

March 31, 2023

Chris Herren
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice

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Via email

Re: Request to investigate Texas Education Agency’s replacement of elected Houston ISD Trustees as potential violations of the Voting Rights Act and U.S. Constitution

Dear Chief Herren:

The undersigned organizations request, on behalf of HISD parents and voters Kenyette Johnson, Anna Chuter, Kourtney Revels, and Audrey Nath, that the Department of Justice investigate the Texas Education Agency (“TEA”) for potential violations of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the 14th and 15th Amendments to the U.S. Constitution. On March 15, 2023, TEA Commissioner Mike Morath announced that the TEA intends to replace the locally elected school board trustees that govern Houston Independent School District (“Houston ISD”, “HISD”, or the “District”) with a board of managers, who will be appointed by the Commissioner and will not have any electoral accountability to Houston voters.

TEA’s actions follow an established pattern of ousting locally elected school boards—almost exclusively in cities where a majority of voters and students are racial minorities. The TEA’s actions raise serious concerns that it is intentionally discriminating against Houston voters of color and denying or abridging their existing right to vote for HISD trustees. At least one Texas court has already recognized that these actions potentially violate Houston voters’ rights under the Voting Rights Act and the U.S. Constitution.¹

¹ In 2020, the Houston Federation of Teachers and individual plaintiffs filed a lawsuit against the TEA after it initially attempted to takeover HISD in 2019. The District Court held that Plaintiffs had sufficiently pleaded Section 2 Voting Rights Act claims against the TEA and Commissioner Morath, as well as 14th and 15th Amendment claims against Commissioner Morath. Order Mot. Dismiss, *Houston Federation of Teachers v. The Texas Education Agency*, 1:20-cv-574-LY, ECF No. 34 (Apr. 26, 2022). That lawsuit was subsequently nonsuited by Plaintiffs.

I. HISD Background

Houston ISD is the largest school district in Texas and is the eighth largest school district in the country.² HISD is made up of a vibrantly diverse student population, with a student body that is over 90% percent students of color.³ HISD's board of trustees are elected from single-member districts that are reflective of the Greater Houston area's similarly immense diversity. A clear majority of Houstonians are people of color.⁴ Historically, a majority of the trustees are elected as the candidate of choice for voters of color in their districts.

TEA annually evaluates school campuses and school districts using a series of metrics in three domains, which culminate in a letter grade of "A" through "F" to rate overall performance.⁵ A rating of "A," "B," or "C," is considered acceptable, while a rating of "D" or "F" is considered unacceptable and can lead to certain reform efforts under the Education Code.⁶ The current A-F rating system was first implemented in the fall of 2017.⁷ Most recently, the TEA has announced plans to again adjust the rating scale "because too many schools were hitting its 60 point benchmark"—a change that TEA has proposed would apply retroactively to prior campus grades.⁸

HISD schools were not rated during the 2017-2018 school year because of Hurricane Harvey.⁹ The TEA also paused all ratings during the 2019-2020 and 2020-2021 school years.¹⁰

II. Complainants are HISD parents and voters harmed by the TEA's actions

Kenyette Johnson is the parent of a student at Wheatley High School. Ms. Johnson identifies as Black and resides in Houston ISD District II. She votes regularly in school board elections.

² HISD, *Facts and Figures*, <https://www.houstonisd.org/achievements>.

³ *Id.*

⁴ U.S. Census Bureau, *QuickFacts Houston* (2022), <https://www.census.gov/quickfacts/houstoncitytexas>; U.S. Census Bureau, *Houston Independent School District, Texas* (2020), https://data.census.gov/profile/Houston_Independent_School_District,_Texas?g=9700000US4823640.

⁵ Tex. Educ. Code § 39.054; Tex. Educ. Agency, *2022 Accountability Manual for Texas Public School Districts and Campuses*, at 3–5, <https://tea.texas.gov/sites/default/files/2022-accountability-manual-full.pdf>; see also Hannah Luke, *Howdy, Partner: Challenges with State Takeovers and Charter Partnerships in Texas School Districts*, 74 SMU L. Rev. 815, 818 (2021).

⁶ See Tex. Educ. Code § 39A.001; § 39.0543.

⁷ See John Tanner, *The A-F Accountability Mistake*, Tex. Ass'n of Sch. Adm'rs at 2 (Nov. 2016), <http://www.futurereadytx.org/wp-content/uploads/2018/06/A-F-mistake.pdf>.

⁸ Bethany Erickson, *Dallas ISD Among 234 Districts Asking Texas to Pause Refresh of A-F Accountability Grades*, D Magazine (Mar. 15, 2023), <https://www.dmagazine.com/frontburner/2023/03/dallas-isd-among-234-districts-asking-texas-to-pause-refresh-of-a-f-accountability-grades/>.

⁹ Tex. Educ. Agency, *2018 Hurricane Harvey Provision*, <https://tea.texas.gov/texas-schools/accountability/academic-accountability/performance-reporting/2018-hurricane-harvey-provision>.

¹⁰ Tex. Educ. Code § 39.0546; Tex. Educ. Agency, *2019-20 School Report Card (SRC) Definitions* (2020), https://tea.texas.gov/sites/default/files/2020_SRC_definitions.pdf.

Anna Chuter is the parent of a student in the special education program at Roosevelt Elementary School, and is also employed as a teacher's assistant at the same school. Ms. Chuter identifies as Hispanic and resides in Houston ISD District I. She votes regularly in school board elections. Ms. Chuter appreciates that she can exercise her vote to elect school board trustees, as well as vote for better trustees if the community is unsatisfied with their actions. She has recently seen large improvements at Roosevelt Elementary and is now afraid of what the takeover will mean for her son's education.

Kourtney Revels is the parent of a student at B.C. Elmore Elementary School and resides in HISD Board of Education District II. Ms. Revels identifies as Black and voted in the most recent school board election. She is concerned that the takeover will worsen educational quality at her daughter's school and feels that it is motivated by politics. She fears that the takeover will result in public schools being converted to charter schools and that it will weaken her daughter's opportunity to access the public, neighborhood schools that are so valuable to her development.

Dr. Audrey Nath is the parent of a student at Wharton Dual Language Academy and resides in HISD Board of Education District VII. Dr. Nath identifies as Asian and votes regularly in school board elections. She is a pediatric neurologist who regularly treats patients who need accommodations in school, and she is concerned that special education programs for students with intellectual disabilities are already severely underfunded by the state. She worries that TEA's actions will result in inadequate resources for special education and changes for neurodivergent students who have difficulty adjusting to change.

III. TEA initiates takeover

TEA began seeking expanded authority over HISD in 2016, which escalated into an initial attempt to appoint a board of managers in 2019.¹¹ That takeover was enjoined after HISD filed a lawsuit in state court arguing TEA's actions were ultra vires under state law.¹²

Subsequently, in 2021, the Texas Legislature amended relevant portions of the Education Code in Senate Bill 1365.¹³ Many SB 1365 provisions were specifically tailored to permit the types of TEA action that were previously held to be ultra vires in HISD's lawsuit.¹⁴ Still, legislators maintained publicly that changes in SB 1365 would not affect the TEA's attempted takeover actions in HISD, which continued to be enjoined at the time. While explaining SB 1365 on the

¹¹ *Texas Educ. Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 7757365, at *1 (Tex. App. Dec. 30, 2020), *rev'd*, 660 S.W.3d 108 (Tex. 2023).

¹² *Id.* at *9.

¹³ Act of May 29, 2021, 87th Leg., R.S., Senate Bill 1365, <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01365F.pdf#navpanes=0>.

¹⁴ *Compare* SB 1365 Bill Analysis (June 8, 2021), <https://capitol.texas.gov/tlodocs/87R/analysis/pdf/SB01365F.pdf#navpanes=0> (“S.B. 1365 has been filed to address the specific provisions within the court’s ruling [in *TEA v. HISD*].”), with *Texas Educ. Agency v. Houston Indep. Sch. Dist.*, 2020 WL 7757365.

House Floor, House Sponsor and State Representative Dan Huberty stated that it would “not impact any current lawsuits that are going on, specifically in accountability issues. . . . [SB 1365] doesn’t impact anything specifically related to Houston ISD. [SB 1365] does not expand the power of the commissioner of education.”¹⁵ Nonetheless, in January of 2023, the Texas Supreme Court retroactively applied the new provisions of the Education Code implemented in SB 1365 to vacate the 2019 injunction.¹⁶ The Texas Supreme Court acknowledged that its decision in January was based on a stale factual record on appeal, recognizing that any further analysis would require consideration of new “factual developments within the District.”¹⁷

And indeed, circumstances in HISD have changed since the TEA initially attempted to impose a board of managers in 2019. In the intervening years, seven of the nine HISD Trustees have been newly elected in local elections, and in 2021 the board appointed a new superintendent, who TEA Commissioner Mike Morath has repeatedly praised.¹⁸ **In 2022, Houston ISD received an overall “B” rating from the TEA, scoring 88 out of 100 points on the state rating scale.**¹⁹ Since 2019, HISD has reduced the number of campuses that did not receive an acceptable rating from 50 to 10.²⁰ Overall, 94 percent of HISD’s 274 schools now receive an acceptable rating.²¹ Further, Wheatley High School—the school TEA has used to justify its takeover—received an acceptable rating for the most recent 2021-2022 school year.²²

Nonetheless, on March 15, 2023, TEA Commissioner Mike Morath sent a letter to Houston ISD stating that TEA will be replacing the locally elected HISD trustees with an appointed board of managers, and replacing the superintendent.²³ The appointed board of managers will assume all

¹⁵ *Legislative Session - Part 2*, Texas House of Representatives Video Player, at 3:59:03 (May 25, 2021), https://tlchouse.granicus.com/MediaPlayer.php?view_id=47&clip_id=20906.

¹⁶ *Texas Educ. Agency v. Houston Indep. Sch. Dist.*, 660 S.W.3d 108, 114 (Tex. 2023).

¹⁷ *Id.* at 119 (“We expect the parties to reconsider their positions and supplement the record in light of changes in the law and factual developments within the District.”).

¹⁸ Bailey Gallion, *What to know about the HISD school board trustees*, Hous. Chron (Mar. 15, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-school-board-trustees-houston-school-district-17841308.php>; Letter from Mike Morath, Commissioner, TEA, to HISD Superintendent and Board of Trustees 4 (Mar. 15, 2023), <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf> [hereinafter “March 15 TEA Letter”].

¹⁹ Texas Education Agency, *Preliminary Accountability Ratings 2021–2022* (Aug. 15, 2022), <https://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/8269/accountabilityreports/tearatings/2021-2022%20Preliminary%20Accountability%20Report.pdf>.

²⁰ Rebecca Carballo et al., *TEA takes over Houston ISD despite community outrage, academic gains*, Hous. Chron (Mar. 15, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/houston-tea-takeover-hisd-17821731.php>.

²¹ Texas Education Agency, *Preliminary Accountability Ratings 2021–2022* (Aug. 15, 2022), <https://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/8269/accountabilityreports/tearatings/2021-2022%20Preliminary%20Accountability%20Report.pdf>.

²² See *infra* Section VI (A).

²³ March 15 TEA Letter, <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf>.

powers and duties normally assigned to elected trustees.²⁴ The board of managers are accountable only to Commissioner Morath, an unelected official appointed by Governor Greg Abbott.²⁵

IV. HISD’s elected Board of Trustees represent the diverse Houston community

The Houston ISD Board of Trustees is made up of nine members, each elected from single-member districts in non-partisan races. Before these single-member districts were introduced in HISD in 1975, Latino and African-American preferred candidates were rarely successful in at-large trustee elections.²⁶ To this day, minority-preferred candidates for statewide office in Texas are rarely successful. The TEA’s plan to appoint board members to replace the current minority-preferred candidates elected to the Board of Trustees will override the preferences of local voters of color with those of the statewide electoral majority.

Of HISD’s nine single-member trustee districts, at least five have a heavily majority-minority voting population and elect the minority community’s preferred candidate. As illustrated below, three districts have been historically majority-Latino and two have been historically majority-African American. In each of these districts, voters of color are sufficiently numerous and compact to form a majority and vote as politically cohesive blocs to elect their preferred candidates.²⁷

As recently as 2021, the Department of Justice acknowledged that population growth in Harris County has been driven by growth in the Latino community, while the Anglo population has been simultaneously decreasing.²⁸ It additionally noted that multiple courts in the last decade have found that voting is racially polarized in Harris County.²⁹

The currently elected HISD Board of Trustees represent the diverse voters across the Greater Houston area and the values and priorities of voters in their districts.³⁰ For example:

²⁴ Tex. Educ. Code. § 39A.201.

²⁵ *Id.* § 39A.207; *Id.* § 7.051.

²⁶ Rebecca Carballo, *Houston ISD set to redraw trustee district boundaries to reflect population changes*, Hous. Chron. (Nov. 18, 2022), <https://www.houstonchronicle.com/news/houston-texas/education/article/Houston-ISD-redraws-trustee-district-boundaries-17587559.php> (“Initially, the board was made up of seven at-large positions. In 1975, the board requested a legislative change to replace seven at-large positions with single-member seats to ensure Black trustees could be elected to serve on the board. Two more board positions were added in 1981 so the growing Hispanic population would have the opportunity to be represented, as well.”).

²⁷ Efforts are also underway to update trustee districts to even more accurately represent communities of color throughout HISD, after the decennial census in 2020. Shawn Arrajj, *Advocates call for keeping communities in tact as Houston ISD redraws trustee districts*, Community Impact (Jan. 31, 2023), <https://communityimpact.com/houston/bellaire-meyerland-west-university/education/2023/01/31/advocates-call-for-keeping-communities-in-tact-as-houston-isd-redraws-trustee-districts/>.

²⁸ Complaint at 21, *United States of America v. State of Texas*, 3:21-cv-00299, 2021 WL 5772999 (W.D. Tex.).

²⁹ *Id.* at 26 (citing *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 754-75 (S.D. Tex. 2013)).

³⁰ Bailey Gallion, *What to know about the HISD school board trustees*, Hous. Chron. (Mar. 15, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-school-board-trustees-houston->

District I is a majority Latino district that has historically elected the Latino-preferred candidate. It is currently represented by Trustee Elizabeth Santos, who was elected in 2017 and is Latina.

District II is a majority African American district and has historically elected the minority-preferred candidate. It is currently represented by Kathy Blueford-Daniels, who was elected in 2019 and is African American.

District III is a majority Latino district that has historically elected the Latino-preferred candidate. It is currently represented by Dani Hernandez, who was elected in 2019 and is Latina.

District IV is a majority African American district that has historically elected the African American-preferred candidate. It is currently represented by Dr. Patricia Allen, who was elected in 2019 and is African American.

District VIII is a majority Latino district, which has historically elected the Latino-preferred candidate. It is currently represented by Judith Cruz, who was elected in 2019 and is Latina.

Finally, District IX is a majority African American district and has historically elected the African American-preferred candidate. It is currently represented by Myrna Guidry, who was elected in 2021 and is African American.

V. Appointing replacements for the Board of Trustees is undemocratic and unlawful

Replacing the Board of Trustees will give the TEA indefinite power over HISD without any mechanism for Houston voters to hold the TEA and its appointed board members accountable. Although school boards are not required to be elected bodies, once “a state has implemented an electoral system as the default method of selecting public officials and granted a specific franchise to its citizens, voter protections found in federal statutory and constitutional law limit state discretion.”³¹ The appointment of a replacement board of managers in HISD violates these protections guaranteed to Houston voters.

school-district-17841308.php; See *Houston Independent School District Board of Trustees 2022-2023*, Houston ISD, <https://www.houstonisd.org/site/handlers/filedownload.ashx?moduleinstanceid=157229&dataid=358224&FileName=Trustee%20Districts%202022-2023%20-%20Updated%20February%202023.pdf> (outlining school district boundaries); COH Planning Department Census Map Viewer, Planning and Development Department <https://mycitymaps.arcgis.com/apps/MapSeries/index.html?appid=0261236530b7493c9eea0b484e7a4135> (sorted by “Census Blocks” and “Race/Ethnicity”).

³¹ Order Mot. Dismiss, *Houston Fed’n of Teachers v. The Tex. Education Agency*, 1:20-cv-574-LY, ECF No. 34 (Apr. 26, 2022) (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966)).

An appointed board of managers will replace elected trustees and assume all oversight powers and duties normally assigned to trustees regarding the school district's management.³² Under state law, there are effectively no limitations on who Commissioner Morath may appoint to the Board of Managers.³³ Houston voters do not select these board members and cannot remove them. Only Commissioner Morath can decide to replace board members.³⁴ While Commissioner Morath asserts that the board of managers "is not permanent," state law allows Commissioner Morath to extend the board of manager's placement every two years, *indefinitely*.³⁵

Although HISD trustees will be stripped of all authority, local elections will continue to be held for trustees while the board of managers is in place.³⁶ This will result in sham elections, in which Houston residents vote for and elect trustees in single member districts, who have no power under state law, while a state agency instead appoints board members without any public input.

Families and voters in HISD are rightfully concerned that the TEA takeover will "erode the democratic process, deepen inequities in education and drain funding from public schools," as well as end HISD's responsiveness to their concerns.³⁷

VI. TEA's justifications for the takeover are flawed and meant to disguise discriminatory intent

TEA Commissioner Morath offers two justifications for the TEA's takeover, both of which are red herrings based on stale data and information.³⁸ Importantly, Commissioner Morath erroneously argues that under state law the TEA *must* appoint a board of managers over HISD—an argument not reflected in state law or supported by the Texas Supreme Court's January 2023 decision.³⁹ Instead, Commissioner Morath is selectively appointing a board of managers in HISD, without applying similar discretion in other school districts that have lower overall ratings than HISD. These flawed justifications for the TEA's actions would lead to the removal of locally elected trustees for an indefinite period, taking away the voice and power of local voters of color.

³² Tex. Educ. Code § 39A.004.

³³ *Id.* § 39A.204.

³⁴ *Id.* § 39A.207.

³⁵ *Id.* § 39A.208.

³⁶ *Id.* § 39A.202 ("[T]he powers of the board of trustees of the district are suspended for the period of the [board of managers] appointment."); *Id.* § 39A.208 ("[T]he members of the board of trustees do not assume any powers or duties after the election until the appointment of the board of managers expires.").

³⁷ Anna Baumann, *HISD parents worry state takeover would deepen inequities, drain funding: 'Everybody's scared'*, Hous. Chron (Mar. 12, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/tea-hisd-takeover-parents-teachers-reaction-17826732.php>.

³⁸ March 15 TEA Letter, <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf>.

³⁹ See *TEA v. HISD*, 660 S.W.3d at 117-18 (relying on other grounds to vacate HISD's injunction).

A. Wheatley High School received an acceptable rating in 2022 and therefore TEA action is not required or permitted by the Education Code

The first supposed justification is that a single district campus, out of HISD's 274 school campuses, allegedly received too many consecutive unacceptable academic ratings. In reality, the TEA is retroactively justifying an undemocratic overhaul of the entire school district based on a single school's stale academic ratings that have since improved and no longer require or allow TEA action.

Under state law, if a school campus receives five consecutive unacceptable ratings, the TEA must either close the school or appoint a board of managers to the district.⁴⁰ TEA has justified its takeover of HISD based on the fact that Wheatley High School has previously underperformed in five consecutive ratings. However, the TEA cites outdated ratings, including some from almost a decade ago. Wheatley High School has recently improved its performance and received an acceptable academic rating for the 2021-2022 school year, scoring only two points away from a "B" rating.⁴¹ No legal authority indicates that state law allows TEA to take over a school district in such a situation.

And yet, TEA Commissioner Morath relies only on Wheatley's unacceptable ratings prior to 2019, turning back the clock to justify the TEA's new planned actions.⁴² He also jumps through hoops to try to undermine Wheatley's recent success and cherry pick other areas for improvement in HISD⁴³—none of which are bases under state law for overtaking a school district. Instead, each of these arguments reveal that the TEA is starkly outcome-oriented towards accomplishing its longstanding goal of taking over HISD.

⁴⁰ Tex. Educ. Code § 39A.111.

⁴¹ Texas Education Agency, *Preliminary Accountability Ratings 2021–2022* at 1, 12 (Aug. 15, 2022), <https://www.houstonisd.org/cms/lib2/TX01001591/Centricity/domain/8269/accountabilityreports/tearatings/2021-2022%20Preliminary%20Accountability%20Report.pdf> (Wheatley's overall scaled score in 2022 was 78).

⁴² March 15 TEA Letter, <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf>.

⁴³ *See id.* Although Commissioner Morath's letter points to other isolated ratings in HISD in the 2021-2022 school year, these are legally insufficient justifications for a district takeover in part because they reflect schools still recovering from the Covid-19 pandemic. HISD issued only partial ratings for the 2021-2022 school year because of the Covid-19 pandemic, and as a result TEA Commissioner Morath stated that schools that did not receive an acceptable rating in the 2021-2022 school year would "not necessarily [be] subject campuses to interventions. They did not formally receive a D or F rating because we want to make sure the system has time to recover." Jennifer Radcliffe et al., *Texas issues first post-COVID school report cards*, *Hou. Chron* (Aug. 15, 2022), <https://www.houstonchronicle.com/news/houston-texas/education/article/texas-schools-covid-report-card-17372203.php>. State law also specifies that "Not Rated" is usually given in instances where "the performance indicators would not accurately reflect quality of learning and achievement for the district or campus," and "an overall performance rating of 'Not Rated' is not included in calculating consecutive school years of unacceptable performance ratings." Tex. Educ. Code § 329.054.

As demonstrated below, to justify its takeover, TEA must reach back a decade while ignoring Wheatley’s recent improvement:

2013-2014: Unacceptable rating	2018-2019: Unacceptable rating
2014-2015: Unacceptable rating	2019-2020: No rating (Covid-19 Pandemic)
2015-2016: Unacceptable rating	2020-2021: No rating (Covid-19 Pandemic)
2016-2017: Unacceptable rating	2021-2022: Acceptable rating (78 out of 100)
2017-2018: No rating (Hurricane Harvey)	

No legal authority supports Commissioner Morath’s argument that “Wheatley’s acceptable rating this year does not abrogate [his] prior legal requirement to intervene” under Texas Education Code 39A.111.⁴⁴ Notably, the Texas Supreme Court was aware of and considered Wheatley’s improved acceptable rating, but its recent decision in *TEA v. HISD* is silent on whether Section 39A.111 can apply retroactively after a subsequent acceptable rating.⁴⁵ House sponsor and State Representative Dan Huberty explained during debate on SB 1365 that, with regard to consecutive unacceptable ratings, an acceptable C rating in fact “resets the clock” under the amended Education Code.⁴⁶ In contrast, the TEA’s interpretation of the Education Code would allow it to appoint a board of managers at any time, even after a school had received acceptable ratings for many years in a row. However, Wheatley’s acceptable rating in 2022 should effectively reset the clock and the TEA is not, as Commissioner Morath asserts, required to take unprecedented action based on ratings that are nearly four years old, at their most recent.

Further, state law specifies that a board of managers appointed on this basis may only be removed if the school campus at issue receives an acceptable rating for two consecutive years.⁴⁷ But the TEA has stated that it only plans to return control to locally elected trustees only after *no* schools in the district have received unacceptable ratings for multiple years⁴⁸—going beyond the requirements of state law to retain power over HISD even longer. Either metric means that poor management by the appointed board of managers could lead to their indefinite placement without any recourse for local voters.

⁴⁴ See March 15 TEA Letter at 3, <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf>.

⁴⁵ 2022 WL 11387704 (Tex.) (Oral Argument) (“JUSTICE JANE N. BLAND: Does the status of the two underperforming schools, the current status matter? I know that you had sent in a letter that, I think, it’s Wheatley, is now acceptable. And then also there’s a new superintendent. So what impact do these more recent events have on our analysis, if any?”); See *TEA v. HISD*, 660 S.W.3d at 118 (relying on other grounds).

⁴⁶ House Journal at 4117 (May 26, 2021)
<https://journals.house.texas.gov/hjrn/87r/pdf/87RDAY56FINAL.PDF#page=32>.

⁴⁷ See Tex. Educ. Code § 39A.209(a).

⁴⁸ Rebecca Carballo, *Here’s what Houston ISD needs to do to regain local control after the TEA state takeover* (Mar. 16, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-regain-local-control-tea-takeover-17839859.php>.

B. TEA has discretion whether to apply a board of managers based on a prior appointed conservator, which would be inappropriate in HISD

The TEA’s second justification is that it has had a conservator assigned to an HISD campus for the last two school years. The Education Code, as amended by SB 1365, allows the TEA Commissioner to appoint a board of managers if “for two consecutive school years, including the current school year, a school district has had a conservator . . . assigned to the district or a district campus.”⁴⁹ As Commissioner Morath explains it, the TEA appointed a conservator to “ensure and oversee district-level support for Kashmere [High School],” but admits that until recently the court injunction preventing the HISD takeover also “limited the authority of the previously placed conservator.”⁵⁰ Indeed, the Texas Supreme Court observed that “[i]n granting a temporary injunction in favor of the District, the trial court . . . prohibited the Commissioner and his appointed conservator from continuing to supervise the school district pending a final trial.”⁵¹ Therefore, it is questionable whether Kashmere’s conservator can serve as the proper basis for a discretionary decision to overtake the District.

Even assuming that the conservator’s actions over the last two years allow the TEA’s actions under state law, Commissioner Morath’s decision to appoint a board of managers under this provision is discretionary.⁵² And Commissioner Morath is choosing to replace HISD’s board of trustees based on an appointed conservator that has had limited authority for the past several years. In sum, the TEA is engaging in circular and outcome-oriented logic to justify its takeover of HISD: it is using its own past action in appointing a conservator to justify its future action of overtaking the District, regardless of the power or effectiveness of the conservator.

VII. TEA targets majority-minority school districts

The TEA has appointed a board of managers or otherwise preempted local control in at least 10 other public-school districts.⁵³ The TEA also threatened a takeover in at least 5 other districts.⁵⁴ All but one of these 15 districts were majority Black or Latino.⁵⁵ HISD’s student population is over 90% students of color and most of its students are economically disadvantaged.⁵⁶

⁴⁹ Tex. Educ. Code § 39A.006.

⁵⁰ March 15 TEA Letter, <https://tea.texas.gov/sites/default/files/hisd-coe-correspondence.pdf>.

⁵¹ *TEA v. HISD*, 660 S.W.3d at 110.

⁵² Tex. Educ. Code § 39A.006 (“[T]he commissioner *may* appoint a board of managers.”) (emphasis added).

⁵³ Hannah Dellinger, *With an HISD state takeover looming, here's how the TEA has taken over other Texas school districts*, Hous. Chron. (Mar. 6, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/tea-takeover-state-hisd-houston-school-district-17818226.php>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

HISD is by far the largest school district that TEA will have taken over, with a student population of over 194,000.⁵⁷ School districts previously taken over by the TEA range in size from less than 100 students to approximately 50,000 students.⁵⁸

Other school districts with lower ratings than HISD have not been targeted for TEA takeovers. In 2022, Houston ISD received an overall “B” rating, scoring 88 points on the state rating scale. This score was higher than hundreds of other school districts in the state. Notably, there were at least 40 school districts in Texas with less than 50% students of color, where the school district received a “C” or did not receive an acceptable rating in 2022.⁵⁹ The TEA is not appointing a board of managers in any of those school districts.

TEA’s history of taking over majority-minority districts is consistent with a nationwide pattern of school district takeovers that target communities of color. About 85% of state takeovers across the country affect majority Black and majority Latino school districts.⁶⁰ School districts governed by and serving a majority Black population are 11 times more likely to have the local school board abolished by the state than majority white serving districts.⁶¹ State takeovers consistently lead to worse outcomes for these students of color, destabilize school districts, increase teacher and staff turnover, and often lead to increased racial segregation within school districts.⁶²

⁵⁷ HISD, *Facts and Figures* (2021-2022), https://www.houstonisd.org/site/handlers/filedownload.ashx?moduleinstanceid=48525&dataid=362423&FileName=Pace_46017_2021-2022_Facts_Figures_proof_3.pdf.

⁵⁸ Hannah Dellinger, *With an HISD state takeover looming, here’s how the TEA has taken over other Texas school districts*, Hous. Chron. (Mar. 6, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/tea-takeover-state-hisd-houston-school-district-17818226.php>.

⁵⁹ Based on available data, these school districts include Bellville ISD, Medina ISD, Leary ISD, Blanket ISD, Rusk ISD, Bellevue ISD, Sivells Bend ISD, Jonesboro ISD, Ranger ISD, Italy ISD, Three Way ISD, Bluff Dale ISD, Bonham ISD, Lefors ISD, Collinsville ISD, Denison ISD, Silsbee ISD, Whitney ISD, Coahoma ISD, Campbell ISD, Hawley ISD, Kemp ISD, North Lamar ISD, Jefferson ISD, Matagorda ISD, Frost ISD, Springtown ISD, Rains ISD, Moran ISD, Excelsior ISD, Trinity ISD, Woodville ISD, Wills Point ISD, Yantis ISD, Bandera ISD, Meridian ISD, Kopperl ISD, Evant ISD, Dawson ISD, Murchison ISD, and Coldspring-Oakhurst CISD.

See TEA, *Multi Year Accountability Rating List* (2022) available at <https://tea.texas.gov/media/document/333186>; Tex. Tribune School District Demographic Data from 2020-2021 available at <https://schools.texastribune.org/districts/>.

⁶⁰ Terrence Wilson & Chloe Latham Sikes, Intercultural Dev. Rsch. Ass’n, *Another Zero-Tolerance Failure--State Takeovers of School Districts Don’t Work 2* (Mar. 6, 2020), <https://www.idra.org/wpcontent/uploads/2020/08/Another-Zero-Tolerance-Failure-State-Takeovers-IDRA-Issue-Brief-2020.pdf>.

⁶¹ *Id.*

⁶² *Id.*

VIII. TEA's Actions Violate Section 2 of the Voting Rights Act

The TEA's actions violate the Voting Rights Act because they prevent Houston voters of color from having an opportunity to meaningfully elect their candidates of choice for school board trustees. Section 2 of the Voting Rights Act ("Section 2") prohibits voting practices or procedures that result "in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301. It applies where members of a historically disenfranchised group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

"A State cannot . . . manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race." *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 108 (1967); *see also Butts v. Aultman*, 953 F.3d 353, 358 (5th Cir. 2020) ("[S]tates are not permitted to manipulate the implementation of appointment structures in order to violate the constitution.").

Because Texas already grants local school districts the ability to self-govern through a locally elected board of trustees, "disenfranchisement of voters for an allegedly constitutionally and statutorily prohibited reason cannot avoid the Voting Rights Act simply by replacing an electoral system with an appointive one." Order Mot. Dismiss, *Houston Federation of Teachers v. The Texas Education Agency*, 1:20-cv-574-LY, ECF No. 34 (Apr. 26, 2022) (citing *Harper*, 383 U.S. at 665).

A Section 2 claim must meet three threshold requirements. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *see also NAACP v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001). These so-called *Gingles* requirements are: (1) the affected minority group must be sufficiently large and geographically compact enough to constitute a voting age majority in a district; (2) the minority group must be politically cohesive; and (3) the majority must vote as a bloc, enabling it, absent special circumstances, to defeat the minority group's preferred candidate. *Fordice*, 252 F.3d at 366 (citing *Gingles*, 478 U.S. at 50–51). After these three requirements are met, a Section 2 claim also requires a showing that "under the 'totality of the circumstances,' [the protected class does] not possess the same opportunities to participate in the political process and elect representatives of their choice enjoyed by other voters." *Id.*; 52 U.S.C. § 10301(b).

The TEA's removal of locally elected HISD trustees results in a denial or abridgement of the right to vote of Houston voters in those trustee districts, on account of their race, color, or ethnicity. The TEA's actions deny Houston voters of color an equal opportunity to participate in the political process and to elect representatives of their choice.

Each of the *Gingles* preconditions for a Section 2 claim are met because HISD board of trustee elections are racially-polarized and because the TEA takeover will allow the statewide Anglo voting bloc to oust the preferred candidates of HISD voters of color. Voters of color are sufficiently numerous, compact, and politically cohesive in HISD elections such that they vote as

a bloc for their preferred candidates, which satisfies the first and second *Gingles* requirements. As discussed above, five out of the nine single member trustee districts elect the minority community's preferred candidate. These single member districts allow communities of color to elect their candidates of choice. Because of the TEA's actions in HISD, the will of voters of color in the Greater Houston area will be superseded by the will of Anglo voters in Houston and across Texas, who vote as a bloc to elect their preferred candidates for statewide elected officials—who in turn appoint the TEA commissioner.⁶³ Accordingly, Anglo voters in HISD and statewide are given outsized electoral power through the TEA's actions, at the expense of Houston voters of color, which satisfies the third *Gingles* requirement.

Further, the TEA's replacement of elected officials in this impermissible manner disproportionately affects voters of color in the five trustee districts that will no longer be able to elect their candidates of choice. Proportionally, the TEA's disenfranchisement of HISD voters affects voters of color more because it eliminates more of their elected leaders.

The totality of circumstances in Houston and HISD indicate that Houston voters of color do not have the same opportunity to participate in the political process as Anglo voters in Houston and statewide. HISD and the Greater Houston area have a long history of electoral discrimination. *See* Complaint at 40–42, *United States of America v. State of Texas*, 3:21-cv-00299, 2021 WL 5772999 (W.D. Tex.). Broadly speaking, “Texas has a long, well-documented history of discrimination that has touched upon the rights of African–Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439–40 (2006). Until single-member districts were implemented in 1975 for HISD trustees, Latino and African American preferred candidates were rarely successful in HISD elections.⁶⁴ In fact, HISD remained under a court-ordered desegregation plan until 1983. *Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 779 (S.D. Tex. 2013) (citing *Ross v. Houston Independent Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983)). Courts have previously recognized that the totality of circumstances indicate limited electoral opportunities for Houston voters of color. *Id.* at 778–89.

Today, the TEA's board of managers dilutes minority voting strength by denying HISD voters of color an equal opportunity to participate in the political process and to elect

⁶³ *See, e.g.*, Complaint at 40, *United States of America v. State of Texas*, 3:21-cv-00299, 2021 WL 5772999 (W.D. Tex.) (“Voting in Texas continues to be racially polarized throughout much of the State. By one recent estimate, Anglo voters and Latino voters in Texas differ in their support for statewide candidates by 30-40 percentage points. . . This perpetuates a longstanding pattern of statewide polarization previously recognized by the Supreme Court.”) (citing *Veasey v. Abbott*, 830 F.3d 216, 258 (5th Cir. 2016) (en banc) and *LULAC v. Perry*, 548 U.S. 399, 427 (2006)); Quinnipiac University Poll, *Texas Governor's Race: Abbott Leads O'Rourke 53% - 46%* (Sept. 28, 2022), <https://poll.qu.edu/poll-release?releaseid=3857> (“The race for the top job in Austin leans toward Abbott, who has very strong support from white Texans, particularly white men, while O'Rourke has overwhelming appeal among Black voters . . .”).

⁶⁴ Rebecca Carballo, *Houston ISD set to redraw trustee district boundaries to reflect population changes*, Hous. Chron. (Nov. 18, 2022), <https://www.houstonchronicle.com/news/houston-texas/education/article/Houston-ISD-redraws-trustee-district-boundaries-17587559.php>.

representatives of their choice. The TEA’s appointed board of managers will effectively rubber-stamp the statewide Anglo voters’ preferred educational policies. Elected trustees will be relegated to powerlessness, and trustees and Houston voters alike will have no electoral recourse for holding the TEA’s appointed board members accountable.⁶⁵ The appointed board members will be accountable only to the TEA and the statewide office holders who appoint TEA officials.

Accordingly, removing the HISD board of trustees violates Section 2 of the Voting Rights Act by minimizing the ability of voters of color to have an equal opportunity to participate in the political process to elect representatives of their preference and enact the educational policies they prefer in their respective local communities.

IX. TEA’s actions violate the 14th and 15th Amendments

The TEA’s actions intentionally disenfranchise voters of color in the Greater Houston area and discriminate against them on the basis of race and national origin in violation of the 14th and 15th Amendments to the U.S. Constitution. The Equal Protection Clause of the Fourteenth Amendment protects against the “unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike” because of intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). The Fifteenth Amendment further protects against racially motivated official action that infringes upon the right to vote. *United States v. Uvalde Consol. JSD*, 625 F.2d 547, 552 (5th Cir. 1980).

“[A]lthough a state may constitutionally provide for the appointment of school board officials rather than their election, once it decides to fill such positions by election, the denial of the vote to any group of citizens must be tested by strict scrutiny.” *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (citing *Kramer v. Union Free School District*, 395 U.S. 621, 628–29 (1969)); *Butts v. Aultman*, 953 F.3d 353, 359 (5th Cir. 2020) (while “states are not obligated to provide for school board elections . . . once they decide to do so, the selective extension of the right to vote is subject to ‘exacting judicial scrutiny’”).

The TEA’s actions raise significant concerns that it is purposefully and discriminatorily targeting HISD because it has over 90% students of color who are potential future voters, it is in the state’s largest city where voters of color are the majority, a majority of its trustees are elected

⁶⁵ HISD Trustees and voters will have no ability to provide electoral feedback or accountability to the appointed board, in contrast to other analogous situations that courts have considered where there was at least some electoral accountability for appointed local boards. *Compare Tex. Educ. Code Sec. 39A.20(a)* (“[T]he members of the board of trustees do not assume any powers or duties after the election until the appointment of the board of managers expires.”), *and id. Sec. 39A.20(c)* (“[T]he commissioner may extend the authority of the board of managers for a period of up to two additional years), *with Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 355 (6th Cir. 2002) (“Five years after the appointment of a school reform board, the citizens of a qualifying school district are able to vote to determine whether to retain the reform board, the CEO, and the structure established . . .”), *and Phillips v. Snyder*, 836 F.3d 707, 721 (6th Cir. 2016) (“Local officials under PA 436 may, by a two-thirds vote, petition for removal of an emergency manager before the emergency manager has served for eighteen months. . . . Furthermore, after the emergency manager has served for eighteen months, the same two-thirds vote of the local government removes the emergency manager.”).

as the preferred candidate of voters of color in racially polarized elections, and its trustees enact and enforce the educational policies preferred by the racially diverse and growing voting-age communities they represent and serve.⁶⁶ As discussed above, the TEA's actions disproportionately affect Houston's voters of color. Under state law, the TEA's appointment of a board of managers is a discretionary choice, which it is selectively employing to target HISD.⁶⁷ The TEA's choice to appoint a board of managers is disguised behind the TEA's manufactured justifications based on outdated circumstances in HISD. But the TEA's true intent is to remove the power of Houston voters of color, who pose a threat to the state's current political power structure and the statewide voters' preferred policies.

While the TEA has relentlessly tried to take over HISD for the better part of a decade, the TEA has not made similar efforts to take over other districts made up of Anglo students and voters. The TEA has a demonstrated history of intentionally and almost exclusively targeting school districts that are mostly students of color. In 2022, there were numerous school districts with lower ratings than HISD—including at least 40 school districts that are not majority students of color—but the TEA has remained singularly focused on replacing only HISD's elected trustees.⁶⁸

Although HISD has demonstrated improvement and has an overall "B" rating, the TEA continues to point to outdated information from over three years ago and cherry pick issues in the district to justify its extreme decision to appoint a board of managers indefinitely, in place of elected trustees. The TEA's extraordinary efforts to justify imposing a board of managers are not reflected in its treatment of districts with a majority of white students and white voters. Instead, the TEA is continuing its pattern of removing locally elected trustees only in school districts with students of color and voters of color. This intentional and purposeful discrimination violates the 14th and 15th Amendments.

⁶⁶ See, e.g., Complaint at 21, *United States of America v. State of Texas*, 3:21-cv-00299, 2021 WL 5772999 (W.D. Tex.) ("The enacted 2021 Congressional plan situates one of the two new Texas Congressional districts in Harris County, in and around Houston, due to massive population growth in the area. Most of that population growth occurred within the Latino community, but Texas crafted the new 38th Congressional district to give Harris County's shrinking Anglo population control of yet another Congressional seat.").

⁶⁷ See *Supra* Section VI.

⁶⁸ *Supra* fn.59.

Conclusion

We urge the Department of Justice to investigate and take any other action necessary to prevent the TEA from violating the Voting Rights Act and the 14th and 15th Amendments by replacing the locally elected HISD board of trustees.

The need for an investigation and action is urgent and time is of the essence. The TEA has already announced its plans, begun the search process for new board members, and intends to appoint new board members beginning on June 1, 2023.

Sincerely,

/s/ Ashley Harris

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