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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

OSCAR LUNA, ALICIA PUENTES, DOROTHY VELASQUEZ, and GARY RODRIGUEZ,

Plaintiffs,

v.

COUNTY OF KERN, KERN COUNTY BOARD OF SUPERVISORS, and MICK GLEASON, ZACK SCRIVNER, MIKE MAGGARD, DAVID COUCH, and LETICIA PEREZ, in their official capacity as members of the Kern County Board of Supervisors, and JOHN NILON, in his official capacity as Kern County Administrative Officer, and MARY B. BEDARD, in her official capacity as Kern County Registrar of Voters, inclusive,

Defendants.

Case No. 1:16-CV-00568-DAD-JLT

PLAINTIFFS' PRETRIAL BRIEF

JUDGE: Hon. Dale A. Drozd
COURTROOM: 5
HEARING DATE: December 5, 2017
TIME: 1:00 p.m.

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I. INTRODUCTION

Plaintiffs are Latino citizens and registered voters of Kern County who seek to protect their individual voting rights by enjoining the current districting plan for the election of Kern County Supervisors. The current supervisorial plan contains one Latino-majority citizen voting age district. Plaintiffs allege that in 2011 Kern County unlawfully fractured a second Latino voting community between two supervisorial districts, so that it is the voting majority in neither. Under Section 2 of the Voting Rights Act, the 2011 districting plan dilutes the voting strength of Latino voters by depriving them of a second district in which they could constitute a majority of the eligible voters and from which they could elect a candidate of choice.

II. STATEMENT OF FACTS

Latinos constitute nearly half of the population of Kern County, and are currently unable to elect more than one of five Board members. This is so because a Latino voting community was unlawfully fractured between two supervisorial districts, so that it is the voting majority in neither. The complaint alleges under Section 2 of the Voting Rights Act that the 2011 districting plan dilutes the voting strength of Latino voters by depriving them of a second district in which they could constitute a majority of the eligible voters and from which they could elect a candidate of choice.

During the decade prior to the 2011 decennial redistricting process, the Latino population in Kern County had grown significantly, from 38 percent to 49 percent of the total population. The only supervisorial district in Kern County to regularly elect a Latino in the last two decades is District 5, currently represented by Leticia Perez. Latino community members and MALDEF testified before the Board, asking for a plan that would create a second Latino majority district by consolidating the Latino agricultural communities of Delano, McFarland, Wasco, Shafter, Buttonwillow, and Lost Hills within a single district. MALDEF warned the Board that if it failed to adopt a supervisorial district map with two Latino majority districts it risked violating the Federal Voting Rights Act.

Allan Krauter, Senior Administrative Analyst in the Kern County Administrative Office, performed the actual mapping and reported to the Board.[1] Mr. Krauter will presumably testify, consistent with his deposition testimony, that in 2011 he believed that compliance with the Voting Rights Act required only the maintenance of the single Latino majority district—District 5. Further, Mr. Krauter will testify consistent with his deposition testimony that there was no way to draw the district that community members in Wasco requested—a northwest district that united Delano, Shafter, Wasco, McFarland, Lost Hills, Buttonwillow—and still maintain two districts in East Kern. This was so, says Mr. Krauter, because when you depopulate District 1 by removing Delano and Shafter and McFarland, it's not a big enough district to meet the redistricting requirement that all districts be equal in population. The evidence will show that the Board chose to fracture the Latino community that advocated for a unified district, and did so in order to create two districts in the sparsely populated areas of East Kern.

Following public workshops, Mr. Krauter drew 6 map options, based on community input. However, he presented only 5 of those plans to the Board, withholding Option 6, which grew out of meetings with Latino community members in northern Kern County, and that preserved in one district the cities of the northern agricultural and primarily Latino areas of Kern County. Following objections from the Latino community over its exclusion, the Board directed Mr. Krauter to present Option 6 to the Board at its next redistricting meeting, and he did so.

At the same meeting, held on August 2, 2011, Mr. Krauter also presented and recommended for adoption a last-minute redistricting proposal (Option 7) he had prepared at the direction of John Nilon, Kern County's Administrative Officer. Despite objection by numerous members of the public asking for more time to review Mr. Krauter's new plan, the Board voted to adopt Option 7.

All of the plans under consideration were missing a legally critical piece of demographic information—the Latino percent share of the citizen voting age composition of each of the

[1] The County designated Mr. Krauter as the person most knowledgeable to answer categories regarding the 2011 supervisorial redistricting process and the election district map options used in the 2011 supervisorial redistricting process.

districts in the various options. Instead, the staff report provided the Board and the public only with total population data for each district in each option. As for data specific to Latinos, the staff included numbers that reflected the Latino share of the total population, but only in District 5 in each plan, and did not reflect the Latino share of the citizens over 18 in any district, in any plan. County Counsel orally assured the Board members that Option 7 preserved the Latino voting majority in District 5, but he did not say specifically what that Latino citizen voting age population ("CVAP") percent was, nor did he provide any Latino CVAP numbers for any other district in any of the 7 plan options.

Providing CVAP data to the governing body and to community members is standard practice during any redistricting process. Nonetheless, Kern County staff never provided the public or the Supervisors with district CVAP data, not during the public workshops, not in their reports to the Board, and not during any of the 2011 Board meeting presentations. Without CVAP information it was impossible for the public or the Supervisors to conclude that any of the 7 plan options complied with the Voting Rights Act, let alone the plan the Board adopted, the plan that fractured the Latino community in half, the plan that left Latino voters submerged in an Anglo majority electorate in two districts (Districts 1 and 4), the plan that gives discriminatory effect to the racially polarized voting that regularly results in the defeat of Latino candidates.

Since at least 2004, elections in Kern County have been racially polarized. Latino voters usually cohesively support Latino candidates, and those candidates generally lose because they do not receive support from non-Latino voters, who are primarily Anglo. Plaintiffs' expert, Dr. Morgan Kousser, analyzed 22 racially contested non-partisan elections from 2004 to 2014: five elections for Board of Supervisors, four elections for other Kern County offices, and twelve statewide elections. He used two methodologies, ecological regression and ecological inference, and concluded that there is almost always a statistically significant difference between the way that Latinos and non-Latinos cast their votes, that Latinos vote cohesively, and that non-Latino bloc voting usually defeats the candidates cohesively preferred by Latinos. He further concluded that the majority vote requirement is an additional impediment to Latino electoral success.

Plaintiffs will also present evidence that in Kern County and in California there is a history of official voting-related discrimination, and that Latinos bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and that there is a lack of responsiveness to the particularized needs of Latinos. Finally, the evidence will show that the primary policy underlying the Board's decision to fracture the Latino community—the maintenance of two East Kern districts—is tenuous and cannot override the County's responsibility to comply with the Voting Rights Act.

The evidence will show that there are at least two configurations of a Board of Supervisors' districting plan that compactly encompass communities of interest, that comport with traditional redistricting principals, and that each configuration contains two districts wherein Latinos constitute the majority of the citizens of voting age. The fracturing of an otherwise whole, politically cohesive Latino community that would otherwise be able to elect a candidate of choice is precisely the kind of vote dilution Section 2 prohibits.

III. ARGUMENT

"Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Unlawful vote dilution occurs under Section 2 of the Voting Rights Act when "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (internal quotation marks and citation omitted). One of the methods of vote dilution is the fragmentation of a concentration of minority voters among districts "so that it is a majority in none," otherwise known as "cracking." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

Plaintiffs will demonstrate at trial that Kern County's 2011 redistricting plan "cracks" a politically cohesive Latino community in the northern part of Kern County into two supervisorial districts (Districts 1 and 4), neither one of which has sufficient Latino population to enable Latino voters to elect a candidate of their choice. The decision to split that community actuates Kern County's racially polarized voting and results in unlawful vote dilution.

IV. PLAINTIFFS WILL DEMONSTRATE THAT THE *GINGLES* PRECONDITIONS ARE MET, AND THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES THE CURRENT PLAN RESULTS IN THE DENIAL OF LATINO VOTERS' OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE ELECTORAL PROCESS AND TO ELECT CANDIDATES OF THEIR CHOICE; THUS THE CURRENT MAP VIOLATES SECTION 2.

Section 2 requires plaintiffs to prove not that a jurisdiction specifically designed its election system in order to discriminate against the minority population but only that the voting system challenged has a discriminatory effect. *Gingles*, 478 U.S. at 35. In other words, "Section 2 requires proof only of a discriminatory result, not of discriminatory intent." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997).

The United States Supreme Court established the requirements for plaintiffs to prevail on Section 2 claims in *Thornburg v. Gingles*. Under *Gingles*, a plaintiff must establish that (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50–51. These are commonly called the three "*Gingles* prongs."

To confirm what establishment of the *Gingles* prongs suggests—that the challenged electoral process impermissibly impairs minority voting strength—the court examines the totality of the circumstances to determine whether minorities have been denied equal opportunity to participate in the political process and to elect representatives of their choice. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). In conducting this inquiry, the Court considers both "past and present reality." *Gingles*, 478 U.S. at 45 (internal quotation marks and citation omitted). In particular, the Court may consider the factors set forth in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act, the so-called "Senate Factors." *Id.* at 44–45 (citing S. Rep. No. 97-417 at 28–29 (1982), 1982 U.S.C.C.A.N. 177, 206–07 (the "Senate Report")). Those 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;
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> (8) 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
>
> (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 36–37 (quoting S. Rep. No. 97-417, at 28–29).

While the Senate Factors provide a helpful framework, they are "neither comprehensive nor exclusive." *Id.* at 45. Accordingly, plaintiffs "need not prove a majority of these factors, nor even any particular number of them in order to sustain their claims." *Ga. State Conference of NAACP v. Fayette Cnty.*, 950 F. Supp. 2d 1294, 1298 (N.D. Ga. 2013); *accord Gingles*, 478 U.S. at 45; *see also Gomez v. City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988) (noting that these factors are not intended to be "used as a mechanical 'point counting' device" and that "[t]he failure of plaintiff to establish any particular factor is not rebuttal evidence of no violation") (internal quotation marks, citation, and alterations omitted). To the contrary, "these factors are

simply guideposts in a broad-based inquiry in which district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used." *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

A. Plaintiffs Will Show that North Kern County's Latino Population Is Sufficiently Large and Geographically Compact to Constitute the Majority of Eligible Voters in a Second Latino-Majority District (*Gingles 1*).

To establish the first *Gingles* precondition, the Latino population must be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50.[2] In a prong one illustrative district, Latinos must constitute the majority of the citizens over 18 (CVAP) in the district, not simply the majority of the total population. *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990); *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391 (E.D. Wash. 2014).

Plaintiffs will demonstrate that the Latino community in Kern County is sufficiently large and compact to form a CVAP-majority in two districts, whereas the adopted Supervisorial Plan includes only one such district. Plaintiffs' expert David Ely will testify that there are at least two ways to accomplish this goal. Plaintiffs' illustrative maps #1 and #2 both create two Latino-majority CVAP districts because, unlike the current map, they do not "crack" the agricultural Latino community in northern Kern County into two districts, one of which stretches east from Delano, across the mountains, all the way to the edge of the county. Mr. Ely will testify that the illustrative district map # 1 joins those Latino communities together with an additional agricultural community farther south to create a second, compact, Latino majority district. Mr. Ely will testify further that both of the Latino-majority districts in illustrative plan #1 have a higher Latino share of eligible voters than the single majority district which was adopted, and that

[2] In Supreme Court voting rights jurisprudence, the word "compactness" in the *Gingles* context refers to the compactness of the minority population—e.g. whether it is sufficiently concentrated to enable it to constitute the majority of the citizens over 18 in a single-member district—not to the shape of the district. *Gingles*, 478 U.S. at 50; *see also Montes v. City of Yakima,* 40 F. Supp. 3d 1377, 1390 (E.D. Wash. 2014).

Plaintiffs' illustrative district was created in accordance with traditional redistricting criteria and the districts are at least as compact, if not more compact, than those adopted by the Board. Finally, Mr. Ely will testify that the shape of the new Latino district in Plaintiffs' illustrative plan #1 follows the land-use contours of the county far better than does the current map and also follows the contours of state and federal legislative districts drawn by the California Supreme Court's Special Masters in 1991 and consistently implemented since then.

Mr. Ely will further testify that there is more than one way to draw two majority Latino CVAP districts in Kern County. Mr. Ely will testify that illustrative map #2 joins Latino communities in northern Kern County with the Latino community in East Bakersfield, which shares socio-economic interests with the northern Kern County communities, to create a second, compact, Latino majority district. Mr. Ely will testify further that Plaintiffs' illustrative district was created in accordance with traditional redistricting criteria and the districts are at least as compact, if not more compact, than those adopted by the Board. Finally, Mr. Ely will testify that the shape of the new Latino district in Plaintiffs' illustrative plan #2 follows the land-use contours of the county far better than does the current map. Plaintiffs will also present testimony regarding the currently bifurcated Latino community's decades-old requests to be joined in one district.

Kern County has argued that Plaintiffs' illustrative plans do not satisfy the first *Gingles* precondition on grounds that they do not adhere to the specific traditional redistricting criteria that have been traditionally been employed in Kern County. Although the Supreme Court has indicated that the Section 2 compactness inquiry "should take into account traditional districting principles," *LULAC v. Perry*, 548 U.S. 399, 433 (2006), the Court did not then require—and has not since required—that a plaintiff must comply with certain such principles, much less a certain number of them, in order to establish "that it is possible to create 'more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.'" *Luna v. Cnty. of Kern*, 2017 WL 2379934, at *3 (E.D. Cal. June 1, 2017) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). As this Court has recognized, "neither the plaintiff nor the court is bound by the precise lines drawn [in a plaintiff's illustrative plan]; at this stage, a plaintiff need only show that a remedy may be feasibly developed." *Id*. (citing *Fairley v.*

Hattiesburg, Miss., 584 F.3d 660, 671 (5th Cir. 2009); *Montes*, 40 F. Supp. 3d at 1399. "[C]onditioning a § 2 plaintiff's right to relief upon his or her ability to create a letter-perfect districting plan would put the cart before the horse." *Montes*, 40 F. Supp. 3d at 1399.[3]

Moreover, Defendants' argument that the traditional redistricting principles to be considered are limited to those asserted by Kern County is belied by the very decisions on which their argument rests. In *LULAC v. Perry*, the Supreme Court indicated that "traditional districting principles" may include "such [practices] as maintaining communities of interest and traditional boundaries," not that the district court there should have deferred to Texas's own account of what practices were worth continuing. *LULAC*, 548 U.S. at 433; *see also Abrams*, 521 U.S. at 99 (recognizing that a state's county line rule explained population deviations across districts in the face of plaintiffs' one person-one vote claim, not that plaintiffs needed to comply with the rule in order to show compactness in their separate Section 2 claim); *Lawyer v. Dep't of Justice*, 521 U.S. 567, 582 (1997) (comparing practices employed by Florida with broader traditional districting principles and finding that the district in question there would have resulted from employing either set of practices); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 628, 639–40, 646–47 (D.S.C. 2002) (recognizing that traditional redistricting principles include those developed by the federal courts and considering practices employed by South Carolina "only insofar as 'those policies [did] not lead to violations of the Constitution or the Voting Rights Act'" (quoting *Abrams*, 521 U.S. at 79)); *Johnson v. Miller*, 922 F. Supp. 1556, 1561 (S.D. Ga. 1995) (recognizing, in crafting a remedial map for a one person-one vote violation, that "[t]he Supreme Court's mandate that courts follow a state's historical legislative districting principles sometimes conflicts with the one person-one vote requirement"). This Court has also recognized

[3] Were the Supreme Court to hold that Section 2 plaintiffs must satisfy a jurisdiction's asserted traditional practices, then the jurisdiction's mere preference for continuing to employ the very practices that have produced the challenged boundaries would constitute a defense to Section 2 liability and defeat the purpose of Section 2. *See Luna*, 2017 WL 2379934, at *5 ("'[I]t would be unfair to require Plaintiffs to draw maps in strict accordance with the County's priorities. Under this scheme, the entire Section 2 analysis is infected by which traditional redistricting principles the County has prioritized, thereby precluding any meaningful review of the dilutive effect, if any, of the County's choice and application of its chosen redistricting principles." In other words, a § 2 claim challenges the propriety of the very process by which a legislative body fashioned a particular reapportionment plan—including its choice and application of certain districting principles." (internal citations omitted) (quoting *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 745 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez*, 601 F. App'x at 260–61)).

that traditional districting principles may include those that a challenged jurisdiction does not assert or even eschews. *See Luna*, 2017 WL 2379934, at *4 (recognizing that, in addition to maintaining communities of interest and traditional boundaries, other principles "typically include population equality, contiguity, respect for political subdivisions, protection of incumbents, and preservation of preexisting majority-minority districts") (internal quotation marks omitted). "[T]he burden is on plaintiffs to present an illustrative plan adhering to comparably consistent principles—not necessarily principles identical, or subjugated, to a locality's exact prioritization, but simply those within the confines of a 'well-developed, legally-adequate plan that can be adjusted' at the remedial stage." *Gonzalez v. Harris Cnty.*, 601 F. App'x 255, 260 (5th Cir. 2015) (quoting *Fairley*, 584 F.3d at 671 n. 14); *see also Luna*, 2017 2379934, at *6 ("[W]hile plaintiffs' Illustrative Map should reasonably comport with traditional districting principles, plaintiffs need not prioritize those principles in the same manner as the County did when it created the Adopted Map.").

Accordingly, Plaintiffs will show at trial that their illustrative plans, in demonstrating that two Latino-majority CVAP districts can be drawn in Kern County, reasonably comport with traditional districting principles. In particular, Plaintiffs' expert David Ely will testify that the illustrative districts in both the illustrative #1 and illustrative #2 plans are equipopulous, are contiguous, respect political subdivisions within Kern County, preserve the preexisting majority-minority district, and maintain communities of interest.

Plaintiffs' lay witnesses will further provide testimony that both illustrative maps capture communities of interest. With respect to illustrative plan #1, Plaintiffs' lay witnesses will provide testimony that the northern Kern County cities and Arvin in the south share not just a current and historical connection to farmworker and immigrant communities, but face many similar issues including environmental, socio-economic, and infrastructure issues, and share cultural and religious interests as well. For example, Ms. Dolores Huerta will provide testimony of the continued presence of farmworker communities in the northern Kern County cities and in Arvin, including testimony that many farmworkers "follow the crops," traveling to work throughout illustrative district 1 to harvest crops depending on the season. Additional lay witness testimony

will provide evidence of the environmental issues faced by communities in the north and Arvin in the south, and the challenges faced by these communities in attempting to address these issues. All of Plaintiffs' lay witnesses will further provide testimony about other socio-economic and cultural similarities between these communities.

With respect to illustrative plan #2, Plaintiffs' lay witnesses will provide testimony that the communities in the northern Kern County cities and East Bakersfield face many similar issues including environmental, socio-economic, and infrastructure issues, and share cultural and religious interests as well. The lay witnesses from the Latino communities in northern Kern County will further provide testimony about their connection to East Bakersfield, an area where they go to shop, to visit family, for church and funeral services, for social events, and for health services. Plaintiffs' lay witnesses will also provide testimony about the immigrant and farmworker communities in East Bakersfield, communities that understandably share many issues with the immigrant and farmworker communities in the northern Kern County cities. Plaintiffs will also present evidence that the current configuration does not respect communities of interest, in particular because it places half of the Latino agricultural areas in the western end of Kern County—including Delano—into a district with the mountains, deserts, and tourist areas of eastern Kern County.

In sum, Plaintiffs will demonstrate the first *Gingles* precondition by eliciting testimony that Latinos in Kern County are "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs will show, moreover, that their illustrative plans—while not required to be "letter-perfect" in order to establish liability—reasonably comport with and do not subordinate traditional redistricting criteria.

B. Plaintiffs Will Show that Kern County's Latino Voters are Politically Cohesive and that Their Preferred Candidates are Usually Defeated by Anglo Bloc Voting (*Gingles 2 and 3*).

The second *Gingles* precondition requires Plaintiffs to demonstrate that Latinos in Kern County are politically cohesive, and the third *Gingles* precondition three requires Plaintiffs to demonstrate that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *See Gingles*, U.S. at

51. "Political cohesiveness must be evaluated 'primarily on the basis of the voting preferences expressed in actual elections.'" *Luna v. Cnty. of Kern*, 2016 WL 4679723, at *5 (E.D. Cal. Sept. 6, 2016) (quoting *Gomez*, 863 F.2d at 1415; *United States v. Blaine Cnty.*, 363 F.3d 897, 910 (9th Cir. 2004)). One way of showing Latino political cohesion (prong two) is to submit, through expert analysis, estimates of Latino voting behavior demonstrating that "a significant number of minority group members usually vote for the same candidate . . . ." *Gingles*, 478 U.S. at 56. The same expert estimates of Anglo voting behavior demonstrate whether Anglo bloc voting works "usually to defeat the minority's preferred candidate," though not necessarily every time (prong three). *Id.* at 50–51, 56. The *Gingles* analysis asks whether voting is usually polarized over a period of time; whether typical elections are characterized by racially polarized voting; and whether there is a difference between how Latino votes and non-Latino votes are cast. *Gomez*, 863 F.2d at 1415.

Courts rely upon expert testimony as to the statistical significance of such polarization, because the racially polarized voting analysis is specific to the jurisdiction at hand. *Gingles*, 478 U.S. at 56. Racially contested elections, in this case those elections where a Latino candidate is running against a non-Latino candidate, are the most probative for drawing conclusions about the second and third prongs of *Gingles. Ruiz v. City of Santa Maria*, 160 F.3d 543, 553–54 (9th Cir. 1998) ("Our rule [that a racially contested election is more probative than one that is racially uncontested] furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to 'elect its candidate of choice on an equal basis with other voters.'") (quoting *Voinovich*, 507 U.S. at 153). *See also Blaine Cnty.*, 363 F.3d at 911 (citing *Old Person v. Conney*, 230 F.3d 1113, 1127 (9th Cir. 2000)).

Elections of Latino-preferred candidates in preexisting majority-minority districts, such as the elections in Kern County's Latino-majority District 5, do "not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Gingles*, 478 U.S. at 57. In *Johnson v. De Grandy*, for example, the Supreme Court held that a district court's finding that there was a "tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates except in a district where a given minority makes up a voting

majority" satisfied the third *Gingles* precondition. *Johnson v. De Grandy*, 512 U.S. 997, 1003–04 (1994); *see also Old Person v. Cooney*, 230 F.3d at 1122 (holding that American Indian electoral success in majority–American Indian districts was only relevant to the totality of the circumstances inquiry and noting that "[t]o do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-[American Indian] districts").

In addition to Board of Supervisor races, evidence derived from analysis of exogenous elections is relevant to the determination of racially polarized voting under the second and third *Gingles* preconditions, especially where, as in Kern County, racially contested endogenous elections are more sparse. The Ninth Circuit has held that it is appropriate for district courts to rely on evidence from exogenous elections, in particular "to supplement its analysis of racially cohesive voting patterns in [endogenous] elections." *Blaine Cnty.*, 363 F.3d at 912 (citing *Citizens for a Better Gretna v. City of Gretna,* 834 F.2d 496, 502 (5th Cir.1987)). Courts in the Ninth Circuit have consistently relied on exogenous elections. *E.g.*, *Old Person*, 230 F.3d at 1123; *Garza v. Cnty. of L.A.*, 756 F. Supp. 1298, 1329–31 (C.D. Cal. 1990); *Montes*, 40 F. Supp. 3d at 1401–02.[4]

Defendants argue that evidence of polarization in partisan elections is irrelevant and should be excluded from the determination of whether local non-partisan elections are racially polarized. First, Dr. Kousser only analyzed elections in which there were no partisan cues – that is, primary elections and top-two non-partisan primaries and subsequent non-partisan runoff elections. Second, Defendants have failed to cite any case law rejecting exogenous election results that exclude such evidence, because the objection, such as it is, goes to the weight and not the admissibility of the elections. Third, partisan and non-partisan exogenous elections are routinely included in racially polarized voting analyses. The district court in *Old Person* admitted

[4] Moreover, courts in the Ninth Circuit are far from alone in relying on exogenous elections. *E.g.*, *Citizens for a Better Gretna*, 834 F.2d at 502 ("[T]he district court properly considered them as additional evidence of bloc voting—particularly in light of the sparsity of available data."); *Patino v. City of Pasadena*, 230 F.Supp.3d 667, 693 (S.D. Tex. 2017) ("[E]xogenous election results can be helpful in determining whether Anglos typically bloc vote to defeat a Latino-preferred candidate." (citing *Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 863, 865 (5th Cir. 2004)))

and considered evidence of district-specific results for 258 election contests in the eight state legislative districts at issue, including "general elections, ballot initiatives and retention elections at the state and federal level." 230 F.3d at 1123. The district court in *Garza* found that analyses of three supervisorial elections were not dispositive, and that "no specific number of elections need be studied in order to determine" polarization. 756 F.Supp. at 1329. Thus "plaintiffs were entitled to attempt to establish political cohesion through the study and analysis of other elections within the County of Los Angeles." *Id.* The *Garza* court admitted evidence of exogenous elections, countywide and non-countywide, partisan and non-partisan, including elections for County Sheriff, County Assessor, seven elections for City Council, Congressional Districts, State Senate, and Assembly Districts. *Id.* at 1329–31. Finally, in *Montes*, the court considered seven City Council elections, one ballot measure, Supreme Court Justice elections, and a school board election. 40 F.Supp. at 1401–02.

At trial, Plaintiffs will demonstrate that Latinos vote cohesively (*Gingles* prong two) and that Anglo bloc voting usually prevents the election of Latino-preferred candidates (*Gingles* prong three). Plaintiffs' expert Dr. Morgan Kousser will testify regarding his analysis of past voting patterns both in Board of Supervisor elections (endogenous elections) and in other elections in which Kern County voters cast votes (exogenous elections). Dr. Kousser will testify on the results of his use of two techniques approved by federal courts—the ecological regression method, and the newer ecological inference method, which are both mathematical techniques used to describe the relationship between those two variables, a relationship that tells us to what extent the race of the voters correlates to the votes cast for each candidate. *See Gingles*, 478 U.S. at 53 n. 20; *see also Garza*, 756 F. Supp. at 1332, 1346); *Romero*, 883 F.2d at 1423; *Montes,* 40 F. Supp. 3d at 1402.[5] Having analyzed Kern County voting behavior in all racially contested elections for Board of Supervisors and for county and state offices since 2004, Dr. Kousser will testify to his conclusion that from 2004 through 2014, all but 3 of the 22 elections were racially

[5] Because ballots are secret, expert witnesses estimate group voting behavior using statistical methodologies to compare two variables—the density (percentage) of Latino voters in each precinct, and the votes received by each candidate in the corresponding precincts.

polarized. Dr. Kousser will further testify that Latino-preferred candidates were successful in only 5 of those 19 racially polarized elections.[6]

Defendants argue that the doctrine of "special circumstances" should lead this court to disregard certain elections where Latinos cohesively supported a Latino candidate, non-Latinos voters voted as a bloc for another candidate, and the Latino candidate lost. Defendants seek to attribute the loss to another cause, *e.g.* insufficient campaign financing. The "special circumstances" doctrine was developed in *Gingles* – "minority *success* in elections infected by special circumstances should not be counted or emphasized in a prong three analysis," because "isolated minority success is distinct from the 'usual predictability' of majority success present in a vote dilution claim." *Ruiz*, 160 F.3d at 550 (citing *Gingles*, 478 U. S. at 51, 57) (emphasis added). The doctrine does not contemplate explaining away Latino candidate losses as attributable to some perceived flaw or other in the Latino candidate rather than to Anglo bloc voting. Indeed, Plaintiffs will show that, in virtually every race that Defendants attempt to discount for such a legally unsupportable reason, the electoral races were otherwise characterized by racial polarization.

Kern County's expert, Dr. Jonathan Katz, offers no racially polarized voting analysis of his own, statistical or otherwise, nor will he offer any alternative interpretations of Dr. Kousser's results and the conclusions he drew from the standard and generally accepted methodologies Dr. Kousser used. Dr. Katz argues that one of the methodologies employed by Dr. Kousser, ecological regression, may be biased by the lack of substantial numbers of homogeneous precincts in Kern County, but he has already admitted in deposition that he cannot be sure whether or not Dr. Kousser's estimates are accurate – they may be wildly off or they may be right on. Dr. Katz's testimony falls well short of rebutting any of Dr. Kousser's conclusions in a reliable manner.

[6] One of the Latino-preferred candidates was successful despite racial polarization because she ran in the only majority Latino Supervisorial district in Kern County, District 5. A second victorious Latino-preferred candidate was an Anglo candidate who was successful because he also received Anglo voter support.

Although statistical evidence like that presented by Dr. Kousser is the primary means of meeting Plaintiffs' prong 2 and prong 3 *Gingles* burden, the court will also hear evidence from lay witnesses regarding the racial political realities in Kern County. *See*, *Rodriguez v. Harris County, Tex*., 964 F.Supp.2d 686, 760 (S.D. Tex. 2013) (citing *Whitfield v. Democratic Party of Ark.,* 890 F.2d 1423, 1428 (8th Cir.1989)); *Askew v. City of Rome,* 127 F.3d 1355, 1377 (11th Cir. 1997) (relying on both empirical and anecdotal evidence of racial bloc voting). Anecdotal evidence relevant to the existence of racial bloc voting includes evidence of common political interests or racial attitudes held by members of the relevant groups in the jurisdiction. *United States v. City of Euclid,* 580 F.Supp.2d 584, 600 (N.D. Ohio 2008).

Plaintiffs' lay witnesses will testify that Latino candidates generally have strong support from the Latino community, and that Anglos generally do not support Latino or Latino-preferred candidates. Plaintiffs will also present testimony on the result of exit polls and the experience of campaigning for Latino and Latino preferred candidates that demonstrate that voting in Kern County is racially polarized.

C. Plaintiffs Will Show That, Under the Totality of Circumstances, Latino Residents of Kern County Have a Diminished Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice.

Once a plaintiff satisfies the three *Gingles* preconditions, the second step of the inquiry requires the Court "to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79 (citations and internal quotation marks omitted). "There is no requirement that a particular number of [Senate] factors be proved, or that a majority of them point one way or the other." *Id.* at 45.

"Plaintiffs are not required to prove a causal connection between these factors and a depressed level of political participation." *Teague v. Attala Cnty.*, 92 F.3d 283, 294 (5th Cir. 1996) (citing *LULAC v. Clements*, 999 F.2d at 867). This is because the Senate factors themselves identified "circumstances that might be probative of a § 2 violation," *Gingles*, 478 U.S. at 36, "any number of which may contribute to the existence of [vote] dilution," *Zimmer v.*

McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973). The third factor in particular—which pertains to large districts, majority vote requirements, anti–single shot provisions, and the lack of at-large candidates running from geographic subdistricts—reflects the legislative finding (based on earlier courts' findings) that these procedures' themselves "enhance dilution." *Id.* at 1305 n.21.

At trial, Plaintiffs' experts, Dr. Albert Camarillo and Dr. Kousser, will testify to abundant evidence establishing the Senate Factors, identifying numerous conditions that lead to and exacerbate voting discrimination in Kern County. In addition to the expert testimony, Plaintiffs will present extensive lay witness testimony with respect to the Senate Factors, particularly with regard to historical discrimination, non-responsiveness of the County Board to their concerns, racial polarization and the difficulty of running as a Latino candidate in Kern County, and the tenuousness of the reasons behind the Board's failure to accommodate the Latino community in northern Kern by combining their agricultural communities in one district.

Dr. Camarillo will testify in detail to historical patterns of official and other forms of discrimination against Latinos and other racial minorities in Kern County affecting their right to participate in the democratic process (Senate Factor 1). Dr. Camarillo will provide details of official attempts to exclude Latinos from the political process, official segregation of schools and public facilities, residential segregation reinforced by racially restrictive covenants, and the development of agricultural economies bifurcated by race and class relations in social and residential settings. Dr. Camarillo will also testify to the broader history of racial discrimination targeting Latinos in California as context for examining how Kern County and its towns and cities often reflected over time more deeply entrenched forms of racial exclusion, segregation, and social discrimination (Senate Factor 5) as well as the under-representation of Latinos in elected and appointed positions in Kern County (Senate Factor 7).

Meanwhile, Dr. Kousser's testimony will address the discriminatory disadvantages of Kern County's majority vote requirement (Senate Factor 3), and the fact that Latinos in Kern County have disproportionately low education, income, and health care levels, which hinder their ability to participate effectively in the political process (Senate Factor 5). Dr. Kousser's testimony of the existence of racially polarized voting in Kern County, while directed primarily at the

second and third *Gingles* preconditions, will also be relevant to the totality of the circumstances inquiry (Senate Factor 2). Plaintiffs will examine Kern County's expert, Dr. Johnson, as to his contention that conditions are improving for Latinos residents in Kern County but that socioeconomic disparities have not disappeared.

Plaintiffs' lay witnesses will testify as to historical discrimination in education in Kern County, including but not limited to: the exclusion of minority children from being admitted to the Richland School District in the 1930s and 40s, the use of corporal punishment to prevent Latino children from speaking Spanish on school campuses in Shafter and Buttonwillow, and to a pattern of placing Spanish speaking children in special education classes, and disparities in graduation rates between Latino students and Anglo students (Senate Factor 5). Plaintiffs' lay witnesses will further testify as to the lack of responsiveness on the part of the elected officials to the particularized needs of the Latino community in Shafter, including but not limited to, the environmental pollution associated with the toxic waste dump on the west side of Kern County, by-right dairies, and fracking within the outskirts of Shafter and Wasco (Senate Factor 8). Plaintiffs' lay witnesses will also testify as to the lack of responsiveness on the part of the elected officials to the particularized needs of the Latino Community in the northern Kern County cities, Arvin, and East Bakersfield (Senate Factor 8). Plaintiffs' evidence will establish that the Board's decision to fracture the Latino community—the maintenance of two East Kern districts—is tenuous. Because the population in East Kern is insufficient by itself to comprise two equipopulous districts,[7] the current District 1 reaches westward to capture population centers like Delano, McFarland, and Shafter, and District 4 hooks east and north into Bakersfield in order to increase its population. In addition, the map-drawers did not use citizen voting age population and the Board did not insist on reviewing that data before examining the various options before the Board – data absolutely necessary to determine compliance with the Voting Rights Act. This despite the fact that the communities of Shafter, McFarland, Delano, and Wasco share a

[7] All five districts must be as equal as possible in total population. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964); Cal. Elec. Code § 21500 (1994).

community of interest and have been advocating to be in the same district for many years (Senate Factor 9). Similarly, plaintiffs' lay witnesses will testify that the current configuration of the districts demonstrates the tenuousness of the policy underlying the districting decisions because Delano and Ridgecrest do not share a community of interest (Senate Factor 9).

V. PLAINTIFFS' CLAIM IS NOT BARRED BY LACHES AND IS NOT UNRIPE.

Defendants have also raised the affirmative defenses of laches and lack of ripeness in their Answer. Defendants' Answer to Complaint for Injunctive and Declaratory Relief, Dkt. 31, at 11.

In the Ninth Circuit, laches cannot bar plaintiffs' claim of a vote dilution violation, "[b]ecause of the ongoing nature of the violation." *Garza v. Cnty. of L.A.*, 918 F.2d 763, 772 (9th Cir. 1990). In *Garza*, defendant county claimed that plaintiffs' Voting Rights Act claim was barred by laches on grounds that "four rounds of elections [had] occurred since the 1981 reapportionment plan was instituted" and that "a regular reapportionment [was] scheduled to occur in 1991," arguing substantial hardship in "redistricting now, when another regularly scheduled one is set to occur so closely on its heels." *Id.* The Ninth Circuit rejected these arguments. The court reasoned that although plaintiffs could have brought suit as early as 1981, "the injury they suffered at that time [was] getting progressively worse, because each election . . . deprived Hispanics of more and more of the power accumulated through increased population." *Id.* Here, as Plaintiffs will demonstrate at trial, the Latino population in Kern County has been growing rapidly, without a corresponding increase in Latino-preferred representation on the Board of Supervisors. The Court should therefore reject Defendants' assertion of laches, which would force Plaintiffs to wait for the next round of redistricting to see whether their ongoing injuries will be rectified rather than to seek judicial relief for present violations of their fundamental rights.

Defendants' affirmatively plead that "insofar as Plaintiffs seek to base their claim on demographic data that was unavailable at the time the 2011 districting plan was adopted by the County Board of Supervisors, that claim is not ripe as the Board has no legal obligation to redistrict until after the 2010 Census." Answer, Dkt. 31 at 11. First, Plaintiffs contend that with the data available to the Board during the 2011 Census, two Latino majority districts should have

been drawn, and their failure to do so violates the Voting Rights Act. Second, the *Garza* court flatly rejected a claim that the District Court erred in considering data other than data from the prior Census, relying on Supreme Court case law permitting the use of predictive data:

> Since *Reynolds* would permit redistricting between censuses, it appears to assume that post-census data may be used as a basis for such redistricting. Furthermore, in a subsequent opinion the Court noted with approval the possibility of using predictive data in addition to census data in designing decennial reapportionment plans. The court stated that "[s]ituations may arise where substantial population shifts over such a period [the ten years between redistricting] can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." *Kirkpatrick v. Preisler,* 394 U.S. 526, 535, 89 S.Ct. 1225, 1231, 22 L.Ed.2d 519, *reh'g denied,* 395 U.S. 917, 89 S.Ct. 1737, 23 L.Ed.2d 231 (1969). *See also Burns v. Richardson,* 384 U.S. 73, 91, 86 S.Ct. 1286, 1296, 16 L.Ed.2d 376 (1966) ("the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which ... substantial population equivalency is to be *measured.")*.

Garza, 918 F.2d at 772–73.

Plaintiffs' claims are not barred by laches, and not barred by lack of ripeness. Indeed, "[t]he Court has never hinted that plaintiffs claiming present Voting Rights Act violations should be required to wait until the next census before they can receive any remedy." *Id.*

VI. CONCLUSION

Plaintiffs will demonstrate at trial that the 2011 Kern County Board of Supervisors districting plan dilutes the voting strength of Latino voters, in violation of Section 2 of the Voting Rights Act, by depriving them of a second district in which they could constitute a majority of the eligible voters and from which they could elect a candidate of choice.

Dated: November 14, 2017

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

/s/ Denise Hulett
Denise Hulett

Counsel for Plaintiffs