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COUNTY OF KERN, *ET AL.*

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

OSCAR LUNA, *et al.*,

Plaintiffs,

vs.

COUNTY OF KERN, *et al.*,

Defendants.

Case #1:16-cv-00568-DAD-JLT

DEFENDANTS' MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

JUDGE: Hon. Dale A. Drozd
COURTROOM: 5
DATE: May 2, 2017
TIME: 9:30 a.m.

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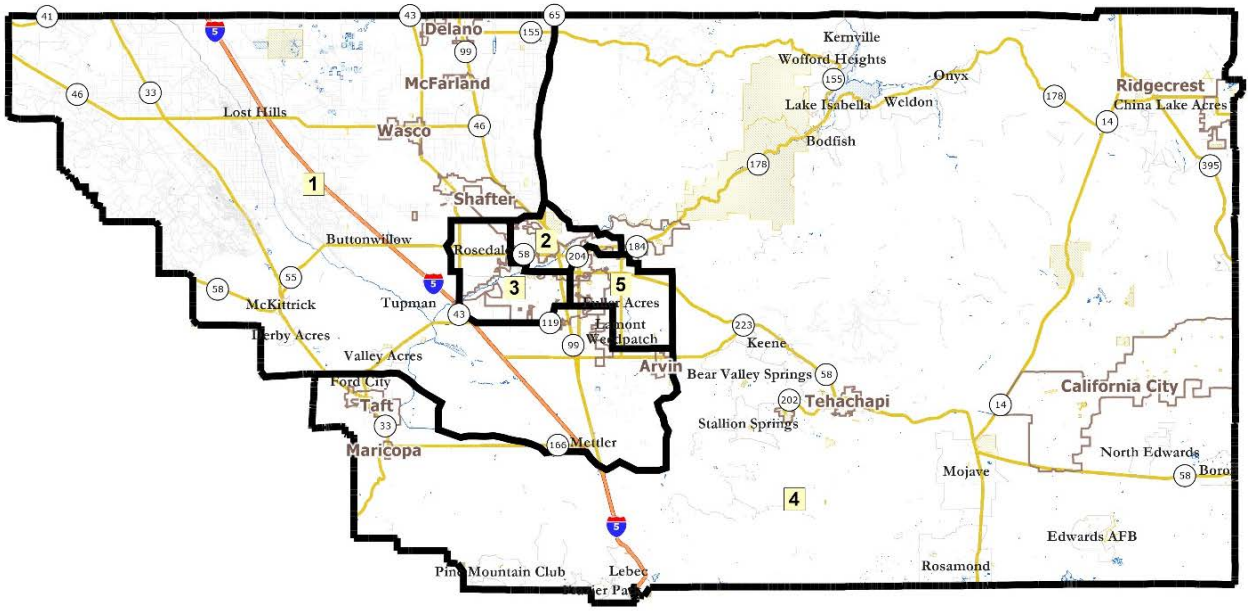
I. INTRODUCTION.

Plaintiffs move for partial summary judgment on the first *Gingles* precondition—the requirement that a Voting Rights Act plaintiff must show that the minority group is sufficiently large and geographically compact to constitute a majority in another single-member district. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Bartlett v. Strickland*, 556 U.S. 1 (2009). Plaintiffs seek to support their claim by submitting an Illustrative Map produced by their demographer, Mr. David Ely (the "Illustrative Map"). Plaintiffs' Illustrative Map is as follows:



Plaintiffs claim undisputed facts support the conclusion that the first *Gingles* precondition is met by this map. Nothing could be further from the truth. While there is no dispute that one compact majority-Latino CVAP district can be drawn in Kern County, or that the map adopted by the County in 2011 contained such a district: District 5, *see* Joint SUMF (Dkt. #39-3), ¶ 12, Defendants *hotly* contest the premise that the Illustrative Map can carry Plaintiffs' burden of showing that *another* such district could have been drawn that meets both the numerosity and compactness requirements.

The Latino communities in the northern part of the County that are the subject of the Complaint—Delano, Shafter, Wasco, McFarland, and neighboring communities—lack sufficient Latino population in their own right to constitute a majority of citizen voting age population (or "CVAP") in a single-member supervisorial district. Therefore, Mr. Ely's map seeks to create a second majority-Latino CVAP district by combining those northern communities with a distant

Latino population center 55 miles away on the far side of metropolitan Bakersfield, namely, the City of Arvin, along with more urban portions of southern Bakersfield. For decades, Arvin has been a part of the County's only majority-Latino CVAP district, District 5, along with neighboring Lamont, Weedpatch, and southeast Bakersfield. There is no question that Arvin shares a community of interest with these neighboring communities, whereas there is strong evidence that it does not share a community of interest with the northern communities with which it is linked in the Illustrative Map.

Tellingly, no local public commentary, from Latinos or non-Latinos, *ever* suggested during the 2011 redistricting process—or the 2001 redistricting, or the 1991 redistricting—that Arvin should be combined with those northern communities, or separated from Lamont and the other nearby communities. In fact, Plaintiffs themselves have acknowledged that the southern and northern areas are separate communities. The Complaint's allegations—which are binding judicial admissions for purposes of this motion—are that Latinos "are currently able to elect only one of five Board representatives, in the only district where Latinos comprise more than half of the citizen voting age population [*i.e.*, District 5, where Arvin currently is located]. The 2011 redistricting plan divides *a second* politically cohesive *Latino community in the northern part of Kern County into two supervisorial districts* [*i.e.*, Districts 1 and 4], neither one of which has sufficient Latino population to enable Latino voters to elect a candidate of their choice." *See* Complaint, ¶ 2 (emphasis added).

Mr. Ely's belated, contradictory claim that Arvin is part of a community of interest with the northern communities is based on no facts, and reeks of a *post hoc* rationalization for a district drawn for purely racial reasons—a pretext for combining otherwise unrelated communities that share nothing but their "Latino-ness"—and it is based primarily on testimony from a demographer who has admitted in sworn deposition testimony that his only knowledge of this purported "agricultural" community of interest is reviewing some Google Earth maps and demographics. Mr. Ely did not visit Kern County; he did not talk to the Plaintiffs or anybody else in Kern County (*i.e.*, the area's residents, who would have first-hand knowledge of Kern County's communities of interest); he did not read any books about Kern County; he did not review the record of the 2011 redistricting process; and he did not even review any of the plans developed in that process, other than the final adopted one. In other words, Mr. Ely's testimony lacks sufficient foundation regarding identification of

communities of interest, which, case law holds, requires more than a review of maps and demographics, and requires intimate familiarity with local circumstances.[1] However, even if his testimony were admissible, Defendants are submitting herewith extensive testimonial and documentary evidence that Arvin and the northern communities have very different interests and orientations, and that the supposed community of interest identified by Mr. Ely is inconsistent with the facts on the ground. At a minimum, this is enough to create a disputed issue of fact regarding the first *Gingles* precondition.

And so is Illustrative District 4. The configuration of Illustrative District 1 has ripple effects outside its boundaries, and results in a *massive* Illustrative District 4 that would combine all of eastern Kern County in a single district stretching the entire length of the County from Ridgecrest in the far northeast to Taft and Maricopa in the far southwest. Such a configuration: violates traditional Kern County redistricting principles, which have long divided eastern Kern County into two supervisorial districts; was vigorously opposed by residents of eastern Kern County in 2011; and would be extremely unwieldy from a representational perspective. Mr. Ely's claim that this District encompasses a community of interest characterized by a "mountains and deserts" is also without foundation, and is further disputed by extensive evidence submitted by Defendants herewith.

These egregious characteristics of the Illustrative Map matter for several reasons. First, the Supreme Court and other courts have held that a district is not "compact" for purposes of the first *Gingles* precondition if it combines distant and disparate minority populations, even though the shape of the district could be said to be compact. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (*LULAC*); *Sensley v. Albritton*, 385 F.3d 591, 596-97 (5th Cir. 2004) (*Sensley*); *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, *23-*26 & *94-*111 (W.D. Tex. Mar. 10, 2017) (three-judge VRA court) (*Perez*).[2]

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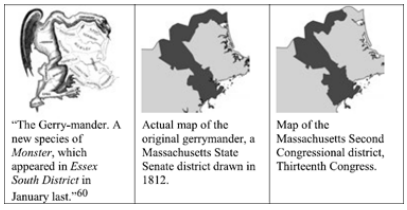
[1] *See* Defendants' Objections to the Testimony of David Ely ("Ely Objections"), filed herewith.

[2] This is not to concede that the shape of Mr. Ely's map District 1 is compact. The 1812 state senate district for which the term "gerrymander" was originally coined (having been signed into law by Governor Elbridge Gerry), "hooked" around Essex County, Mass., in similar fashion. *See* Ansolabehere & Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 750 (2016).



"The Gerry-mander. A new species of *Monster*, which appeared in *Essex South District* in January last."[60]

Actual map of the original gerrymander, a Massachusetts State Senate district drawn in 1812.

Map of the Massachusetts Second Congressional district, Thirteenth Congress.

Moreover, the Supreme Court has held, regarding the first *Gingles* precondition, that "[a]s to a minority population's geographic compactness, 'the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Luna v. County of Kern*, 2016 U.S. Dist. LEXIS, 120208, *13 (E.D. Cal. Sept. 6, 2016) (quoting *LULAC*, 548 U.S. at 433) (citations and internal quotations omitted). Plaintiffs' Illustrative Map does grave violence to virtually all of Kern County's traditional redistricting criteria.

At the very least, there are heavily disputed issues of fact with respect to the first *Gingles* prong, and Plaintiffs' motion should therefore be DENIED.

II. APPLICABLE LEGAL STANDARD.

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is "genuine" if there is evidence in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), and "may not weigh the evidence or make credibility determinations," *Anderson*, 477 U.S. at 248; *Nolan v. Heald College*, 551 F.3d 1148, 1154-55 (9th Cir. 2009). "Summary judgment is improper where divergent ultimate inferences may reasonably be drawn from the undisputed facts." *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (internal quotation marks omitted); *see also Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir. 1985) ("Even where the basic facts are stipulated, if the parties dispute what inferences should be drawn from them, summary judgment is improper."). If a court finds that there is no genuine dispute of material fact as to only a single claim or defense or as to part of a claim or defense, it may enter partial summary judgment. *See* Fed. R. Civ. P. 56(a).

With respect to summary judgment procedure, the moving party always bears both the ultimate burden of persuasion and the initial burden of producing those portions of the pleadings,

discovery, and affidavits that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will bear the burden of proof on an issue at trial (as Plaintiffs will here, *see, e.g., Gingles*, 478 U.S. at 50 & n.17; *Feldman v. Reagan*, 843 F.3d 366, 385 n.18 (9th Cir. 2016) (en banc)), it must also show that any reasonable trier of fact would have to find in its favor. *Celotex*, 477 U.S. at 325.

III. FACTUAL BACKGROUND.

A. The 2011 Redistricting Process: The Workshops.

Kern County is divided into five supervisorial districts, each of which elects a single Supervisor to four-year terms. (Joint SUMF [Dkt. 39-3] #11.) Every ten years, following the release of the decennial Census, state law and the U.S. Constitution require that the Board of Supervisors evaluate and re-adjust the boundaries of the supervisorial districts to equalize population. Cal. Elec. Code § 21500; *Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964); *see also* Joint SUMF #14.

In early 2011, anticipating the release of the 2010 Census, County staff sought and received direction from the Board of Supervisors to conduct a series of 15-20 public "workshops" to receive input from residents of Kern County regarding the proper considerations to guide the redistricting process, most especially to identify communities of interest within the County. The County Administrative Office—in particular, legislative analyst Allan Krauter—oversaw this process. (Krauter Decl., ¶¶ 18-20.) He received training on Maptitude for Redistricting software, one of the leading redistricting packages available (and the most user-friendly), and using that software he prepared an initial map that would have made the absolute minimum changes necessary to bring the existing supervisorial map, adopted in 2001, into compliance with equal population requirements. (Krauter Decl., ¶ 19; Aug. 2, 2011 Staff Report [RJN, Ex. 14] at 3.) Then, armed with that initial map and the Maptitude software, Mr. Krauter advertised and conducted approximately 20 public hearings throughout Kern County to solicit public input. (Krauter Decl., ¶¶ 20-30.)

At the public workshops, Mr. Krauter would give an initial presentation regarding the redistricting process, the overall requirements—including the need to preserve District 5 as a majority-Latino district—and the initial map he drew. (Krauter Decl., ¶ 19; RJN, Ex. 18.) He would then open the floor to comments. At workshops where there was a significant sentiment in favor of

a particular configuration, Mr. Krauter would use the Maptitude software to create a new map for possible presentation to the Board of Supervisors. Sometimes, the changes were simple enough to complete a new map at the workshop. In other circumstances, it was necessary to complete the process at a later point, based on the comments. For a map configuration proposed at a workshop to become a formal map "option" for presentation to the Board, Mr. Krauter required that it receive support from the majority of the workshop's attendees. (*Id.*, ¶¶ 20-30.) At subsequent workshops, newly-developed "options" would also be shown to the public as well. (*Id.*, ¶ 21.)

During the workshops, the Maptitude software would automatically update the total and voting age population ("VAP") breakdowns for each district, in real time, including the racial/ethnic makeup of each, based on the data that came built into the program. (*Id.*, ¶ 21.) However, Mr. Krauter was aware that citizen voting age population ("CVAP") would be relevant for purposes of legally evaluating plans, and those data did not come pre-loaded in Maptitude. Rather, they became available that summer from the California Statewide Database ("SWDB"), the official redistricting database of the State of California. He, therefore, downloaded the CVAP data from the SWDB website, but was unable to successfully import it into Maptitude, despite consulting with Howard Simkowitz, Maptitude's programmer. (*Id.*, ¶ 19.) Mr. Krauter therefore sent the CVAP data to County Counsel so that office could advise him using the appropriate data. (*Id.*)

The workshop process initially resulted in five map options, the various characteristics of which are summarized in the declarations of Mr. Krauter and Dr. Douglas Johnson, filed herewith.

B. Public Hearings Before The Board of Supervisors.

The five initial map options were first presented to the Board of Supervisors at two public hearings on July 5, 2011. At the end of the July 5 public hearings, the Board determined to remove Option 5 from consideration. (Krauter Decl., ¶ 31; Tr. of Second Hearing on July 5, 2011 [RJN, Ex. 2] at 42:10-43:6.) That map, developed at the Shafter workshop, sought to unify the entire west side of the County in a single district, and would have unified Delano, Shafter and McFarland—then in District 1—with Wasco, then in District 4. However, to do so, Option 5 would have united the entire eastern half of the County into a single supervisorial district. This was contrary to the County's traditional practice going back decades. It was regarded by affected supervisors as unwieldy, and

was vigorously opposed in public testimony from residents of eastern Kern County. (Krauter Decl., ¶ 31; Nilon Decl., ¶ 24.) Nobody at the public hearings spoke in favor of Option 5.

However, at the July 5 meeting, the Board heard testimony from Mary Helen Barro in support of another option, initially suggested at the final workshop in Bakersfield, that sought to move Delano, Shafter, and McFarland into the same district with Wasco, but still maintain two districts in the east County. That option was not initially presented to the Board by Mr. Krauter because it had not received sufficient support from attendees of the Bakersfield workshop. (Again, he required majority support for an option before bringing it forward, and Option 6 fell far short.) However, following the commentary on July 5, the Board voted to add the option—designated Option 6—to the mix. (Krauter Decl., ¶ 29; Tr. of Second Hearing on July 5, 2011 [RJN, Ex. 2] at 42:8-43:6.)

Following the July 5 hearings, it was clear to County staff that none of the options had majority support on the Board. County Administrative Officer John Nilon therefore instructed Mr. Krauter to see if he could produce a new option that would address some of the concerns expressed by the Board. In response, Mr. Krauter produced Option 7, which was a slight variation on the existing map. Option 7 was presented to the Board at a public hearing on August 2, 2011. (Nilon Decl., ¶ 30; Aug. 2, 2011 Staff Report [RJN, Ex. 14] at 2 & 5.)

Each of the "options" that Mr. Krauter prepared in response to public testimony and presented to the Board sought to maintain District 5—comprised of southeast Bakersfield, Arvin, Lamont and Weedpatch—as a majority-Latino CVAP district, as it had been since it was first created by the Board (on the Board's own initiative, without threat of lawsuit) in 1991.[3] However, none of the seven "options" contained a second majority-Latino CVAP district. (Johnson Decl., Exs. 2-9.) The day before the August 2 hearing, Mr. Krauter received a request from a "student" at UCLA for the shapefiles and demographic database being used in the redistricting process. The next day, at the August 2 hearing, MALDEF's redistricting director, Steven Ochoa, appeared before the Board and presented a map that he claimed created two majority-Latino CVAP districts. (Krauter Decl., ¶¶ 32-33; Tr. of Aug. 2, 2011 [RJN, Ex. 3] at 16:14-18:12.)

[3] Deputy County Counsel Devon Brown advised the Board the Options 3 and 6 likely violated the VRA, because they dropped the Latino CVAP in District 5 slightly below 50%. (Krauter Decl., ¶ 33.)

Mr. Ochoa did not urge the Board to adopt his map. He admitted that—contrary to County policy—it did not exclude prisoners from the population base. Instead, he simply suggested that his map demonstrated the *possibility* of drawing a second majority-Latino CVAP district in the County, and urged the Board to delay for further investigation. (Krauter Decl., ¶¶ 34-35; Tr. of Aug. 2, 2011 [RJN, Ex. 3] at 16:14-18:12.) But the Board had been advised that adoption in August was necessary to guard against the prospect of the Legislature voting to move the 2012 primary forward from June to March, which would have advanced candidate filing deadlines from December to September, and the process had already been delayed, so the Board, after questioning staff about the MALDEF map, conducted a first reading of an ordinance to adopt Option 7. (Krauter Decl., ¶¶ 35-36.)

Following the August 2 meeting, Mr. Krauter spent the better part of a day trying to recreate a map that included two majority-Latino CVAP districts with the prison population removed (as MALDEF had merely provided a hard-to-read, 8.5" x 11" paper copy). (Krauter Decl., ¶¶ 37-39.) Based on prior analyses conducted during the process, Mr. Krauter knew that to create a district with 50%+ Latino CVAP, it was necessary for that district to have 70%+ Latino VAP. (*Id*., ¶ 38.) Despite spending five hours in the attempt, Mr. Krauter was unable to create such a map, because the creation of a second majority-Latino district in the northwest part of the County required cannibalizing District 5. (*Id*.) He so reported to the Board of Supervisors at the meeting on August 9. (Tr. of Aug. 9, 2011 [RJN, Ex. 4] at 21:3-22:21.) Again, though a number of individuals urged delay, no one urged the adoption of the MALDEF map or proposed another alternative that would have included two majority-Latino CVAP districts. (*See generally* Tr. of Aug. 9, 2011 [RJN, Ex. 4].) That same day, the Board formally adopted Option 7.

C. Kern County's Traditional Redistricting Criteria.

During the 2011 redistricting process, public commentary strongly supported:

1. Keeping two supervisorial districts in east Kern to ensure appropriate representation of the unique needs of this area.
2. Creating a plan with the least amount of change in district boundaries.
3. Maintaining the 5th District as an effective Latino opportunity district.

(July 5, 2011 Staff Report [RJN, Ex. 13]; Nilon Decl., ¶¶ 8, 11, 17, 32; Krauter Decl., ¶ 31.)

These considerations have been traditional redistricting criteria in Kern County for decades, along with: exclusion of prisoners from the population base; balancing rural and urban interests on the Board of Supervisors, by ensuring that four of the five districts have a substantial portion of Bakersfield's population, while the fifth district—District 1—includes little Bakersfield population; and avoiding removing incumbents' residences from their districts. (*Id.*)

There was also public commentary in favor of: uniting all of Oildale within District 3, instead of dividing it between Districts 1 and 3; uniting Shafter and Wasco in the same district; and (relatedly) considering a new configuration for the "Westside" district including Delano, McFarland, and Shafter, with Wasco, Buttonwillow, and Lost Hills (and other westside communities in one proposal), but excluding East Kern and if possible excluding as much of Bakersfield as possible. (*Id.*) These considerations, however, were not traditional redistricting criteria in Kern County. (*Id.*)

Following the public hearings on July 5, August 2, and August 9, the Board adopted a map that complied with the County's traditional redistricting criteria. It did not unite Oildale or include Delano, McFarland and Shafter in the "westside" district. (*See, e.g.,* Tr. of Aug. 9, 2011 Hearing (RJN, Ex. 4) at 11:13-12:4.)

D. Subsequent Proceedings, Including This Lawsuit.

Following the adoption of the final supervisorial district map, elections were held in 2012 (in Districts 1, 4 and 5); in 2014 (in Districts 2 and 3); and in 2016 (again in Districts 1, 4 and 5). (Kern County Elections Results, https://elections.co.kern.ca.us/elections/results.asp.) Plaintiffs filed this action on April 22, 2016. Though Plaintiffs' complaint alleges the division of a Latino community between Districts 1 and 4, and though they now seek to dismantle District 5 to create their new Illustrative Map, Plaintiffs sought no relief against the 2016 elections (*see* Complaint, Prayer), meaning that those districts will only have one more election before the next round of redistricting, in 2020. Districts 2 and 3, neither of which are the subject of this suit, are up for election in 2018.

Referring to the 2011 Ochoa/MALDEF map, the Complaint alleges that "Latino community members submitted a geographically compact and equipopulous plan to Defendant Board of Supervisors that increased the number of districts in which Latinos would constitute a majority of the CVAP from one district to two districts." (Complaint, ¶ 21.) Yet, in response to the County's

motion to dismiss, which challenged the claim that the MALDEF map was equipopulous (in light of its inclusion of prison population), Plaintiffs disclaimed any reliance on that map. *See Luna*, 2016 U.S. Dist. LEXIS 120208, at *3 n.2. They have since stipulated that they will not rely on it "to support any contention that the first *Gingles* precondition (that Latinos in Kern County are 'sufficiently numerous and compact to form a majority in a [second] single-member district') is met in this case." *See* Stipulations re Steven Ochoa and Related Topics, filed herewith ("Ochoa Stipulations").

IV. THERE ARE MANY DISPUTED QUESTIONS OF FACT REGARDING PLAINTIFFS' ABILITY TO MEET THE FIRST *GINGLES* PRECONDITION.

The term "compactness," when used in connection with redistricting, can have different meanings depending on the context. In some contexts it can refer to the shape of a district itself, *LULAC*, 548 U.S. at 433, but in the context of the first *Gingles* precondition, the Supreme Court has held that "compactness" refers to the compactness of the minority population—*e.g.*, whether that population is sufficiently concentrated to enable it to constitute a majority of the citizen voting age population in a single-member district—not to the shape of the district itself. *Id.*; *see also* Plaintiffs' Memorandum of Points & Authorities in Support of Motion for Partial Summary Judgment (Dkt. #39-1), p. 9:12-15 (agreeing with this premise).

The shape of the district is not exactly irrelevant to this inquiry—the lack of a district's compactness may strongly suggest the non-compactness of the minority population as well. *See Sensley*, 385 F.3d at 596. But even a compact district may contain a minority population that is not "geographically compact" within the meaning of the first *Gingles* precondition, if it combines disparate communities instead of a single, cohesive minority community. *See LULAC*, 548 U.S. at 432-33 (first *Gingles* prong was not met with respect to a district that, while itself compact, combined "disparate communities of interest" in Austin and near the Rio Grande to achieve majority minority voting numbers); *Perez*, 2017 U.S. Dist. LEXIS 35012, at *23-*26 & *94-*111 (rejecting claims that Texas had a legal obligation in 2010 to create additional majority-Latino CVAP districts in the Dallas/Fort Worth area or another in South/West Texas, because the Latino populations in Plaintiffs' proposed districts were too dispersed within the proposed districts).

In *Sensley*, the Fifth Circuit held that a plaintiff's illustrative plan did not meet the *Gingles*

compactness requirement when it combined "two areas of highly-concentrated African-American population, which are roughly 15 miles apart from one another, [and] were then linked together by a narrow corridor of land to form a new District 6." 385 F.3d at 597. Here, Plaintiffs' Illustrative District 1 links two areas of highly-concentrated Latino population, which are 40+ miles apart, not by a narrow corridor, but by using largely unpopulated western oil fields as a 38-mile long geographic "bridge" to link the two population centers around the City of Bakersfield. (*See* Johnson Decl., ¶¶ 16, 36, 41-42, 57; Oviatt Decl., ¶ 7.)

Courts are also more likely to reject a claim of "compactness" where the new district is created by dismantling an existing minority opportunity district, as is the case here. *See LULAC*, 548 U.S. at 432-33 (Texas violated Section 2 by undermining an existing opportunity district, and the creation of a non-compact district elsewhere in the State did not ameliorate the harm).

Finally, "[a]s to a minority population's geographic compactness, 'the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Luna*, 2016 U.S. Dist. LEXIS, 120208, *13 (quoting *LULAC*, 548 U.S. at 433) (citations and internal quotations omitted). The courts have elaborated on this requirement thus:

> Such principles include, *inter alia*: compactness, contiguity, and respect for political subdivisions, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993); avoiding contests between incumbent representatives, *e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983); not disrupting preexisting electoral minority-opportunity districts, *e.g.*, *Abrams*, 521 U.S. at 94; *Sensley*, 385 F.3d at 598; and maintaining communities of interest and traditional boundaries, *e.g.*, *Perry*, 548 U.S. at 433. "[T]he party attacking the . . . boundaries [drawn by the political subdivision] must show at the least that [it] could have achieved its legitimate political objectives in alternative ways that are *comparably consistent with* traditional districting principles". *Easley v. Cromartie*, 532 U.S. 234, 258, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001) (emphasis added).

Gonzalez. v. Harris County, 601 Fed. Appx. 255, 259 (5th Cir. 2015).

Plaintiffs' expert, David Ely, claims he developed Plaintiffs' Illustrative Map "in accordance with traditional redistricting criteria with particular focus on Communities of Interest, connectedness within districts, and the simplicity and recognizability of boundaries. In particular a district was created which combined agricultural areas northeast and south of the city of Bakersfield, while the western and southern mountainous and desert areas comprise another district." (Ely Report [Dkt. #39-12], ¶ 21.) Defendants do not believe that Plaintiffs have carried their burden of supporting this

claim with admissible evidence, but even if they did, extensive expert and lay testimony creates numerous disputed questions about these claims.

A. There Are Disputed Questions Of Fact As To Whether Plaintiffs' Illustrative District 1 Combines Disparate Communities, Rather Than A Single, Cohesive, Compact Minority Population.

1. Plaintiffs have not provided competent evidence to carry their burden, as Mr. Ely's testimony on communities lacks sufficient foundation.

As discussed more fully in Defendants' objections to Mr. Ely's testimony, filed herewith, Mr. Ely's opinions on "communities of interest" in Kern County lack a sufficient foundation to be admissible. The identification of "communities of interest" is not a question to be addressed in the abstract. It is a jurisdiction-specific inquiry; "the identification of a 'community of interest,' a necessary first step to 'preservation,' requires insights that cannot be obtained from maps or even census figures. Such insights require an understanding of the community at issue, which can often be acquired only through direct and extensive experience with the day-to-day lives of an area's residents." *Favors v. Cuomo*, 2012 U.S. Dist. LEXIS 36910, *27 (E.D.N.Y. Mar. 19, 2012) (footnote omitted). Yet Mr. Ely admitted in his reports and sworn testimony that his Illustrative Districts are based exclusively on Google Earth maps and census figures, and not a jurisdiction-specific understanding of the community at issue. He conceded that: he did not visit Kern County; he did not talk to the plaintiffs; he did not talk to anybody in Kern County (*i.e.*, the area's residents, who would have first-hand knowledge of Kern County's communities of interest); he did not read any books about Kern County; he did not review the record of the 2011 redistricting process; and he did not even review any of the plans developed in that process, other than the final adopted one. (Ely Dep. [Skinnell Decl., Ex. 1] at 47:3-25; *see also id*. at 81:2-5 ["There's no argument that every community of interest has been considered or that any of my broad stroke descriptions are comprehensive."].)

The defects in Mr. Ely's superficial approach are perhaps best illustrated by his claim that Arvin shares a community of interest with Delano, Shafter, Wasco and McFarland, on the far side of Bakersfield and 40+ miles distant, when no one who is local to Kern County has ever suggested that they should be combined in a single supervisorial district before. In *Johnson v. Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996) (per curiam), a three-judge redistricting court observed that "[i]t would be

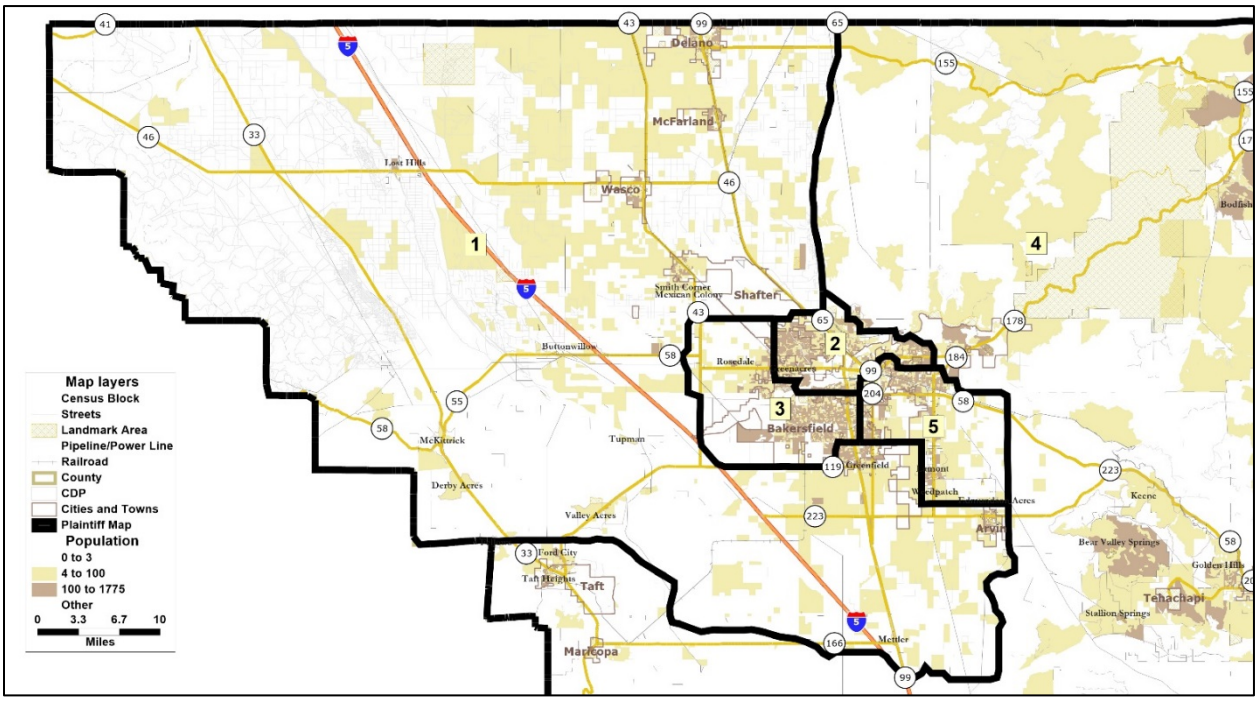
more than a little curious if DOJ attorneys in Washington, D.C., were aware of a community of interests unknown to longtime residents of the area." *Id*. at 1548. Likewise, here, it would be more than a little curious if a demographic consultant from Los Angeles was aware of communities of interests unknown to longtime residents of Kern County. The flaws of his approach are also illustrated by the fact that Plaintiffs' Illustrative Plan divides an undisputed community of interest between Arvin, Lamont, Weedpatch and east Bakersfield, which has created the core of an effective Latino opportunity district for decades, while acknowledging that he did not take those communities into account in drawing Plaintiffs' Illustrative Map. (Ely Dep. [Skinnell Decl., Ex. 1] at 76:17-19; Huerta Dep. [Skinnell Decl., Ex. 5] at 42:1 – 52:24.)

2. Extensive expert and lay testimony—and even judicial admissions in Plaintiffs' own complaint—contradict Mr. Ely's claim that the northern and southern "arms" of Illustrative District 1 are part of the same community.

Even if Mr. Ely's testimony were admissible, it is strongly disputed by extensive testimony from Defendants' experts—a redistricting consultant, Dr. Douglas Johnson, and the County's Planning Director, Ms. Lorelei Oviatt—as well as lay testimony from Alan Christensen (former City Manager of Arvin then Wasco), Allan Krauter, and others. The testimony from those individuals strongly supports the view that the northern and southern arms of District 1 represent disparate communities of interest, and—at the very least—creates a contested issue of fact.

Extensive evidence support the conclusion that Illustrative District #1 contains not one, but two separate Latino communities, in two disparate population centers—one in the north, consisting of Shafter, Delano, Wasco, McFarland, and other small, nearby communities (Lost Hills, Buttonwillow), and the other population center in the south, encompassing Arvin and south Bakersfield. (*See e.g.*, Johnson Decl., ¶¶ 14-48, 55-57; Oviatt Decl., ¶¶ 7-43.) The City of Bakersfield—with a population of approximately 350,000—lies between the two regions, and (again) the proposed District 1 "hooks" around the City using the largely unpopulated western oil fields as a 38-mile long geographic "bridge" to link the two population centers around the City of Bakersfield. (*Id*.) In the map below, the white/clear Census Blocks each contain 0 residents (using the 2010 Census data, without the prisons). The Census Blocks shaded yellow have a total population

of only 4 to 100 persons. And the tan Census Blocks have more than 100 people in them. The map clearly shows the long, unpopulated "hook" used by District 1 to include the geographically distant northwestern and southern population centers in a single district by wrapping around Bakersfield:



Map 1: Unpopulated Areas and the Plaintiffs' District 1

(Johnson Decl., ¶ 17.)

Taft Highway (State Route 119), runs through the middle of the unpopulated oilfields southwest of the City.[4] One-third of the population for the District is south of Taft Highway, and two-thirds reside north of that boundary. (*Id.*) In Plaintiffs' proposed District 1 there are 57,678 people who live south and east of Taft Highway. Of those residents of District 1's southern "hook," over half live in densely populated urban neighborhoods in the southern part of incorporated Bakersfield and the adjacent urban community of Greenfield. (*Id.*)

The fact that these are two separate communities, rather than a single cohesive is strongly evidenced by the fact that the Plaintiffs themselves have alleged that Latinos "are currently able to

[4] Because Illustrative District #1 combines small communities on opposite sides of Bakersfield through largely unpopulated oil fields to the southwest of the City, the result is to separate the Cities of Taft and Maricopa from those oil fields, which constitute the basis of the latter communities' economies. (Johnson Decl., ¶¶ 25-27 and Map 5.)

elect only one of five Board representatives, in the only district where Latinos comprise more than half of the citizen voting age population [*i.e.*, District 5, where Arvin currently is located]. The 2011 redistricting plan divides *a second* politically cohesive *Latino community in the northern part of Kern County into two supervisorial districts* [*i.e.*, Districts 1 and 4], neither one of which has sufficient Latino population to enable Latino voters to elect a candidate of their choice." *See* Complaint, ¶ 2 (emphasis added). A statement in a complaint is a judicial admission. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). "'[U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court.'" *Id.* (quoting *Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986)) (alteration in original). "District courts in this circuit have consistently applied this doctrine in the context of motions for summary judgment." *Miramontes v. Mills*, 2015 U.S. Dist. LEXIS 158943, *13 n.25 (C.D. Cal. Nov. 24, 2015) (citing cases).

Beyond the judicial admissions in the Complaint, the fact that Arvin does not share a community of interest with the northern communities is also strongly evidenced by the fact that the combination of Arvin with those communities is a configuration that was not suggested by *any* member of the public—Latino or non-Latino—in connection with the 2011 redistricting, nor the 2001 redistricting, nor the 1991 redistricting. (*See* Krauter Decl., ¶¶ 8-9, 11-12, 15(b), 25-28, 34, 39; Nilon Decl., ¶¶ 8(b), 15, 17(b).) There is good reason for that omission: they are not regarded by local residents as part of the same community. (Krauter Decl., ¶ 43.)

The distance between Arvin and the nearest northern community—Shafter—is approximately 40 miles straight through metro Bakersfield (taking approximately 45 minutes to drive), and it is 54 miles if one skirts around Bakersfield (as Illustrative District #1 does), increasing the drive time to more than an hour. (Johnson Decl., ¶¶ 41-42.) Because there is no "beltway" around Bakersfield, travel between communities on opposite sides of the metro area can be difficult, especially during peak traffic times, limiting the extent to which people from Arvin travel to the northern communities for jobs, shopping, or other activities, and vice versa. (Oviatt Decl., ¶ 7.)

Moreover, there is no public transit between these two population centers, except by connecting in downtown Bakersfield; the northern communities and the southern communities of

Arvin and Lamont are separate "spokes" on the public transit wheel. (*Id*., ¶¶ 7, 14, 18; Christensen Decl., ¶ 6.) By public transit, the trip would take approximately four hours. (Oviatt Decl., ¶ 7.)

The orientation of Arvin (and its surrounding areas) is toward nearby southeast Bakersfield, where Arvin residents must go for much of their shopping, jobs, public services, etc., or to the south, specifically to the Tejon Ranch Commerce Center, a 1,450-acre development offering contiguous industrial sites from 1 to 280 acres for sale and build-to-suit opportunities from 20,000 to nearly 3 million sq. ft. for sale or lease. With nearly 4 million square feet of developed industrial space, the Tejon Ranch Commerce Center sits at the southern gateway to Kern County, a mere 14 miles from Arvin, presenting unique challenges and opportunities to that City and surrounding areas, including housing, educational, employment and commercial issues. Tejon Ranch is fully entitled and home to major distribution centers for IKEA, Famous Footwear, Dollar General, and Caterpillar. The availability of qualified labor including in Arvin, was an important consideration for the development. By contrast, the Tejon Ranch development draws little of its workforce from the northern communities in Illustrative District 1. Arvin Transit provides two round trips per day to the industrial center to the south. In contrast, there is no direct public transportation between Arvin and the cities of Delano, Wasco, McFarland, or Shafter. Other industries in the Arvin area include renewable energy with wind and solar power, which are not industries with a significant presence in Delano, Shafter, McFarland and Wasco. (Oviatt Decl., ¶ 14.) By contrast, relatively few people travel from Arvin to the northern communities for work, recreation, etc. (Christensen Decl., ¶ 8.)

To the extent the northern communities have a local focus, it tends to be toward more northern parts of the City of Bakersfield, or northward to Visalia, Earlimart, Tulare, etc. (Oviatt Decl., ¶ 20.)

In light of these facts, it is no surprise that combining Arvin with the northern communities found no basis whatsoever in the public testimony; they are simply understood by local residents to be separate, disparate communities. (*See* Krauter Decl., ¶ 43.) Essentially, treating these two population centers as part of the same "compact" community is akin to concluding that Madera and Kingsburg—also approximately 40 miles apart, on opposite sides of Fresno—share a common, "compact" community. *See LULAC* 548 U.S. at 432-35 (combination of distant minority communities not "compact" for purposes of *Gingles* 1); *Sensley*, 385 F.3d at 597 (same, where

minority population concentrations were approximately 15 miles apart).

3. "Agriculture" does not define a unique community of interest that unites the various communities in Illustrative District 1, nor do the various other issues that Plaintiffs claim are "shared" by those communities.

Dr. Johnson and Ms. Oviatt, among others, strongly take issue with Mr. Ely's contention that an "agricultural" community of interest defines a single, unique community of interest in Illustrative District #1. That designation is both over- and under-inclusive, insofar as it relates to communities of interest in Kern County. (*See* Oviatt Decl., ¶¶ 8-12.) For one thing, virtually every part of the County outside of Bakersfield (and even some areas within Bakersfield)—including many of the communities outside of Illustrative District #1—has *some* "agricultural" economic interests. (*Id*. at ¶ 9.) Tellingly, Illustrative District 1 circles around and excludes west Rosedale, near Shafter, though west Rosedale has significant agricultural areas, to pick up more distant rural areas, *i.e.*, Arvin (presumably for no other reason than because Rosedale is less heavily Latino). (*Id.*)

Second, throughout Kern County agriculture is an ever less important driver of the economy. The "agricultural" communities in Kern County—both inside and outside Illustrative District 1—have been working for decades to try to diversify their economies. (Oviatt Decl., ¶¶ 10 & 26; Christensen Decl., ¶¶ 3-11.)

Third, to the extent Illustrative District 1 combines "agricultural areas," it combines disparate agricultural areas that are spread throughout the County with the various areas having different crops, different water issues under state water legislation, and different other logistical issues—hence, different communities of interest. (Oviatt Decl., ¶ 11; Christensen Decl., ¶¶ 3, 11.)

And finally, to characterize the population center in the southern part of Illustrative District 1 as "agricultural" is misleading in a further respect. While the southern "arm" of that District does contain Arvin, which has historically had a significant agricultural component to its economic base, the majority of the population in that southern arm is, in fact urban—located in the incorporated City of Bakersfield and the adjacent urban Greenfield area. (Oviatt Decl., ¶ 12; Johnson Decl., ¶¶ 19-22.)

The County's expert and lay witnesses also dispute the notion that the various other issues that Plaintiffs identify as unifying Illustrative District #1 (*see* Plaintiffs' SUMF [Dkt. #39-4], ¶ 16) really define a "community of interest" in that District either. With respect to many of the issues—

such as agriculture (discussed above), contaminated water, water quality, transportation issues, economic issues, crime, and public health, the shared "interests" are pitched at a high level of generality that obscures very real differences on these issues with respect to the northern and southern population centers. (Oviatt Decl., ¶¶ 24, 43.) And with respect to the others, the issues that are common to Arvin and the northern communities are common to the entire County, at least outside of Bakersfield. For example, with respect to unemployment, teen pregnancies, crime, drugs, etc., Boron, Mojave, Willow Springs, and other communities in eastern Kern have very similar characteristics and problems, as do the communities in the Kern River Valley. The same is true with respect to sewer, water, transportation and other types of infrastructure; water contaminated by nitrates; housing stock; income levels; etc. These are not issues unique to the communities contained in Plaintiffs' Illustrative District 1. They do not define a unique community of interest in Kern County that is circumscribed by Illustrative District 1. (Oviatt Decl., ¶ 25.)

4. The overlying congressional, Senate and Assembly districts do not define a single community of interest for purposes of supervisorial redistricting.

Citing Mr. Ely's deposition testimony, Plaintiffs also observe that the State's congressional, Assembly and Senate districts "hook" around Bakersfield to unite territory south of Bakersfield, including Arvin, with Delano, Shafter, Wasco and McFarland. In this manner, they apparently seek to imply that these communities share a single "community of interest," hence their inclusion in the same legislative districts.[5] But these maps were never raised in the 2011 public process. (RJN, Exs. 1-4 (transcripts of 2011 public hearings); Krauter Decl., ¶ 11; Johnson Decl., ¶ 26.) Nor did Mr. Ely ever suggest—in neither his initial report nor his rebuttal report—that he, in fact, took those districts

[5] In 1991, the California Supreme Court approved maps drawn by Court-appointed Special Masters that were explicitly drawn to maximize Latino population. *See Wilson v. Eu*, 1 Cal. 4th 707, 774-75, 823 P.2d 545, 583-85 (Cal. 1992). These are the only maps that unite Delano and Arvin and combine them with territory in Kings County and other heavily-Latino areas to the north with a "hook" like that proposed in Plaintiffs' map. These 1991 Assembly, State Senate and Congressional maps were approved by the State Supreme Court prior to the United States Supreme Court rulings in *Miller v. Johnson* and *Shaw v. Reno*, striking down racially gerrymandered plans and holding that the Voting Rights Act does not require that the number of possible minority districts be maximized. Citing the requirements of the Federal Voting Rights Act at the time, the Legislature and Governor in 2001 and the California Citizens' Redistricting Commission in 2011 approved the preservation of similar 'hook' districts explicitly focused on maximizing Latino population.

into account in drawing Plaintiffs' Illustrative Map. This appears to be nothing more than a *post hoc* justification of the map he drew. (Johnson Decl., ¶ 28.)

Moreover, those legislative districts differ in a critical way from Plaintiffs' Illustrative Map: they do not divide Arvin from its undisputed community of interest with Lamont, Weedpatch, and east Bakersfield, as Plaintiffs' Illustrative Map does. (*Id.*, ¶ 30; Dkt. #39-10 (legislative maps).)

Additionally, what constitutes a "community of interest" varies, based on the level of government in question and the relative size of the districts. A "community of interest" for purposes of representation at the state or federal levels, which have much larger districts and which, of necessity, govern at a more "macro" level than local governments do, tends to be defined in far more general, "macro" terms than a "community of interest" at the local level. (Johnson Decl., ¶ 31.)

And finally, the mere fact that a legislative body chooses to place two communities in the same district does not necessarily mean that they are a single community of interest—indeed, Plaintiffs vigorously contend that Ridgecrest and Delano, which have been in the same supervisorial district for decades, do not share a community of interest. Generally, the question of how to combine disparate communities of interest in a district is a legislative/policy question to which courts defer, and that choice will only be second-guessed where an alternative choice is legally compelled. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."). In this case, for the combination of Arvin with the northern communities to be legally compelled, Plaintiffs would have to show that they are a single community, not multiple disparate ones. Plaintiffs have provided no evidence to support the inference that Arvin shares a single community of interest with the northern communities just because they are in the same state and federal legislative districts.

B. There Are Disputed Questions Of Fact Regarding Plaintiffs' Claims Of "Compactness" And "Communities Of Interest" With Respect To Illustrative District 4, Too.

The prior section focused primarily on the compactness and purported communities of interest in Illustrative District #1, because that is the second majority-Latino CVAP district that Plaintiffs put forward in an effort to meet their *Gingles* 1 burden. However, the rest of the map cannot

be ignored; "of importance, of course, is the compactness of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met." *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1466 (M.D. Ala. 1988).

In this case, one consequence of Mr. Ely's contortions to create a second majority-LCVAP district is the creation of a new mega-district that encompasses the entire eastern half of one of the largest counties in California. Kern County has the third largest land mass of any County in California (behind San Bernardino and Inyo Counties), and it is larger in land area than six U.S. States: Massachusetts, New Jersey, Hawaii, Connecticut, Delaware, and Rhode Island (plus, of course, the District of Columbia). It is so large that the County actually has regions contained within it. These distances present significant challenges for community cohesion and for supervisorial representation, even under the current map, particularly for Supervisors representing substantial portions of the County outside of Bakersfield. (Oviatt Decl. at ¶ 6.)

Plaintiffs' Illustrative Map exacerbates this problem considerably. That new district—comprised of 5,527 square miles in the north, east, south, and southwestern parts of the County—combines such distant and far-flung communities as Ridgecrest, in the far northeast of the County, with Taft and Maricopa, all the way to the southwest. Not only does this violate one of criteria supported most vigorously by the public in the various public hearings before the Board—maintaining two separate districts in the east side of the County—but it results in a supervisorial district that would be prohibitively difficult to represent. (Oviatt Decl., ¶¶ 30-42; Johnson Decl., ¶¶ 15, 37, 40, 43, 51-52.) A supervisor elected to represent this District would likely face significant logistical challenges in adequately representing this District—far more so even than the supervisors who currently represent existing Districts 1, 2 and 4, which are large, but not nearly so large. (*Id.*)

Moreover, the "mountainous and desert" community of interest that Mr. Ely claims defines this District—again, assuming his testimony on this point is even deemed admissible—"is pitched at far too high a level of generality for a County as vast and varied as Kern. These 'mountainous and desert' areas are so enormous and diverse that they do not represent a unified 'community of interest' in Kern County; the mountainous and desert areas incorporated in Illustrative District 4 are all very

different in terms of climate, environmental concerns, industries and economic focus." (Oviatt Decl., ¶ 31; *see also id.* at ¶¶ 32-42; Johnson Decl., ¶ 15.)

C. There Are Disputed Questions Of Fact As To Whether Plaintiffs' Illustrative Map Complies With Other Traditional Redistricting Criteria As Well.

Again, David Ely, claims he developed Plaintiffs' Illustrative Map "in accordance with traditional redistricting criteria with particular focus on Communities of Interest, connectedness within districts, and the simplicity and recognizability of boundaries." (Ely Report [Dkt. #39-12], ¶ 21.) Defendants do not believe that Plaintiffs have carried their burden of supporting this claim with admissible evidence, but even if they did, extensive expert testimony creates a disputed question of fact about the Illustrative Map's compliance with traditional redistricting criteria.[6]

1. Plaintiffs have not provided competent evidence to carry their burden, as Mr. Ely's testimony on Kern County's traditional redistricting criteria lacks sufficient foundation as well.

Defendants do not believe that Mr. Ely's statements regarding traditional redistricting criteria are admissible,[7] for much the same reasons as his testimony on "communities of interest." The question of what constitutes "traditional redistricting criteria" is jurisdiction-specific. The proper focus is on the specific criteria that have traditionally been employed *in Kern County*; it is not an abstract inquiry, separate from the jurisdiction's history.[8] Mr. Ely, however, admits that in drawing his Illustrative Districts he merely reviewed some maps and Census figures. He did not visit Kern County; he did not talk to the Plaintiffs or anybody else in Kern County (*i.e.*, the area's residents, who would have first-hand knowledge of Kern County's traditional redistricting criteria); he did not read any books about Kern County; he did not review the record of the 2011 redistricting process;

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[6] Mr. Ely apparently defines "connectedness within districts" so broadly as to be meaningless (*see* Johnson Decl., ¶ 37), but in any event it is not one of Kern County's traditional redistricting criteria.

[7] *See* Ely Objections, §§ I and II.

[8] *See Abrams v. Johnson*, 521 U.S. 74, 99 (1997) (noting Georgia's 'strong historical preference' for not splitting counties outside the Atlanta area … and for not splitting precincts"); *Lawyer v. Dept. of Justice*, 521 U.S. 567, 582 (1997) (rejecting claim of failure to follow traditional districting criteria, noting "unrefuted evidence showing that on each of these points District 21 is no different from what *Florida's traditional districting principles* could be expected to produce." (emph. added)); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 646 (D.S.C. 2002) (three-judge court) ("We turn now to the 'traditional districting principles' of the state" of So. Carolina); *Johnson v. Miller*, 922 F. Supp. 1556, 1561 (S.D. Ga. 1995) (noting "[t]he Supreme Court's mandate that courts follow a state's historical legislative districting principles").

and he did not even review any of the plans developed in that process, other than the final adopted one. (Ely Report [Dkt. #39-12] at p. 2, ¶ 8; Ely Dep. (Skinnell Decl., Ex. 1) at 47:3-25.) Thus, his testimony regarding "traditional redistricting criteria" lacks sufficient foundation to be admissible.

2. Plaintiffs' Illustrative Map violates virtually every one of Kern County's traditional redistricting criteria.

However, even if his testimony were admissible, ample testimony from numerous witnesses contradicts Mr. Ely's claim to have complied with traditional districting criteria.

a. Division of an existing Latino opportunity district. The courts have recognized that maintenance of an existing minority opportunity district is a legitimate redistricting criterion,[9] and it is one that Kern County has adhered to since District 5's creation in 1991. (*See* Tr. of Second Hearing on July 5, 2011 (RJN, Ex. 2) at 5:14-6:3.) Yet, Plaintiffs' Illustrative Map divides up this established, effective voting Latino community in existing District 5, by separating Arvin from its historical community of interest with Lamont, Weedpatch, and southeast Bakersfield,[10] all of which have shared a supervisorial district for at least 25 years.

The violation of this criterion is especially egregious, because the County had good reason to believe in 2011 that if it did not maintain the (predominantly Latino) community of interest in District 5, it would face a challenge under the Voting Rights Act for that failure—indeed, many Latino speakers, including Dolores Huerta, strongly opposed far less dramatic changes to District 5. (*See* Krauter Decl., ¶ 13); *see also Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (U.S. 2015) (governing body need only have a "strong basis in evidence" for acting on the belief that maintaining a given majority-minority district is necessary to comply with the Voting Rights Act, "even if a court does not find that the actions were necessary for statutory compliance.").

b. Combination of all of east Kern in a single district. Since at least 1981, eastern

[9] *See LULAC*, 548 U.S. at 430-31 (Texas violated Section 2 by dismantling existing Latino opportunity district to create alternative majority-Latino district elsewhere); *Abrams*, 521 U.S. at 94 (district court did not err by maintaining existing minority opportunity district); *Gonzalez*, 601 Fed. Appx. at 261 (plaintiffs' plans failed to adhere to traditional districting principle of preserving an existing, effective minority-opportunity district); *Sensley*, 385 F.3d at 598 (same).

[10] *See* Ely Dep. (Skinnell Decl., Ex. 1) at 77:7-15; Oviatt Decl., ¶¶ 9-11, 13-19, 21-23 & 29; Christensen Decl., ¶¶ 7-8 & 12.

Kern County has been divided into two supervisorial districts. (*See* 1991 and 2001 Maps [Dkt. #39-11]; Krauter Decl., ¶ 7(a).) This is partly because a single east-side district (like Illustrative District 4) would be so unwieldly (*see* Nilon Decl., ¶ 24), and also because residents of these districts have long expressed their support for such a division. Indeed, proposals to combine them were one of the mostly vocally opposed suggestions in the 2011 process. (Krauter Decl., ¶ 18.) Yet, of course, Plaintiffs' Illustrative Map ignores this long-standing, traditional County redistricting policy.

c. Dramatic change. The courts have recognized that maintaining communities of interest and traditional boundaries—*i.e.*, by maintaining the core of existing districts and minimizing changes—is a legitimate redistricting criterion,[11] and it is one that Kern County has adhered to for decades. (Krauter Decl., ¶ 3; July 5, 2011 Staff Report [RJN, Ex. 13] at 2; Nilon Decl., ¶¶ 31, 34.) Indeed, the 2011 map is not dramatically different from the 2001 map, which is not dramatically different from the 1991 map or the 1981 map. This preserves relationships between elected officials and their constituents. Plaintiffs' Illustrative Map, however, radically reworks the existing boundaries, collapsing Districts 1 and 2 into a single district; carving up District 5 by removing Arvin; creating a whole new, entirely urban district on the westside of Bakersfield; and separating the traditional westside communities from their community of interest with Taft and Maricopa.

d. Undermining the balance of rural and urban interests on the Board. The Board has long sought to ensure that the supervisors have an incentive to look past the boundaries of the City of Bakersfield, which is the 800-pound gorilla in Kern County, by ensuring that only one district (District 3) is entirely within the metropolitan Bakersfield area; three of the five districts (Districts 2, 4 and 5) have a substantial portion of Bakersfield's population *plus* substantial non-Bakersfield population; and the fifth district (District 1) includes relatively little Bakersfield of population. (Krauter Decl., ¶¶ 3, 6, 7(e)-(f); Tr. of Aug. 2, 2011 Public Hearing [RJN, Ex. 3] at 40:10-42:9.) Plaintiffs' Illustrative Plan also undermines this careful balance, by creating three districts that are almost entirely within the Bakersfield metro area (Districts 2, 3 and 5), while creating two districts that have relatively little of Bakersfield (Districts 1 and 4). In a sense, adoption of a Map like

[11] *See LULAC*, 548 U.S. at 433; *Abrams*, 521 U.S. at 92; *Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 654 (D.S.C. 2002).

Plaintiffs' would likely be a Pyrrhic victory, because the supervisor in their new "agricultural" District 1 would face the prospect of being routinely outvoted by an urban majority.

e. Combining incumbents' residences in the same district. Though it does not take incumbent "protection"—and incumbents' political fortunes—into account in redrawing district lines, the County has historically sought to avoid pairing incumbents in the same district, a criterion the courts have held to be legitimate.[12] Plaintiffs' Illustrative Map disrupts incumbent-constituency relationships; a map combining the entire east side of the County requires pairing the two incumbent supervisors from Districts 1 and 2 (now Gleason and Scrivner) in a single district—here in proposed District 4. (*See* Tr. of Second Hearing on July 5, 2011 [RJN, Ex. 2] at 11:19-21.)

Plaintiffs criticize the means by which the Board of Supervisors sought to apply these criteria in 2011, and the tradeoffs that they made when the criteria conflicted. They urge that applying their own criteria—sweepingly defined communities of interest and "connectness within districts"—their own Map is better. This misunderstands the inquiry. "The test is not for the superiority of an alternative plan, but whether the legislative choice passes muster. Thus, even the existence of [an] objectively superior [supervisorial] plan, standing alone, is insufficient as a basis to find that the Board plan was not constitutionally or legally permissible. This is true whether the legislative plan fails to reflect the preferences of the minorities or of the court. The requirement that courts show deference to legislative policy decisions means that a federal court is precluded from substituting a plan that is perceived only to be 'better.'" *Seastrunk v. Burns*, 772 F.2d 143, 155 (5th Cir. 1985); *see also Miller*, 515 U.S. at 915 (cited above); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elec.*, 835 F. Supp. 2d 563, 592 (N.D. Ill. 2011) (three-judge VRA court) ("As illustrated by the Committee's proposed District 4, the state could have drawn a more compact majority-minority Latino district. The test, however, is not whether a better map can be drawn, but rather, whether the Committee has shown that there is a legal reason to set the legislator's map aside.").

In this case, the proper question is whether the Kern County Board of Supervisors had a legal *obligation* to adopt a map like Plaintiffs' Illustrative Map in 2011—not whether it might be

[12] *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

preferable as an abstract policy matter. For the Board to have had such an obligation, Plaintiffs must show that their Illustrative District 1 contains a single, cohesive minority population, rather than disparate population centers that are unified mainly on the basis of their "Latino-ness," and that their Plan complies with the County's traditional redistricting criteria. This, they have not done—at all, and certainly not beyond any reasonable dispute, as would be their burden for purposes of summary judgment. *See Celotex*, 477 U.S. at 325 (to obtain summary judgment, party with the burden of proof at trial must also show that any reasonable trier of fact would have to find in its favor).

V. PLAINTIFFS' EFFORTS TO IMPLY PROCEDURAL IRREGULARITIES IN THE 2011 REDISTRICTING PROCESS ARE BASELESS AND IRRELEVANT.

Finally, Plaintiffs implicitly seek to smear the County's 2011 redistricting process as somehow defective, implying that the purported "failure" to make CVAP data available was improper; that the County had some obligation to delay its process at Mr. Ochoa's demand; or that the introduction of Option 7 after the public workshops was inappropriate.

These insinuations are irrelevant—Plaintiffs have pointed to no law that the County broke in conducting its public process, and they have expressly disclaimed any allegation of intentional wrongdoing by the County. *See* Ochoa Stipulations, ¶ 1(c). But relevant or not, the innuendoes are also unfounded. Kern County has not historically made CVAP publicly available and was unable to do so this time. The MALDEF map contained evident defects, and Mr. Krauter was unable to create a second Latino-CVAP-majority district. And Option 7 was a reaction to the perceived inadequacies of the other maps after the July 5 hearings. The County's process was thorough and legal.

VI. CONCLUSION.

Plaintiffs' motion for partial summary judgment should be DENIED.

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Dated: April 18, 2017

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