *see* Ex. 2 ¶ 6 (Weber Rep.)—does not create a genuine dispute as to whether Plaintiffs satisfy the second and third *Gingles* preconditions.[16] As a threshold matter, as set forth in

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[16] While Adelson attempts to address Dr. Engstrom's analysis, *see, e.g.*, Ex. 4 at 15-21 (Adelson Rep.), for the reasons set forth in Plaintiffs' separate motion to exclude the testimony of Adelson under FRE 702, Adelson's testimony is inadmissible. Even if it were admissible, it still would not create a genuine issue because Adelson admitted that he did not conduct a RPV analysis. *See* Ex. 5 at 138:18-25, 140:14-20 (Adelson Dep.).

Adelson also acknowledged that he had no reason to dispute the results of Dr. Weber's and Dr. Engstrom's RPV analyses. *See id.* at 201:3-11. His only criticisms of Dr. Engstrom's analysis are that: (1) the 1993 election for the First Circuit Court of Appeal and the 1994 election for the 32nd JDC are stale; and (2) Dr. Engstrom relies upon exogenous elections. *See* Ex. 4 at 15-21 (Adelson Rep.); Ex. 5 at 190:6-25 (Adelson Dep.). Neither contention has merit. Adelson's staleness argument is the same as that of Dr. Weber and unpersuasive for the reasons set forth *infra* note 17. Moreover, Adelson refused to say that the remaining, non-stale elections would be insufficient to establish RPV. *See* Ex. 5 at 191:22-192:10 (Adelson Dep.). Finally, Adelson's suggestion that Dr. Engstrom improperly examined exogenous elections is contrary to case law. *See supra* note 14. Adelson concedes that courts look to both endogenous and exogenous elections to assess RPV, including in cases where, as here, data from endogenous elections are sparse. *See* Ex. 5 at 193:5-195:11; 196:16-23 (Adelson Dep.).

Plaintiffs' separate motion to exclude Dr. Weber's testimony under FRE 702, Dr. Weber's testimony on the issue of RPV is inadmissible. However, even if it were admissible, there still would be no genuine dispute about *Gingles* two and three.

First, Dr. Weber used the same statistical method—King's ecological inference—to analyze the same seven elections that Dr. Engstrom studied, and the results of Dr. Weber's statistical analysis are essentially the same as those of Dr. Engstrom. *See* Ex. 3 at 149:6-18 (Weber Dep.); *id.* at 154:10-155:1; 190:1-25; 191:9-20; *see also* Ex. 13 at 7 n.4 (Lichtman Supp. Rep.); Ex. 14 (Illustrative Ex.). According to Dr. Weber, Black voters' support for the Black candidates ranged from 67.3% to 98.8%, with an average of 85.8% (as compared to an average of 87.1% estimated by Dr. Engstrom). *See* Ex. 2 ¶¶ 30-43, tbls. 9 to 11-4 (Weber Rep.); *see also* Ex. 14 (Illustrative Ex.). By contrast, non-Black voter support for these candidates ranged from 1.2% to 13.0%, with an average of 7.1% (as compared to an average of 7.8% estimated by Dr. Engstrom). *See* Ex. 2 ¶¶ 30-43, tbls. 9 to 11-4 (Weber Rep.); *see also* Ex. 14 (Illustrative Ex.). Accordingly, Dr. Weber's own results demonstrate RPV. *See Teague*, 92 F.3d at 289, 291; *Westwego Citizens for Better Gov't*, 946 F.2d at 1118-20.

Second, Dr. Weber agrees, based on his own results, that Black voters are cohesive in each of the elections that he studied, such that there is no dispute that Plaintiffs satisfy *Gingles* two (bloc voting by Black voters). *See* Ex. 2 ¶ 45, tbl. 12 (Weber Rep.); Ex. 3 at 236:21-25 (Weber Dep.). Dr. Weber opines that, in each of the examined seven elections, Black voters cohesively supported the Black candidate. *See* Ex. 2 ¶¶ 34, 36, 37, 40-43 (Weber Rep.); *see also* Ex. 3 at 238:18-24 (Weber Dep.) (acknowledging that, even were there was a subsequent runoff, the Black candidate "was the first choice of African-American voters"). Thus, there is no genuine dispute about the second precondition of *Gingles*.

Third, Dr. Weber agrees that apart from Black voter cohesion, there was RPV in four of the seven elections that he and Dr. Engstrom studied: the (1) 1993 election for the First Circuit Court of Appeal; (2) 2008 election for U.S. President; (3) 2012 election for U.S. President, and (4) 2014 election for the Houma City Court. *See* Ex. 2 ¶¶ 36, 37, 40, 42 (Weber Rep.). Dr. Weber's concession that four of seven examined elections demonstrate RPV is sufficient to satisfy *Gingles*. *See Westwego Citizens for Better Gov't*, 872 F.2d at 1209 (plaintiffs may prove RPV by using exogenous elections if "the absence of black candidates has created a sparsity of data on [RPV] in purely indigenous elections").[17]

Fourth, Dr. Weber differs from Dr. Engstrom only in his opinion that there was no RPV in three of the seven elections: the (1) 1994 election for the 32nd JDC; (2) 2011 election for Tax Assessor; and (3) 2014 election for City Marshal. *See* Ex. 2. ¶¶ 34, 41, 43 (Weber Rep.). Dr. Weber's opinion does not create a genuine issue, however, because, as detailed above, his concession that there was RPV in four of the elections is sufficient to satisfy *Gingles*. Even if it were not, Dr. Weber's analysis of the remaining three elections is based on a flawed rule that he himself made up (*i.e.*, a "decision rule") that is contrary to the governing legal standard, including the seminal Section 2 case, *Gingles*, and otherwise lacks social science support. *See Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 531 n.12 (5th Cir. 1999) ("Summary judgment is appropriate when an ill-reasoned expert opinion suggests the court adopt an irrational inference, or rests on an error of fact or law.").

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[17] Dr. Weber's contention that the 1994 election for the 32nd JDC is stale, *see* Ex. 2 ¶ 34 (Weber Rep.), is of no consequence. The Fifth Circuit has explicitly rejected the notion that "plaintiffs may never make out a vote dilution claim [under Section 2] when there is no evidence from 'indigenous' elections." *Westwego Citizens for Better Gov't*, 872 F.2d at 1209; *see also id.* at 1208 (reversing district court because it erroneously "believed that plaintiffs could not, as a matter of law, make out a vote dilution claim based on evidence of [RPV] drawn from elections other than the [endogenous] elections themselves"). "To hold otherwise," the Fifth Circuit has explained, "would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress sought to remove." *Id.* at 1208 n.9. Indeed, "the lack of black candidates [may well be] a . . . result of a racially discriminatory system." *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir. 1984).

To determine cohesion and polarization, Dr. Weber employs his decision rule, which features bright-line numerical cutoffs. *See* Ex. 2 ¶ 32 (Weber Rep.). In a two-person contest, Dr. Weber will find a group to be cohesive only if "[the] group's percentage for support for a particular candidate is at least 60% of the total vote among all candidates." Ex. 3 at 192:20-193:6 (Weber Dep.). In an election with three or more candidates, Dr. Weber "will first determine whether the top two candidates together garner more than 50 percent of the [group's] support." *Id.* at 198:1-11. If that condition is satisfied, then Dr. Weber will find cohesion only if, "as between the two of those candidates, one candidate has at least 60 percent of the vote." *Id.*[18] According to Dr. Weber, for there to be RPV, both minority voters and non-minority voters must meet his test for cohesion. *Id.* at 208:4-209:10.

Thus, under his decision rule, Dr. Weber refuses to find RPV in the 1994 election for the 32nd JDC, even though, by his own estimates, 71.2% of Black voters supported Mr. Lewis, only 1.2% of non-Black voters supported him, and the remaining 98.8% of non-Black voters cast their ballots for the white candidates, thereby defeating Mr. Lewis. *See* Ex. 2 ¶ 46, tbl. 9 (Weber Rep.); Ex. 3 at 215:8-216:25 (Weber Dep.). According to Dr. Weber, these numbers do not demonstrate RPV because, while John Walker and James Dagate, the two white candidates who received the most support from non-Black voters, collectively garnered more than 50% of non-Black voter support, Walker did not receive 60% of that subset's support. *See* Ex. 3 at 195:21-197:7; 209:11-18 (Weber Dep.). Stated plainly, according to Dr. Weber, there was no RPV

[18] Dr. Weber will classify cohesion as "moderate" if the level of support is at least 60% but less than 80% and "strong" if the level of support is at least 80%. Ex. 2 ¶ 32 (Weber Rep.). Thus, if a group's level of support is 79.99%, he will deem it moderately cohesive. Ex. 3 at 199:24-200:4 (Weber Dep.). But if the level of support is 80.00%, he will deem it strongly cohesive. *Id.* at 200:8-10. This is so, even though the difference is only 0.01%. *Id.* at 200-11:14.

because non-Black voters did not sufficiently coalesce around a single, white candidate. *See id.* at 195:21-197:7; *see also* Ex. 2 ¶ 34 (Weber Rep.).[19]

While Dr. Weber has steadfastly used his decision rule in the cases in which he has served as an expert witness, *see* Ex. 3 at 214:7-10 (Weber Dep.), federal courts have repeatedly rejected it. *See, e.g.*, *Hall v. Louisiana*, No. 12-657, ___ F. Supp. 3d ___, 2015 WL 3604150, at *9 (M.D. La. June 9, 2015); *see also United States v. Blaine County*, 363 F.3d 897, 911 (9th Cir. 2004); *Large v. Fremont County*, 709 F. Supp. 2d 1176, 1214-15 (D. Wyo. 2010); *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 430 (S.D.N.Y. 2010); *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1443 (N.D. Ill. 1997), *aff'd in part and vacated in part on other grounds*, 141 F.3d 699 (7th Cir. 1998). This is unsurprising because Dr. Weber's decision rule suffers from multiple fatal defects.

First, Dr. Weber's decision rule is contrary to the legal standard for determining RPV because it incorrectly focuses on whether white voters cohere sufficiently behind a single, white candidate. In *Gingles*, the Supreme Court explained that "[t]he purpose of inquiring into the existence of [RPV] is twofold: [1] to ascertain whether minority group members constitute a politically cohesive unit and [2] to determine whether whites vote sufficiently as a bloc usually *to defeat the minority's preferred candidates*." 478 U.S. at 56 (emphasis added). Thus, contrary to Dr. Weber's assumption, the salient inquiry is not whether white voters cohere behind a single

[19] Similarly, under his decision rule, Dr. Weber refuses to find RPV in the 2011 Tax Assessor election, even though, by his own estimates, 67.3% of Black voters supported the Black candidate, Clarence Williams, and only 1.6% of non-Black voters did so, and as a result, Mr. Williams was defeated, losing to three white candidates. Ex. 2 ¶ 41 (Weber Rep.). And, under his decision rule, Dr. Weber also refuses to find RPV in the 2014 City Marshal election, even though 82.0% of Black voters supported the Black candidate, David Mosely, while only 5.3% of non-Black voters did so, and as a consequence, Mr. Mosely was defeated, losing to five white candidates. *Id.* ¶ 43. In each of these cases, Dr. Weber's opinion rests on the fact that non-Black voters did not sufficiently coalesce—under his rule—behind one of the white candidates. *See id.* ¶¶ 41, 43.

candidate, but rather whether white voters *refuse* to support the preferred candidates of Black voters, thus preventing Black voters from electing their candidates of choice.[20]

For this reason alone, numerous courts have rejected Dr. Weber's decision rule. *See, e.g.*, *Hall*, 2015 WL 3604150, at *9 ("It is of no import . . . whether [Black electoral] defeat is due to less or more than 60% of non-African American voters supporting a single candidate, when the ultimate result is a defeat of the preferred candidate of African American voters."); *Village of Port Chester*, 704 F. Supp. 2d at 430 ("It is not necessarily important that the non-Hispanic voters coalesce behind a particular candidate or that a particular percentage of non-Hispanic voters vote for any one candidate—what matters most is that those voters do not cast votes for the Hispanic candidate of choice, and those votes usually result in the defeat of the minority-agreed preferred candidates."); *Barnett*, 969 F. Supp. at 1443 (holding that Dr. Weber erroneously "limited the cohesiveness requirement to cohesiveness behind a single candidate," and that "[b]y failing to look . . . [at] the combined level of white support for white candidates, Professor Weber provided an inaccurate view of [RPV]").

Second, the arbitrary numerical cut-offs that Dr. Weber uses to assess cohesion and polarization are contrary to case law. "*Gingles* [itself] rejected a blanket numerical threshold for [finding] white bloc voting." *Blaine County*, 363 F.3d at 911. In fact, "*Gingles* would have come out differently if the Supreme Court had used Dr. Weber's arbitrary threshold because several of the elections in which the Court found polarization to be present did not meet Dr. Weber's

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[20] The facts in *Gingles* itself illustrate this focus. The district court there found RPV because "a high percentage of black voters regularly supported black candidates and . . . ***most white voters were extremely reluctant to vote for black candidates***." *Gingles*, 478 U.S. at 54 (emphasis added). Most crucially, the district court found that, on average, about four-fifths and two-thirds of white voters refused to support Black candidates in primary and general elections, respectively. *Id.* at 59. The Supreme Court held that this analysis, which "revealed that blacks strongly supported black candidates, ***while, to the black candidates' usual detriment, whites rarely did***, [reflects] the proper legal standard" for determining RPV. *Id.* at 61 (emphasis added). Consistent with this holding, to determine RPV, the Fifth Circuit has focused on the degree to which white voters have provided (or refused to provide) crossover support for minority voters' candidates of choice. *See, e.g.*, *Teague*, 92 F.3d at 291-92; *Westwego Citizens for Better Gov't*, 946 F.2d at 1118-20; *Campos*, 840 F.2d at 1249.

standard." *Large*, 709 F. Supp. 2d at 1214-15. In each of the districts where the Supreme Court affirmed the finding of RPV, there were elections in which Black candidates received more than 40% of white voter crossover support. *See Gingles*, 478 U.S. at 54-61, 80-81. "Under Dr. Weber's definition, however, [these] elections would *not* have been considered polarized." *Large*, 709 F. Supp. 2d at 1215 (emphasis added). Tellingly, Dr. Weber unabashedly admitted that "[he] never went back to *Gingles* and looked at . . . how would the *Gingles* evidence have [fared] under [his] criterion." Ex. 3 at 213:5-9 (Weber Dep.).

Third, Dr. Weber's arbitrary numerical cutoffs find no support in social science. Dr. Weber admitted at trial in *Hall* that "he is unaware of any [other] expert witness who has employed [his] classification rule." *Hall*, 2015 WL 3604150, at *9. Likewise, in this case, Dr. Weber was unable to identify with any specificity any expert witness who has used his decision rule. *See* Ex. 3 at 204:18-25 (Weber Dep.) (naming a social scientist, but stating "I can't tell you when, where, [or] how" that person used his rule). Dr. Weber claims that the 60% threshold that he uses reflects the work of Dr. Allan Lichtman, Plaintiffs' expert in this case, and, specifically, the concept of a 60% landslide that Dr. Lichtman has explored. *See id.* at 192:20-193:15, 249:25-251:3.[21] However, as Dr. Lichtman has explained, the contention that his work provides any support for Dr. Weber's arbitrary and unsupported decision rule is "false." Ex. 13 at 9 (Lichtman Supp. Rep.). According to Dr. Lichtman:

> I have articulated the concept of a 60 percent "landslide" in the specific context of assessing minority voter cohesion. The social science literature provides "no consensus for specifying a minimum level of cohesive minority voting." In my view, 60 percent is a "threshold above which the minority group's cohesion [can] be established *beyond dispute*." (emphasis added). In other words, a level of

[21] Dr. Weber provided the same answer with respect to the 60% threshold that he uses in the context of a two-person race, and the 60%-40% split in the context of an election with three or more candidates, discussed *supra*. *See* Ex. 3 at 192:20-193:15; 249:25-251:3 (Weber Dep.). As for the 50% initial cutoff that he uses in the context of an election with three or more candidates, Dr. Weber candidly admitted that it is simply "a pretty workable number." *Id.* at 251:4-12. Dr. Weber cited no social science or case law support for this numerical threshold. *Id.*

> support of 60 percent is *sufficient*, but not *necessary*, to demonstrate minority voter cohesion.

Id. (quoting Allan J. Lichtman & J. Gerald Herbert, *A General Theory of Vote Dilution*, 6 La Raza L.J. 1, 5-6 (1993)). Thus, contrary to Dr. Weber's contention, Dr. Lichtman has "never suggested 60 percent as a specific cut-off or a bright-line rule for finding minority voter cohesion—let alone white voter cohesion." *Id.*

Numerous courts have recognized that Dr. Weber's decision rule and numerical cutoffs find *no* support in any social science and are wholly arbitrary. *See, e.g.*, *Village of Port Chester*, 704 F. Supp. 2d at 430 (declining to "endorse a cut-off without any scientific or statistical basis other than it is simply a number at which Dr. Weber feels comfortable" (internal quotation marks omitted)); *Barnett*, 969 F. Supp. at 1443 ("There is virtually no support for [Dr. Weber's] interpretation of cohesiveness . . . in the scholarly literature"); *see also Large*, 709 F. Supp. 2d at 1215 (rejecting Dr. Weber's "threshold approach" as "arbitrary").

Finally, in an attempt to support his decision rule, Dr. Weber repeatedly emphasized that it reflects "common sense." *See* Ex. 3 at 207:1-8 (Weber Dep.) ("I think it's a commonsense rule"); *id.* at 209:19-25 ("it's pretty much commonsense"); *see also id.* at 210:19-24 ("It's a commonsense rule."). However, common sense alone cannot be the basis for an expert opinion, particularly where it runs counter to the governing legal standard and is devoid of scientific support. *See IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 376 (5th Cir. 2002).

In sum, there is no dispute that Plaintiffs satisfy *Gingles* two and three.

II. There Is No Genuine Dispute That, Under the Totality of Circumstances, Black Voters in Terrebonne Have Less Opportunity Than Other Members of the Electorate to Elect Candidates of Their Choice

Because Plaintiffs have satisfied each of the three *Gingles* preconditions, a "totality of circumstances" analysis is required to determine whether Black residents in Terrebonne "have

less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See* 52 U.S.C. § 10301(b); *Johnson v. DeGrandy*, 512 U.S. 997, 1009-12 (1994). "[I]t will be only the very unusual case in which the plaintiffs can establish the . . . *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Clark*, 21 F.3d at 97 (internal quotation marks and citation omitted); *accord Teague*, 92 F.3d at 293; *Clark*, 88 F.3d at 1396.

The Senate Report accompanying the 1982 amendments to the VRA identified "typical factors" ("Senate Factors") that are relevant in analyzing whether Section 2 has been violated.[22] Plaintiffs need not, however, prove "any particular number of factors . . . or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45; *Westwego Citizens for Better Gov't*, 946 F.2d at 1120 ("No one of the factors is dispositive; the plaintiffs need not prove a majority of them; other factors may be relevant."); *see also Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987) (finding a Section 2 violation after determining that four Senate Factors were irrelevant and the remaining five Senate Factors weighed in plaintiffs' favor), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

The "two most important factors considered in the totality-of-circumstances inquiry" are "the existence of [RPV] and the extent to which minorities are elected to public office." *Clark*,

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[22] These factors are: (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;" (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized;" (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;" (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process;" (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;" (6) "whether political campaigns have been characterized by overt or subtle racial appeals;" and (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 36-37 (internal citation and quotation marks omitted). Additional factors include: (1) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and (2) "whether the policy underlying the state or political subdivision's use of such voting . . . practice or procedure is tenuous." *Id.* (internal citation and quotation marks omitted).

88 F.3d at 1397 (citing *Gingles*, 478 U.S. at 48 n.15; *Westwego Citizens for Better Gov't*, 946 F.2d at 1122); *see also McMillan*, 748 F.2d at 1043 ("[RPV] will ordinarily be the keystone of a dilution case."). Courts have found vote dilution based solely on the existence of these two factors. *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006); *NAACP v. Gadsden Cty. Sch. Bd.*, 691 F.2d 978, 982-83 (11th Cir. 2000). The other factors "are supportive of, but *not essential to,* a minority voter's claim." *Gingles*, 478 U.S. at 48 n.15 (emphasis in original).

Here, there is no genuine dispute that, under the totality of circumstances, Terrebonne's Black electorate has less opportunity than its white electorate to participate in the political process and elect representatives of its choice. **Senate Factors 1, 2, 3, 5, 7, and 9** are most relevant, and each weigh in Plaintiffs' favor, including the two most critical Senate Factors: Senate Factor 2 (RPV) and Senate Factor 7 (lack of Black electoral success).

A. There Is a Long, Intense, and Persistent History of Voting Discrimination in Louisiana and Terrebonne (*Senate Factor* 1)

This factor reviews "the extent of any history of official discrimination in the state *or* political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Id.* at 36-37 (emphasis added). Each of the individual Plaintiffs need not have personally experienced discrimination for this factor to weigh in Plaintiffs' favor. *Id.*

As explained by Plaintiffs' expert, Dr. Lichtman,[23] Louisiana has a long, intense, and persistent history of *de jure* and *de facto* discrimination against Black voters that extends to the

[23] Dr. Lichtman is an expert in political history, political analysis, and historical and statistical methodology, who has published numerous scholarly works and served as a consultant or expert witness in more than 80 voting and civil rights cases. Ex. 15 at 5-7 (Lichtman Rep.). A three-judge court in a VRA case involving redistricting in Texas cited Dr. Lichtman's work in finding that the state intentionally discriminated against minority voters. *See id.*

election of judges. *See* Ex. 15 at 12-13 (Lichtman Rep.); *see also* Ex. 13 at 1-2 (Lichtman Supp. Rep.). "Indeed, it would take a multi-volumed treatise to properly describe the persistent, and often violent, intimidation visited by white citizens upon black efforts to participate in Louisiana's political process." *Citizens for a Better Gretna v. City of Gretna,* 636 F. Supp. 1113, 1116 (E.D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987). Accordingly, federal courts have widely recognized, and taken judicial notice of, this history of voting discrimination. *See, e.g.*, *Clark v. Edwards*, 725 F. Supp. 285, 295 (M.D. La. 1988) (judicial notice); *Chisom v. Edwards*, 690 F. Supp. 1524, 1534 (E.D. La. 1988) (judicial notice); *see also Westwego Citizens for Better Gov't*, 946 F.2d at 1114 ("The unfortunate history of racial discrimination in Louisiana . . . is a matter of common knowledge." (internal quotation marks omitted)); *Major v. Treen*, 574 F. Supp. 325, 339-41 (E.D. La. 1983) (chronicling the history).

Dr. Lichtman situates the use of at-large voting for the 32nd JDC in Terrebonne in the historical continuum of Louisiana's use of other discriminatory voting practices, including: Louisiana's 19th century use of the so-called grandfather clause, its 20th century use of the all-white primary and the "interpretative" literacy test, and Louisiana's 20th century operation of other tests or devices that denied Black people of the opportunity to register and vote, which resulted in Louisiana's nearly 50-year coverage under the preclearance requirement of Section 5 of the VRA ("Section 5"). Ex. 15 at 13-14 (Lichtman Rep.). As Dr. Lichtman notes, however, voting discrimination in Louisiana did not end with the enactment of the VRA[24] or the coverage of the state under Section 5. *Id.* at 13-20. To the contrary, Louisiana has continued to thwart Black political participation in myriad ways. *Id.*

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at 7 (referencing *Texas v. Holder*, 887 F. Supp. 2d 133 (D.D.C. 2012)). Dr. Lichtman has served as a consultant or expert witness numerous times for state and local jurisdictions, including Louisiana. *Id.*

[24] Congress enacted the VRA for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *Chisom*, 501 U.S. at 403 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)).

A centerpiece of this effort has been the adoption and maintenance of at-large voting in Louisiana. *See id.* at 14-20. In 1968, following increased Black voter registration and turnout *because of* the VRA's operation, Louisiana authorized at-large electoral methods, which had been prohibited, for local parish boards. *Id.* at 15.[25] In the same year, the 32nd JDC was established, and its members began to be elected at-large. *Id.* Many of the nearly 150 Section 5 objections interposed by the U.S. Department of Justice ("DOJ") to proposed discriminatory voting changes in Louisiana involved the use of at-large voting and numbered posts, the very voting practices at issue in this case. *Id.* at 15-16 (discussing, among other objections, the DOJ's statewide objection to at-large voting in 1969 and its finding that the method of election, "if widely implemented, will have the effect of discriminating against Negro voters").[26]

Consistent with these Section 5 objections, federal courts in Louisiana have struck down at-large electoral methods because of their discriminatory effect. *See, e.g.*, *Westwego Citizens for Better Gov't*, 946 F.2d at 1124 ("The time has come for Westwego to leave behind its at-large system of electing aldermen, a system which has effectively barred the black citizens of Westwego from any meaningful role in Westwego's government."). For example, the consent decree in *Clark v. Roemer*, 777 F. Supp. 445 (M.D. La. 1990), which challenged numerous at-large judicial districts, established majority-minority opportunity subdistricts for nine district courts (*i.e.*, 1st , 4th, 9th, 14th, 15th, 18th, 19th, 24th, and 40th judicial districts), the East Baton Rouge Family Court, and one court of appeal circuit (1st Circuit, 2nd District), and required the Louisiana Legislature to create majority-minority subdistricts for other district courts (*i.e.*, 23rd

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[25] The Fifth Circuit described in detail this history in *Zimmer v. McKeithen*, 485 F.2d 1297, 1301 & n.7 (5th Cir. 1973) (en banc), *aff'd sub nom.*, *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

[26] In 1990, a federal court rebuked Louisiana for failing to seek preclearance for voting changes related to nearly 28% of its district courts, including a proposed addition of a judicial seat to the 32nd JDC, recognizing that the "State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the [VRA]." Ex. 15 at 17 (Lichtman Rep.) (citations omitted).

and 27th), and a court of appeal circuit (2nd Circuit, 1st and 3rd Districts), which Defendant Governor signed into law. Ex. 15 at 16-17 (Lichtman Rep.).[27]

Moreover, while Plaintiffs are not required to offer evidence specific to Terrebonne's history of discrimination,[28] Dr. Lichtman has presented undisputed evidence of this history. For example, a Section 2 lawsuit, like the instant one, challenging at-large voting for the Terrebonne Parish Council *and* School Board, resulted in the establishment of majority-Black single-member districts for these two local bodies. *Id.* at 16 & n.18 (referencing Final Judgment, *Terrebonne Improvement Ass'n v. Terrebonne Parish Sch. Bd.*, No. 76-2191 (E.D. La. Sept. 2, 1977)). And, in 1992, the DOJ interposed a Section 5 objection to the Parish Council's redistricting plan for fragmenting the Black community and failing to draw a "readily achievable" third majority-Black district. *Id.* at 16.

Adelson, the only expert retained by Defendants to address this undeniable history of discrimination, responds by positing that the Louisiana of today is not the Louisiana of the Jim Crow era. Ex. 4 at 32-33 (Adelson Rep.). He bases this conclusion on his research in writing a book about the integration of baseball between 1950 and 1965, and his six years of work at the DOJ (although his DOJ work was not exclusively related to Louisiana or Terrebonne). *See id.*; *see also* Ex. 5 74:3-13 (Adelson Dep.); *id.* at 102:1-10; 124:1-4; 186:18-187:12. As a threshold matter, as set forth in Plaintiffs' separate motion to exclude Adelson's testimony under FRE 702,

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[27] Critically, the *Clark* litigation followed a 1973 state constitutional convention where officials voted overwhelming to maintain at-large voting for trial and appellate courts in Louisiana, and the DOJ subsequently objected to at-large voting methods in judicial districts where at least one majority-Black opportunity subdistrict was feasible. Ex. 15 at 16-17 (Lichtman Rep.).

[28] *See, e.g.*, *Dillard v. Crenshaw County*, 649 F. Supp. 289, 294 (M.D. Ala. 1986) (in a Section 2 challenge to at-large voting in nine Alabama counties, recognizing that "from the late 1880's to the present the *State of Alabama* and its political subdivisions have 'openly and unabashedly' discriminated against their black citizens by employing at different times such devices as the poll tax, racial gerrymandering, and at-large elections . . . .") (emphasis added); *Sierra v. El Paso Indep. Sch. Dist.*, 591 F. Supp. 802, 807 (W.D. Tex. 1984) (in a Section 2 and constitutional challenge to at-large voting and other voting practices for a Texas school district, focusing generally on the effect of Texas's poll tax on Mexican-American voters).

Adelson's testimony is inadmissible. Even if this testimony were admissible, Adelson's opinion would not create a genuine issue of fact.

First, Adelson does not—and cannot—dispute Dr. Lichtman's account of Louisiana's and Terrebonne's history of discriminatory voting practices. *See* Ex. 4 at 32-33 (Adelson Rep.); Ex. 5 at 77:18-25 (Adelson Dep.). Indeed, Adelson concedes that his purported historical expertise encompasses only the period of 1950-1965 covered by his baseball book. Ex. 4 at 32 (Adelson Rep.) (identifying 1950-1965 as "the time period of my historical expertise"); *see also* Ex. 5 74:3-13 (Adelson Dep.). He, therefore, has no basis to dispute the evidence of *de jure* and *de facto* discrimination affecting the right to vote in Louisiana and Terrebonne *prior* to 1950 or *after* 1965. Moreover, even with respect to 1950-1965, Adelson's familiarity is limited to the integration of baseball in the deep South, and not racial discrimination in voting or in judicial elections in Louisiana or Terrebonne. *See, e.g.*, Ex. 5 186:18-187:12 (Adelson Dep.).[29] Thus, the history of voting discrimination in Louisiana and Terrebonne remains undisputed.

Second, Adelson's argument that this Court should completely discount the undisputed history of discrimination in Louisiana and Terrebonne is contrary to the legal framework for this case, which recognizes that the "*history* of official discrimination" is a relevant and important consideration. *Gingles*, 478 U.S. at 36 (emphasis added); *see also Westwego Citizens for Better Gov't*, 872 F.2d at 1211-12 (holding that "the district court judge [erred insofar as he] disregarded historical evidence of discrimination, based upon his belief that there has been no

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[29] This is consistent with the fact that the court in *Hall* limited Adelson's testimony to the period from 1948 to 1965 and to the integration of baseball. Ex. 16 (Transcript of Bench Trial at vol. 5, 261:23-262:19, *Hall v. Louisiana* (M.D. La.) (Nov. 18, 2014) (sustaining an objection to Adelson's qualifications after reasoning: "I find it to be an enormous stretch that someone whose research is . . . about the history of Jim Crow in minor league baseball in the deep South. But, to me, it's an intellectual stretch from there to what's the status now of the ability of minorities and non-minorities to now elect judges in 2014. Or even more recently than that. I don't know if there's anything in your book that even mentions the word judge. . . . I think we're going really too far afield to suggest that because he conducted research on African-American ball players from . . . '40 something to 1964, that that in and of itself, that act of researching qualifies him to opine about judgeships.")).

racial discrimination in . . . the State of Louisiana in the past 15 to 20 years" because "Congress was concerned not only with present discrimination, but with the vestiges of discrimination which may interact with present political structures to perpetuate a historical lack of access to the political system"); *Zimmer*, 485 F.2d at 1306 (holding that the district court erred in finding that the removal of certain "impediments to participation in the electoral process" "vitiated the significance of the showing of past discrimination"; "[t]his conclusion is untenable . . . because the debilitating effects of these impediments do persist").[30]

Finally, Adelson's opinion, based on the testimony of Dr. Weber, about present-day registration and turnout rates among Black and white voters in Terrebonne does not create a genuine issue. Ex. 4 at 14, 17-18, 34 (Adelson Rep.). Indeed, as discussed *infra*, Dr. Weber's own data demonstrates that, to this day, Black voters register and turn out to vote at rates lower than white voters in Terrebonne. *See also* Ex. 13 at 12-13 (Lichtman Supp. Rep.) (pointing out flaws in Adelson's opinion regarding voter registration and turnout rates in Terrebonne). Similarly, Adelson's opinion that there are Black elected officials today in Louisiana "when there were none during the Jim Crow era," Ex. 4 at 32 (Adelson Rep.), is immaterial, given the undisputed evidence that *no* Black person has ever won an at-large election for the 32nd JDC after facing opposition, and that the only Black elected officials in Terrebonne are elected from single-member majority-Black districts, as discussed *infra*.

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[30] Although the Fifth Circuit's en banc decision in *Zimmer* predates *Gingles*, the Supreme Court in *Gingles* "relied substantially on *Zimmer* as a foundation for the analytical framework prescribed for § 2 claims," and the Fifth Circuit has rejected the notion that the teachings of *Zimmer* are obsolete. *See Citizens for a Better Gretna*, 834 F.2d at 498 ("We cannot agree that the Supreme Court in *Gingles* made the *Zimmer* analysis obsolete."); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (en banc) (holding that the totality of circumstances inquiry is guided "by the so-called *Zimmer* factors listed in the Senate Report").

B. There Is No Genuine Dispute That RPV Exists in Louisiana and Terrebonne (*Senate Factor* 2)

There is no dispute that elections in Louisiana are characterized by RPV. Indeed, Louisiana has an extensive and judicially-recognized history of RPV.[31] There also is no genuine dispute that RPV characterizes elections in Terrebonne as the above discussion regarding the second and third *Gingles* preconditions demonstrates. The record establishes beyond dispute "the keystone of [this] dilution case." *McMillan*, 748 F.2d at 1043.

Contrary to what Defendants might suggest, the record does not demonstrate that polarization in Terrebonne is due to politics and not race. In the 1993 election for the First Circuit Court of Appeal, the only Black candidate, Mr. Lewis, who was overwhelmingly preferred by Black voters (at 99.2%), ran at-large as a Democrat against a white Democratic candidate and lost after receiving only 10.5% of non-Black voter support. Ex. 12 ¶¶ 20-22 (Engstrom Rep.). In the 2014 Houma City Court election, the only Black candidate, Ms. Carter, also overwhelmingly preferred by Black voters (at 85.1%), ran at-large as a Republican against two white Republican candidates and lost after receiving only 8.3% of non-Black voter support. *Id.* ¶¶ 16-17. Thus, Black candidates in Terrebonne are consistently defeated in at-large elections regardless of their party affiliation. In particular, Ms. Carter's defeat belies any suggestion that Black candidates in Terrebonne can win so long as they run as Republicans. As Dr. Lichtman observes, this consistent and pronounced pattern of white opposition to Black candidates cannot be explained by party affiliation alone. Ex. 15 at 10 (Lichtman Rep.).

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[31] *See, e.g., Clark*, 725 F. Supp. at 296 ("The existence of [RPV] in Louisiana has been found by many courts."); *see also Westwego Citizens for Better Gov't*, 946 F.2d at 1118 ("There is no dispute that the results from every election which included a viable [B]lack candidate exhibit racial polarization . . . ."); *Citizens for a Better Gretna*, 834 F.2d at 504 (recognizing racial bloc voting in Gretna's aldermanic elections as the "most notable" factor in affirming the finding of vote dilution); *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 691 F. Supp. 991, 1004 (E.D. La. 1988) ("From the elections submitted into evidence, it is difficult to conclude that the voting in Jefferson Parish is *not* racially polarized.") (emphasis added), *aff'd*, 926 F.2d 487 (5th Cir. 1991).

Defendants' experts have offered no evidence that "indisputably proves" that partisan affiliation, and not race, accounts for the divergent voting patterns among minority and white citizens in Terrebonne. *Clements*, 999 F.2d at 850. While Dr. Weber and Adelson suggest in passing that party affiliation is a factor in Terrebonne elections, *see* Ex. 2 ¶ 46 (Weber Rep.); Ex. 4 at 22 (Adelson Rep.), neither performed any statistical or any other systematic analysis to assess the role of partisanship as opposed to race in Terrebonne elections. *See* Ex. 3 at 241:11-242:2 (Weber Dep.); Ex. 5 at 206:19-208:6 (Adelson Dep); *id.* at 229:4-7.[32] Dr. Weber conceded that the 1993 election for the First Circuit Court of Appeal featured an all-Democratic field, and that voting was racially polarized. Ex. 3 at 242:3-14 (Weber Dep.). Dr. Weber further conceded that the 2014 election for the Houma City Court involved an all-Republican field, and that voting was racially polarized. *Id.* at 242:15-243:9. Any argument that voting in Terrebonne solely reflects partisan affiliation, rather than race, rests on "a 'scintilla' of evidence," which is insufficient to defeat summary judgment. *Little*, 37 F.3d at 1075.

C. It Is Undisputed That the Majority-Vote Requirement and Numbered Posts in Terrebonne Enhance the Likelihood of Discrimination Against Black Voters (*Senate Factor* 3)

This factor considers "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that *may* enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 37 (emphasis added);[33] *see also Lodge v. Buxton*, 639 F.2d

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[32] This is consistent with Dr. Weber's testimony that "he believe[s] factors of race and partisanship are 'inextricably intertwined' in such a way that they [can] not be separated statistically." *United States v. Charleston County*, 316 F. Supp. 2d 268, 300 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004). The Fourth Circuit, in affirming the finding of vote dilution, noted that "[e]ven assuming that the effects of partisanship and race on voting could have been isolated and measured, no such evidence was before the district court." 365 F.3d at 352. The same is true here.

[33] Single-shot voting entails members of a group casting only one vote, for the group's candidate of choice, and not casting any of their remaining votes for any other candidate. *City of Rome v. United States*, 446 U.S. 156,

1358, 1380 (5th Cir. 1981) (affirming finding of vote dilution in part because "the presence of these factors enhanced the *likelihood* that the electoral system *could be* used for discriminatory purposes") (emphasis added), *aff'd sub. nom.*, *Rogers v. Lodge*, 458 U.S. 613 (1982).

Here, it is undisputed that in conjunction with at-large voting, the electoral system for the 32nd JDC features (1) designated division posts[34] and (2) a majority-vote requirement.[35] Ex. 12 ¶¶ 30-32 (Engstrom Rep.); Ex. 15 at 10, 63-64 (Lichtman Rep.); Ex. 2 ¶ 8 (Weber Rep.). The Fifth Circuit and federal courts in Louisiana have repeatedly recognized that these voting practices, when combined with other devices, such as at-large election schemes, impair minority voting strength. *See, e.g., Jones v. City of Lubbock*, 727 F.2d 364, 383-84 (5th Cir. 1984) (majority-vote requirement and numbered posts); *Lodge*, 639 F.2d at 1380 (same); *see also Zimmer*, 485 F.2d at 1306 & n.25 (majority-vote requirement in Louisiana), *Citizens for a Better Gretna*, 636 F. Supp. at 1124 (same); *Major*, 574 F. Supp. at 340, 351 & n.32 (same); *Ausberry v. City of Monroe,* 456 F. Supp. 460, 466 (W.D. La. 1978) (majority-vote requirement and numbered posts in Louisiana).

Consistent with this case law, Plaintiffs' experts, Drs. Engstrom and Lichtman, explain that Defendants' use of division posts (*e.g.*, A, B, C, D, and E) for the 32nd JDC exacerbates the discriminatory nature of the at-large electoral system because it precludes a minority group from engaging in single-shot voting. Ex. 12 at ¶¶ 30-32 (Engstrom Rep.); Ex. 15 at 10, 63-64

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184 n.19 (1980). This strategy provides the candidate of choice of voters of color with a better opportunity, but by no means a certainty, of winning one of the electoral seats. Ex. 12 ¶ 31 (Engstrom Rep.).

[34] A designated division/place/post system (*i.e.*, a numbered post system) "requires a candidate to declare for a particular seat on a governmental body. The candidate then runs only against other candidates who have declared for that position. The voters then only have one vote for that seat. The system prevents the use of bullet, or single shot, voting." *Bradford Cty. NAACP v. City of Starke*, 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

[35] "Where more than two candidates run for a particular office, the majority vote requirement ensures that no candidate supported by only a minority . . . of the populace will succeed. In the presence of [RPV], the majority vote requirement permits a white majority that scattered its votes among several white candidates in a[n] election to consolidate its support behind the remaining white candidate in the run-off election, thereby defeating the minority-supported candidate." *Clark*, 88 F.3d at 1398.

(Lichtman Rep.). Moreover, Drs. Engstrom and Lichtman explain that the use of the majority-vote requirement, such that a Black candidate cannot win by a plurality but must compete in a runoff election, also impedes the opportunity for Black voters to elect their candidates of choice. Ex. 12 at ¶¶ 30-32 (Engstrom Rep.); Ex. 15 at 10-11 (Lichtman Rep.).

This evidence is undisputed because both Dr. Weber and Adelson conceded that they did not analyze whether the post system or the majority-vote requirement affects Black voting strength in Terrebonne. *See generally* Ex. 2 (Weber Rep.); Ex. 4 (Adelson Rep.); *see also* Ex. 3 at 248:20-25 (Weber Dep.) (post system); *id.* at 249:5-24 (majority-vote requirement); Ex. 5 at 145:23-147:9 (Adelson Dep.) (post system); *id.* at 147:10-21 (majority-vote requirement). And Dr. Weber actually acknowledged that these voting practices impact minority voting strength in Terrebonne. *See* Ex. 3 at 71:2-8; 72:16-73:9 (Weber Dep.) (noting that the post system "has an impact on minority voting strength," and that the majority-vote requirement, "of course, impacts on minority voting opportunities").[36]

D. There Is No Genuine Dispute That Discrimination in Education, Employment, Health, and Other Areas Hinder Black Residents' Ability to Participate Effectively in the Political Process (*Senate Factor* 5)

This factor focuses on "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37.

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[36] Contrary to Dr. Weber's assertion, *see* Ex. 3 at 71:2-8; 72:16-73:8 (Weber Dep.), that these enhancing factors are present elsewhere in Louisiana does not diminish their significance. *See Westwego Citizens for Better Gov't*, 872 F.2d at 1212 (holding that the district court erred in discounting the majority-vote requirement as a factor on the ground that it is "virtually universal"; "[t]he fact that majority vote requirements may be commonplace does not alter the fact that Congress clearly *did* conclude that such provisions could serve to further dilute the voting strength of minorities"); *see also Clark*, 88 F.3d at 1398 (holding that the district court "misjudged the weight to be accorded to" the majority-vote requirement; "even if the majority vote requirement is not 'inherently discriminatory,' Congress has included it as one factor to consider as part of the totality-of-circumstances inquiry").

Plaintiffs' expert, Dr. Lichtman, demonstrates that there is a significant history of discrimination in virtually every aspect of political, economic, and social life in Louisiana. Ex. 15 at 64-70 (Lichtman Rep.). This history encompasses, as examples: (1) the Jim Crow era following slavery and Reconstruction, where Black people were *de jure* "confined to segregated and vastly underfunded and substandard schools, denied equal access to state-run public facilities," "excluded from the political and criminal justice system," "largely excluded . . . from residence in neighborhoods lived in exclusively by white people," and *de facto* relegated to "dead end, low paying jobs;" (2) the post-*Brown v. Board of Education* era wherein Louisiana "long delayed the submission of desegregation plans and segregation persisted in many districts aided and abetted by the state policy of providing aid to segregated private schools attended by white Louisiana students;" and (3) the present day where "some 34 school districts in Louisiana remain subject to federal oversight because of continuing segregation," where "Louisiana was ordered -- on at least ten occasions from 1965 to 1998 -- to integrate segregated universities and professional schools or compensate the state's historically black colleges and universities for generations of neglect," and where in 2011, "55.5 percent of all state employment discrimination charges were based on race or color, placing Louisiana first in the nation." *Id.* at 64-68.

Dr. Lichtman and Cooper further demonstrate the impact of this historical and ongoing racial discrimination with Census data that shows stark socioeconomic disparities between Black residents, as compared to white residents in Terrebonne, which impede Black residents from participating effectively in the political process. *Id.* at 68-70; Ex. 1 at ¶ 24 (Cooper Decl.). For example, Plaintiffs' experts show, among other things, that in Terrebonne: (1) Black median household income is about 55% of white median household income; (2) the poverty rate for Black people is about three times the poverty rate for white people; (3) about three times as

many Black households rely on food stamps as compared to white households; (4) the median earnings of Black individuals working full-time is about two-thirds the median earnings of white individuals working full-time; (5) the unemployment rate of Black people is almost double the unemployment rate of white people; (6) the rate at which Black people are employed in management or professional occupations is about half the rate at which white people are employed in such occupations; and (7) the Black infant mortality rate is almost twice the white infant mortality rate. *Id.*

Although Dr. Weber acknowledges these stark socioeconomic disparities, he opines that there are no lingering effects of discrimination on Black political participation in Terrebonne. Ex. 2 ¶ 29 (Weber Rep.). This opinion does not create a genuine issue for two reasons. *First*, Dr. Weber concedes that his opinion is based only on (1) voter registration and (2) voter turnout rates of Black as compared to white voters in Terrebonne. *Id.*; Ex. 3 at 178:24-179:10; 181:25-182:14 (Weber Dep.). Dr. Weber did not analyze the impact of socioeconomic disparities on Black *candidates*' ability to raise campaign funds, obtain volunteers, purchase newspaper and television ads, engage in direct mail campaigns, and hire professional consultants. Ex. 3 at 182:15-183:23 (Weber Dep.). Nor did Dr. Weber analyze the impact of stark socioeconomic disparities on Black *voters*' ability to participate in the political process by making campaign contributions or serving as campaign volunteers. *Id.* at 182:19-22; 183:3-6.

Second, even assuming that Dr. Weber's narrow focus on voter registration and turnout was persuasive, his *own* data demonstrates that, in most elections, Black voters do *not* register or turn out to vote at the same rate as white voters, *and*, even when Black voters (barely) participate at a higher level than white voters, they are unable to elect the candidates of their choice. Ex. 13 at 4-6 (Lichtman Supp. Rep.). Dr. Weber bases his opinion primarily on voter registration and

turnout rates calculated as percentages of the VAP in five elections in Terrebonne. *See* Ex. 3 at 180:7-20 (Weber Dep.) (stating that his opinion is based on Table 5 in his report); *see also* Ex. 2 tbl. 5 (Weber Rep.). As Dr. Weber acknowledges, however, white voter turnout was higher than Black voter turnout in *every* election he studied. *See* Ex. 3 at 138:14-21 (Weber Dep.); *see also* Ex. 2 tbl. 5 (Weber Rep.). Similarly, the registration rate among white voters was higher than the registration rate among Black voters in all but one election. *See* Ex. 3 at 143:8-13 (Weber Dep.); *see also* Ex. 2 tbl. 5 (Weber Rep.). On average across these five elections, white voter turnout exceeded Black voter turnout by 5.3 percentage points, and white voter registration rate exceeded Black voter registration rate by 2.2 percentage points. *See* Ex. 2 tbl. 5 (Weber Rep.); Ex. 13 at 3, 5 (Lichtman Supp. Rep.).[37] Thus, Dr. Weber's own data confirms the effects of discrimination on Black political participation in Terrebonne.[38]

E. It Is Undisputed That No Black Candidate Who Has Faced Opposition Has Been Elected to the 32nd JDC or Any Other At-Large Elected Office in Terrebonne (*Senate Factor* 7)

This factor considers the "extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37. Here, as a result of the discriminatory at-large electoral scheme, *no* Black candidate who has faced opposition has ever been elected to the 32nd JDC. *See* Ex. 15 at 71 (Lichtman Rep.).[39] Indeed, *no* Black candidate,

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[37] Dr. Weber also analyzed Black and white voter turnout as percentages of registered voters in seven elections. *See* Ex. 2 tbl. 4 (Weber Rep.). Dr. Weber's results show that in 71% of these elections, white voter turnout exceeded Black voter turnout. Ex. 13 at 3-4 (Lichtman Supp. Rep.). The remaining two elections that displayed higher Black voter turnout (barely) were the presidential elections in 2008 and 2012 in which Barack Obama competed, but nonetheless lost in Terrebonne, despite being the candidate of choice of Black voters. Ex. 2 tbl. 4, ¶¶ 40, 42 (Weber Rep.). On average across these seven elections, white voter turnout exceeded Black voter turnout by 7.1 percentage points. *See id.* tbl. 4; Ex. 13 at 3-4 (Lichtman Supp. Rep.).

[38] Nor can Adelson dispute the lingering effects of discrimination having: only adopted the flawed analysis of Dr. Weber, Ex. 4 at 14, 32 (Adelson Rep.); and failed to conduct his own independent analysis of voter registration and participation rates. Ex. 5 156:7-161:18 (Adelson Dep.).

[39] Potential Black candidates face the harsh reality that their election is not possible given the current at-large system, stark patterns of RPV, and the use of division posts and a majority-vote requirement; as a result, some have been discouraged from running. *See, e.g.*, Ex. 17 at 70:22-71:4; 129:25-130:21 (Lewis Dep.); *see generally* Ex. 18 (Cheryl Carter Decl.).

whether she ran as a Republican or Democrat, has ever been elected to any other at-large elected office, after facing opposition, in Terrebonne. *See id.* The only Black candidates who have won elections in Terrebonne, after facing opposition, have been elected from majority-minority districts created as a result of litigation, including members of the Parish Council and School Board. *See, e.g., id.*; *see also* Ex. 4 at 12 (Adelson Rep.); Ex. 5 166:15-168:12 (Adelson Dep.).

These undisputed facts weigh heavily in favor of a finding of vote dilution. *See Gingles*, 478 U.S. at 48 n.15 (noting that this Senator Factor is one of the two "most important" factors); *see also Teague*, 92 F.3d at 285 (reversing district court's finding of no vote dilution where "no black candidate has ever won a county-wide election or an election in a white majority district when pitted against a white candidate"); *Clark*, 88 F.3d at 1398 (reversing district court's finding of no vote dilution where there was a "virtually complete absence of black elected officials in county offices"); *Westwego Citizens for Better Gov't*, 946 F.2d at 1122 (reversing district court's finding of no vote dilution where "no black has ever been elected to municipal office in Westwego"); *Campos*, 840 F.2d at 1249 (affirming finding of vote dilution where "no minority has ever been elected to the Baytown City Council"); *Citizens for a Better Gretna*, 834 F.2d at 504 (affirming finding of vote dilution and noting that "in the entire history of Gretna, . . . no black has ever been elected to municipal office"); *McMillan*, 748 F.2d at 1045 (affirming finding of vote dilution where, prior to the litigation, no Black person had been elected to county commission or school board).

Defendants might attempt to explain away Black electoral defeat under at-large voting in Terrebonne in **three** ways. Each of these arguments fails as a matter of law.

1. *Juan Pickett*

For multiple reasons, the November 2014 at-large election of Judge Juan Pickett, a Black person, to the 32nd JDC is not material and does not defeat Plaintiffs' claim.

First, Judge Pickett's election reflects the quintessential special circumstances that the Supreme Court has recognized fail to undercut a Section 2 claim. *See Gingles*, 478 U.S. at 57, 75 (holding that "proof that some minority candidates have been elected does not foreclose a § 2 claim," particularly where "special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success"). Indeed, it is undisputed that: (1) Judge Pickett's November 2014 election occurred *after* this lawsuit was filed; and (2) Judge Pickett faced *no* opposition to an open seat on the 32nd JDC from any of the approximately 200 white lawyers in the Parish, Ex. 7 at 146:7-148:14 (Boykin Dep.); Ex. 17 at 204:17-205:8 (Lewis Dep.); Ex. 15 at 46-47 (Lichtman Rep.). Binding precedent holds that minority electoral success under such circumstances is of little probative value and cannot defeat a vote-dilution claim. *See Gingles*, 478 U.S. at 60 & n.29, 76 (district court correctly discounted Black electoral success in contests where Black candidates were "running essentially unopposed" and in a race that "occurred after the instant lawsuit had been filed"); *Clark*, 21 F.3d at 96 (holding that the election of a Black candidate was of "limited relevance" because it "was in an uncontested race that occurred while this litigation was pending").

In particular, the Supreme Court and the Fifth Circuit have explained that Black electoral success during the pendency of litigation should be viewed with skepticism because it might reflect an improper attempt to thwart the case. *See, e.g.*, *Gingles*, 478 U.S. at 76 (affirming district court's finding that "the pendency of this very litigation might have worked a one-time advantage for black candidates in the form of unusual organized political support by white

leaders concerned to forestall single-member districting"); *Zimmer*, 485 F.2d at 1307 (holding that the success of three Black candidates under an at-large plan did not foreclose claim because "such success might be attributable to political support motivated by [the fact] that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds").

The record in this case indisputably reflects "the possibility . . . that the majority citizens might evade § 2 by manipulating the election of a 'safe' minority candidate.'" *Gingles*, 478 U.S. at 75 (internal quotation marks and citation omitted). Indeed, since 1990, nearly 7,000 candidates have sought election to various judicial offices in Louisiana. Ex. 19 at 7 (Romig Rep.).[40] *Judge Pickett is the only Black candidate in the past 24 years to have gone unchallenged to an open seat in an at-large election in a majority-white jurisdiction in Louisiana. Id.* at 9 & Exs. F, G.[41] Moreover, there is no evidence that he was actually the candidate of choice of Black voters. *See, e.g.*, Ex. 8 at 63:18-64:5 (Shelby Dep.) ("Juan Pickett, I can't say whether he is our candidate of choice because there is no other choice"); Ex. 7 at 146:7-153:2 (Boykin Dep.) (opining that "Juan Pickett was selected" by the "power structure," including 32nd JDC judges and the district attorney); Ex. 10 at 16:5-17:14 (Fusilier Dep.); Ex. 17 at 204:17-206:20 (Lewis Dep.).[42]

Second, even assuming that Judge Pickett's election did not involve any "special circumstances," his isolated success would be insufficient to rebut the consistent pattern of Black

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[40] Pending before the Court is Defendants' motion for an order permitting them to use Angele C. Romig as an expert witness. Doc. 71. Plaintiffs have filed an opposition brief to this motion. Doc. 75. Thus, Plaintiffs' reference to Romig's report herein is not a concession that Romig was a timely designated expert by Defendants, or that Defendants should have additional time to designate her as an expert witness. Rather, to the extent that Ms. Romig is a potential fact witness in this case, as reflected in Defendants' Second Amended Supplemental Initial Disclosures, Doc. 71-9 at 3-4, Plaintiffs reference the factual data that Romig reported. Plaintiffs maintain their objection to any expert testimony by Romig that Defendants might elicit given that Defendants have not timely designated her as an expert witness.

[41] The persistent election of white judges to the 32nd JDC has bestowed incumbent advantages on white voters and white judges and never on Black voters and their preferred judicial candidates. Ex. 15 at 11-12 (Lichtman Rep.).

[42] Adelson conceded that he was not retained to analyze whether Judge Pickett was the candidate of choice of Black voters in 2014, and that he did not "recall seeing that analysis performed by any other expert in this case." Ex. 5 at 171:1-6 (Adelson Dep.). Adelson acknowledged that "it would be very difficult" to conduct a RPV analysis of Judge Pickett's election because it was not contested. *Id.* at 172:24-173:2.

electoral defeat in Terrebonne. *See Gingles*, 478 U.S. at 76 ("Where [a method of voting] generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters."); *see also Teague*, 92 F.3d at 288 ("[T]he results of a couple of elections do not discount the presence of racial bloc voting."). The success of one Black candidate is immaterial. *See Clark*, 88 F.3d at 1397-98 (noting that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote," and holding that the "isolated victories" of three Black candidates did not rebut "the presence of [RPV] and the virtually complete absence of black elected officials"); *McMillan*, 748 F.2d at 1045 & nn.20-21 (affirming finding of vote dilution despite the election of three Black candidates to local bodies, including after the case was filed).

2. *"Non-Racial" Factors*

Defendants might contend that various Black candidates have lost for reasons other than race. *See generally* Ex. 20 (Beychok Rep.); *see also* Ex. 21 71:11-15 (Beychok Dep.).

Fifth Circuit precedent is clear, however, that Plaintiffs do not bear the initial "burden of negating all nonracial reasons possibly explaining" RPV and Black electoral defeat. *Teague*, 92 F.3d at 295; *see also id.* at 291 (district court erred when it improperly "placed upon the plaintiffs the insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results [where] the defendant had itself produced no real evidence that factors other than race were at work"). It is Defendants' burden, if they so choose, to rebut RPV by establishing that Black electoral defeat is due to factors other than race. *See id.* at 290 ("Such a showing is for the defendants to make.").[43] Defendants cannot carry this burden.

[43] This is consistent with the recognition that proof of RPV under *Gingles* is sufficient to create an inference of racial bias in the electoral system. *See Teague*, 92 F.3d at 290 ("Plaintiffs are to present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors."); *see also Clements*, 999 F.2d at 859 (declining

Defendants have retained Michael Beychok, a political consultant, to opine on why Black candidates lost in five of the seven elections that Dr. Engstrom examined. Ex. 20 at 3-20 (Beychok Rep.). As set forth in Plaintiffs' separate motion to exclude the testimony of Beychok pursuant to FRE 702, Beychok deploys a flawed and result-driven methodology and simply assumes that race is not a significant factor in the elections that he examines. Beychok also inconsistently applies that methodology in examining the elections. Thus, his testimony is unreliable and inadmissible.

Even if Beychok's testimony were admissible, there still would be no genuine issue for multiple reasons. *First*, as a threshold matter, Beychok concedes that he has no basis upon which to dispute the findings of Dr. Engstrom. *See, e.g.*, Ex. 21 at 96:18-97:9 ("I have no standing to dispute the findings") (Beychok Dep.). Thus, there is no genuine dispute that voting in Terrebonne elections is polarized along racial lines, including the two elections that Beychok did not analyze (*i.e.*, the 2008 and 2012 presidential elections) and that both Dr. Engstrom and Dr. Weber agree exhibit RPV. *See id.* at 87:21-88:1.

Second, while Beychok attempts to attribute the losses of Black candidates in the five elections that he examined to three purportedly race-neutral factors, namely: (1) the amount of money that the campaigns raised and spent; (2) the amount of time that the campaigns spent communicating with voters; and (3) the extent to which the campaigns recruited volunteers, Ex. 20 at 1-2, 20 (Beychok Rep.), the undisputed facts show that these factors are not race-neutral. Beychok concedes that race affects the amount of money that Black candidates can raise. *See* Ex. 21 at 111:18-22 (Beychok Dep.) (conceding that "it's easier for [B]lack candidates in majority [B]lack districts to raise money than in majority white districts"). And Beychok does not dispute

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to "hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in the white electorate").

that Black residents in Terrebonne suffer from significant socioeconomic disadvantages, and that an individual's economic circumstances can affect his or her willingness to make a campaign contribution. *See id.* at 99:24-100:16; 114:15-18; 247:11-248:6. Moreover, Beychok acknowledges that the amount of money a candidate can raise affects the amount of campaign time and the number of campaign volunteers that a candidate can have. *Id.* at 119:3-120:4.

Thus, by Beychok's own admissions, race can have a significant effect on all three of his key factors. *See id.* Because he did not disentangle race from the purportedly race-neutral factors that he attempts to use to explain Black electoral defeat, he cannot demonstrate that race is not a significant factor. Indeed, as Plaintiffs' expert, Dr. Lichtman, notes, the racial disparities in fundraising among the Black and white candidates, identified in Beychok's report, are evidence of the handicaps that Black candidates face as a result of the lingering effects of discrimination. Ex. 13 at 10-12 (Lichtman Supp. Rep.).

Third, even assuming that the factors that he identifies are race-neutral, Beychok concedes—as he must, given the stark patterns of RPV in each of the elections that he studied—that Black voters and white voters respond differently to the three factors that he identified as being the most important in explaining Black electoral defeat. *See, e.g.*, Ex. 21 at 165:11-20 (Beychok Dep.) (agreeing that Black and white voters "responded with their votes differently" to the three factors); *see also id.* at 232:14-21 (conceding that Black and white voters "clearly responded differently"). In particular, Beychok acknowledges that Black voters had reasons to overwhelmingly support their preferred candidates—reasons that he was unaware of, given that he chose not to speak to any voters to understand why they voted as they did—notwithstanding the Black candidates' supposedly inadequate campaigning. *See, e.g.*, *id.* at 218:24-220:16: *see*

also id. at 232:1-21. Thus, as Dr. Lichtman notes, the purportedly non-racial factors do not—and cannot—account for voting behavior in Terrebonne. Ex. 13 at 7-12 (Lichtman Supp. Rep.).

Fourth, consistent with his experience as a political consultant, Beychok admits that race "certainly is a factor" in Terrebonne elections. Ex. 21 at 123:6-16 (Beychok Dep.); 125:13-126:1 (disclaiming that he "ruled [race] out"); *id.* at 198:14-22 ("I don't think that I opined that race was not a factor"); *see also id.* at 68:3-70:5 (acknowledging that race is a factor in contests where white candidates defeat Black candidates); *id.* at 77:17-79:15 (acknowledging that race is "one of many demographics that [he] consider[s]" in advising Black candidates); *id.* (conceding that he has advised white candidates about race as a factor). Beychok even admits, in view of the stark pattern of RPV, that the Black candidate in the 2014 City Marshal election could have had "a racial disadvantage." *Id.* at 194:10-14. Beychok's acknowledgment that race is a factor—combined with the fact that the three factors that he identifies as the most important in explaining Black electoral defeat do *not* account for the patterns of RPV—makes it clear that Defendants have failed to prove that voting patterns in Terrebonne do not reflect racial bias.[44]

In sum, there is no genuine dispute that Defendants are "unable to shake" Plaintiffs' showing of RPV and Black electoral loss. *Teague*, 92 F.3d at 291.

3. *Lack of Black Candidates*

Finally, the lack of Black candidates for the 32nd JDC does not create a genuine issue. Indeed, the Fifth Circuit has rejected this argument as a matter of law, noting that it "begs the ultimate question whether blacks 'possess the same opportunities to participate in the political process and elect [the candidates] of their choice.'" *Clark*, 88 F.3d at 1398. As the Court of Appeals has explained, "the lack of black candidates [may be] a likely result of a racially

[44] Adelson's argument regarding these various non-racial factors, *see, e.g.*, Ex. 4 at 23 (Adelson Rep.), is inadmissible for the reasons set forth in Plaintiffs' separate motion to exclude his testimony. It also would fail to create a genuine issue for the same reasons as set forth above with respect to Beychok's testimony.

discriminatory system." *McMillan*, 748 F.2d at 1045. Accordingly, "[t]hat few or no black citizens have sought public office in the challenged electoral system does not preclude a claim of vote dilution." *Clark*, 88 F.3d at 1398 (citing *Westwego Citizens for Better Gov't*, 872 F.2d at 1208 n.9); *see also McMillan*, 748 F.2d at 1045 (noting that "the fact that no black ran for the Commission between 1970 and the time this litigation commenced [did not] help defendants").

F. It Is Undisputed That the Justifications for the Maintenance of At-Large Voting for the 32nd JDC Are Tenuous (*Senate Factor* 9)

This factor considers whether the policy reasons underlying the state's use of the voting practice or procedure is tenuous. *Gingles*, 478 U.S. at 37. "Although a strong state policy in favor of at-large elections is less important under the results test, a tenuous explanation for at-large elections is circumstantial evidence that the system is motivated by discriminatory purposes *and* has a discriminatory result." *McMillan*, 748 F.2d at 1045 (emphasis added). Here, as discussed *infra*, *none* of the justifications offered to maintain at-large voting for the 32nd JDC withstand scrutiny. *See also* Ex. 15 at 50-59, 74-75 (Lichtman Rep.).

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In sum, there is no genuine dispute that **Senate Factors 1, 2, 3, 5, 7, and 9** each weigh in Plaintiffs' favor, including the two most important Senate Factors in the totality of circumstances inquiry. *See Gingles*, 478 U.S. at 48 n.15; *Clark*, 88 F.3d at 1397. It is undisputed that *no* Black candidate has ever been elected to the 32nd JDC after facing opposition. And it is undisputed that elections in Terrebonne are characterized by RPV. Based on the heavy weight of those two factors, along with the four other factors identified above, it is beyond dispute that the at-large electoral method for the 32nd JDC has the impermissible effect of diluting the votes of Black voters in violation of Section 2. Summary judgment on this claim is appropriate.

PLAINTIFFS HAVE PROVEN SECTION 2 AND FOURTEENTH AND FIFTEENTH AMENDMENT VIOLATIONS BY SHOWING THAT AT-LARGE VOTING HAS BEEN MAINTAINED WITH A DISCRIMINATORY PURPOSE

There is no genuine dispute that Defendants have maintained at-large voting for nearly 50 years with a discriminatory purpose in violation of Section 2 and the Fourteenth and Fifteenth Amendments. Ex. 15 at 14-15 (Lichtman Rep.). Indeed, Defendants have not disputed the record of intentional discrimination chronicled by Dr. Lichtman. *Compare* Ex. 15 at 7-77 (Lichtman Rep.) *with* Ex. 4 at 32-33 (Adelson Rep.).

To prevail on a vote-dilution claim under the Fourteenth or Fifteenth Amendments, a plaintiff must demonstrate a discriminatory effect, which Plaintiffs have indisputably shown *supra,* and a discriminatory purpose. *See Rogers*, 458 U.S. at 622-27 (holding that at-large voting was maintained for invidious purposes in violation of Fourteenth and Fifteenth Amendments); *see also Jones*, 727 F.2d at 370. Proof of a constitutional violation "is sufficient" to establish intentional discrimination under Section 2. *McMillan*, 748 F.2d at 1046. Moreover, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act [to establish] a violation of the Fourteenth and the Fifteenth Amendments." *Velasquez v. City of Abilene,* 725 F.2d 1017, 1022 (5th Cir. 1984). It is enough that "a discriminatory purpose [was] a motivating factor" in the maintenance of the challenged system, here at-large voting. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

To prove discriminatory purpose, a plaintiff may rely upon either direct or circumstantial evidence. *Rogers*, 458 U.S. at 618. In *Arlington Heights*, the Supreme Court identified several non-exhaustive factors that guide the circumstantial evidence inquiry: (1) a discriminatory impact; (2) a historical background of discrimination; (3) the sequence of events leading up to the challenged law or practice; (4) procedural or substantive deviations from the normal

decision-making process; and (5) contemporaneous viewpoints expressed by the decision-makers. 429 U.S. at 265-68. Here, there is no dispute that each of these factors points toward a finding of discriminatory purpose. *See generally* Ex. 15 at 7-77 (Lichtman Rep.).

First, as set forth above, there is no genuine dispute that at-large voting for the 32nd JDC, in combination with RPV, the majority-vote requirement, and numbered posts, preordains the defeat of Black-preferred candidates, and, thus, has a discriminatory impact. *See id.* at 7-12.

Second, as set forth above, it is undisputed, well-documented, and judicially recognized that Louisiana has a long, intense, and persistent history of *de jure* and *de facto* discrimination against Black voters, including those in Terrebonne. *See id.* at 12-21. This undisputed history "reveals a series of official actions taken for invidious purposes," which support a finding of intentional discrimination. *Arlington Heights*, 429 U.S. at 267.

Third, there is no genuine dispute that the sequence of events leading to the rejection of *six legislative proposals* to provide Black voters in Terrebonne with an equal opportunity to participate in the political process demonstrates discriminatory purpose. Since at least the 1980s, Black voters in Terrebonne have advocated for district-based voting without success. Indeed, the 32nd JDC was a subject of the landmark *Clark* litigation. Ex. 15 at 21 (Lichtman Rep.). Although the demographics of Terrebonne at the time of that litigation did not enable the development of a majority-Black district, Black residents continued to advocate for district-based voting. *See id.* at 21-42. Subsequently, however, Louisiana officials rejected such efforts *on at least six occasions*, even as: (1) the *Clark* litigation established the precedent for judicial redistricting in Louisiana; (2) Terrebonne's Black population grew significantly, and it was feasible, as early as the mid-1990s, to draw a majority-Black district for the 32nd JDC; (3) a task force established by the Louisiana Supreme Court recognized in 1996 that the creation of "sub-districts, where

appropriate, [is] the only feasible means of ensuring diversity and ethnic heterogeneity in our judicial system"; (4) at the request of the five sitting 32nd JDC judges, the Judicial Council of the Louisiana Supreme Court ("Judicial Council") recommended in 1997 the creation of an additional judgeship for the 32nd JDC to ease the workload of these judges, opening the door for a majority-Black district; *and* (5) no Black candidate had *ever* been elected after facing opposition to the 32nd JDC. *Id.* The ***six legislative proposals*** encompassed the following:

- In 1997, a proposal for a majority-Black district was made after the Judicial Council recommended a new judgeship in response to a request by 32nd JDC judges to ease their workload. *Id.* at 23. However, Rep. H.B. "Hunt" Downer, then Speaker of the Louisiana House of Representatives and a white legislator, sponsored House Bill ("H.B.") 1399, authorizing a sixth judgeship *to be elected at-large*. *Id.* at 24-25. The relevant House committee rejected an amendment supported by Plaintiff Terrebonne NAACP, a delegation of Black attorneys, and a Black Terrebonne Parish Council member that would have provided for a majority-Black district. *Id.* Ultimately, Rep. Downer tabled the bill so it never went to a vote. *Id.* at 30.[45]

- In 1998, when 32nd JDC judges—for the second time—requested a sixth judgeship, Terrebonne's Black residents again used that opportunity to seek a majority-Black district. *Id.* at 30. Instead, Sen. John Siracusa, a white legislator, introduced Senate Bill ("S.B.") 166, which would have created a sixth judgeship *to be elected at large*. *Id.* Terrebonne's Black residents strongly opposed the bill, which did not include a provision for district-based voting, but the bill passed the Senate overwhelmingly. *Id.* at 31. The bill ultimately did not come up for a vote in the House before the end of the Special Session. *Id.*

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[45] In so doing, Rep. Downer stated that the DOJ would oppose a majority-Black district. As explained by Dr. Lichtman, however, this justification is pretextual for numerous reasons, including that the DOJ was unlikely to object to a district whose purpose and likely effect was to provide Black electoral opportunity for the 32nd JDC where none had previously existed. Ex. 15 at 25-30 (Lichtman Rep.).

- In 1999, Sen. Michael Robichaux, a white legislator, introduced S.B. 1052, which would have created a sixth judgeship for the 32nd JDC to be elected from *a majority-Black district*. *Id.* at 31. By this time, the 32nd JDC judges, including Judge Ellender, had withdrawn their request for a new judgeship, citing a reduced workload as a result of a transfer of cases to the Houma City Court—which has parish-wide jurisdiction but only one judge—and now opposed S.B. 1052. *Id.* at 31-32. Despite cross-racial local support for a majority-Black district, including from the white-majority Parish Council, S.B. 1052 died in the Senate. *Id.*

- In 2001, S.B. 968, authored by Sen. Butch Gautreaux, and H.B. 1723, by Rep. Carla Blanchard Dartez, both white legislators, were introduced and would have added a new judge to the 32nd JDC to be elected from *a majority-Black district*. *Id.* at 32-34. Both bills failed to get out of committee, with a former white 32nd JDC judge, Judge Edward J. Gaidry, requesting that Rep. Dartez withdraw her bill. *Id.* at 34-35. Both bills failed purportedly because 32nd JDC judges did not need a new judgeship given their reduced workload. *Id.* at 33, 35. In reality, however, the workload for the 32nd JDC decreased only because cases were transferred to an already-overburdened Houma City Court, closing the door on the possibility of an additional 32nd JDC judge elected by a majority-Black district. *Id.* at 35-36.[46]

- In 2011, at the urging of Plaintiff Terrebonne NAACP and others, legislators introduced H.B. 582, which would have created a majority-Black district to elect the seat vacated by a retiring 32nd JDC judge. *Id.* at 39-40. At this point, state officials were fully aware that the only Black officials in Terrebonne were elected from majority-Black districts, created as a result

[46] The undisputed record also reflects efforts by Terrebonne's Black residents to advocate for a second judgeship for the Houma City Court that would be elected by a majority-Black district. *Id.* at 35-37 & n.65. Those efforts also were rebuffed by Louisiana officials even when Judge Fanguy, the lone Houma City Court judge, sought assistance with his overburdened docket by advocating, *over more than five years* (*i.e.*, 2001-2007), for various forms of assistance. *Id.* at 36-38 & n.65. By 2007, Judge Fanguy told the Parish Council that he no longer needed the second judgeship, even though in 2009, a report by the Judicial Council showed that the Houma City Court's workload warranted two judges. *Id.* at 38-39.

of Section 2 litigation. *Id.* at 40. Although H.B. 582 made it out of committee (with the support of *every Black committee member*), the House voted against the bill with *every Black legislator* voting for the bill, and the overwhelming proportion of white legislators opposing it. *Id.* at 41-42.

Thus, the undisputed record reflects that despite over 30 years of local advocacy for a majority-Black district for the 32nd JDC, Louisiana officials have rebuffed *every* effort to give Black voters electoral opportunity, whether it be in relation to a sixth judgeship for the 32nd JDC, one of the five existing 32nd JDC judgeships, or an additional Houma City Court judgeship.

Fourth, there is no dispute that procedural and substantive deviations from the normal decision-making process accompanied legislative defeats. To be sure, such deviations were not necessary to defeat the bills and advocacy efforts given the overwhelmingly vehement opposition to a majority-Black district in Terrebonne. *Id.* at 47-48. Nonetheless, the record reflects several deviations, including attempts by white legislators to defeat H.B. 582 by rerouting the bill to a different House committee, a move that Black legislators opposed because it would have doomed the bill, *id.* at 48; and the failure of the Legislature to follow its policy of heeding the Judicial Council's recommendation on the creation of judgeships, *id.* at 48-49.

Fifth, and finally, there is no dispute that the justifications provided by opponents of a majority-Black district for the 32nd JDC are pretextual and tenuous. Opponents of a majority-Black district have claimed, among other things, that: (1) judges should be elected by voters from the entire district over whom they have jurisdiction; (2) judicial redistricting should be addressed in a statewide/comprehensive fashion; and (3) there are not enough qualified Black attorneys in Terrebonne. *Id.* at 50-55. These arguments are not credible for multiple reasons, including that: (1) there is no evidence that any of the judicial subdistricts elsewhere in the state fail to serve Louisiana residents; (2) there has been no effort to engage in any comprehensive

judicial redistricting in Louisiana; and (3) white voters have opposed qualified Black candidates in Terrebonne elections, even while Black voters have overwhelmingly thrown their support behind these candidates as reflected in the RPV evidence discussed *supra*. *Id.* at 50-59.

The claims that there are not enough qualified Black attorneys in Terrebonne and that at-large voting is necessary to ensure judicial accountability ring especially hollow in Terrebonne given the circumstances surrounding the reelection of Judge Ellender to the 32nd JDC in 2008, mentioned *supra*. *Id.* at 55-57. Despite being suspended in 2004 for appearing in blackface in an apparent parody of Black criminal defendants who appeared before him, and despite being charged with mistreating a woman who appeared before him in a domestic abuse case in 2007,[47] Judge Ellender was reelected at large without opposition to a six-year term in 2008. *Id.* It is clear that the pretextual arguments leveled against district-based voting seek to conceal the real intent at issue here: to prevent Black voters from electing their candidates of choice. *Id.* at 50-59.

In sum, the undisputed facts unambiguously demonstrate that at-large voting for the 32nd JDC has been maintained with a discriminatory purpose in violation of Section 2 and the Fourteenth and Fifteenth Amendments. Summary judgment as to these claims is appropriate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment.[48]

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[47] In 2009, the Louisiana Supreme Court suspended Judge Ellender for a second time after sustaining the charges against him in connection with that incident. *See In re Ellender*, 16 So. 3d 351, 360 (La. 2009).

[48] Plaintiffs move for summary judgment as to liability only. Upon a finding of liability, Plaintiffs will request that the Court enter an order providing appropriate relief, including the implementation of an electoral system for the 32nd JDC that complies with Section 2 and the Fourteenth and Fifteenth Amendments, and an order pursuant to Section 3(c) of the VRA, 52 U.S.C. § 10302(c), retaining jurisdiction over this action and requiring Defendants to obtain preclearance for a necessary and appropriate period of time, from this Court or the DOJ, for any and all future changes in voting law impacting the 32nd JDC. Doc. 1 ¶ 82 & 22-23.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment* with this Court using the CM/ECF system, which provides notice of filing to all counsel of record.

This the 21st day of August, 2015.

Respectfully submitted,

s/ *Leah C. Aden*