UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALPHA PHI ALPHA FRATERNITY INC., et al., *Plaintiffs*, vs. BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia. *Defendant*.	CASE NO. 1:21-CV-5337-SCJ

PLAINTIFFS' SUPPLEMENTAL SUBMISSION IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Supreme Court in *Allen v. Milligan* unambiguously reaffirmed the *Gingles* framework in its entirety—a framework that has governed the Court's Section 2 jurisprudence for nearly 40 years. No. 21-1086, 2023 WL 3872517, at *9-10 (U.S. June 8, 2023). The Court upheld "the law as it exists," rejected "Alabama's attempt to remake [the Court's] §2 jurisprudence anew," and refused to import a new "race-neutral" benchmark into the applicable legal standard for Section 2 vote dilution claims. *Id.* at *11-15, *19. It further upheld a preliminary injunction order requiring Alabama to draw a remedial map with a new congressional district in which Black voters will have an opportunity to elect a representative of their choice, based on legal standards that mirror those applied by this Court during the preliminary injunction phase of this case and evidence that is strikingly similar to the record in this case—including *Gingles* 1 illustrative maps drawn by Mr. Cooper that meet or beat the enacted maps on various objective metrics of compactness. *Id.* at *10; *see also id.* at *15-16 (Opinion of Roberts, C.J.).

The *Milligan* decision puts the final nail in the coffin for Defendant's summary judgment motion. As Plaintiffs have already explained, the extensive record in this case could easily support a factfinder's conclusion that each of the

Gingles preconditions is satisfied under the established vote dilution standard. *See* Pl.'s Opp. to Def.'s MSJ [Dkt. 244] ("MSJ Opp.") at 19-35; *see also, e.g.*, *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015) (vacating summary judgment and noting trial courts' "special vantage point" in Section 2 vote dilution cases, which involve claims that are "[n]ormally . . . resolved pursuant to a bench trial"). Defendant's last hope was that the Supreme Court might change the law, such that their fact-based, credibility-dependent trial defenses might turn into legal arguments that could serve as a basis for summary judgment. That did not happen.

Instead, *Milligan* unequivocally reaffirmed the established standard, under which this Court has already concluded Plaintiffs are likely to succeed on the merits. *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1266 (N.D. Ga. 2022). And the record Plaintiffs have amassed for trial is even stronger than what was before the Court at the preliminary injunction phase. MSJ Opp. 1-35.

Summary judgment should be denied, and this case should proceed to trial.

ARGUMENT

I. Under *Milligan*, Defendant's Summary Judgment Motion on *Gingles* 1 Must Be Denied

Defendant's argument on *Gingles* 1 boils down to the assertion that Mr. Cooper was "improperly focused on race" in creating his Illustrative Plans, Def.'s Br. in Supp. of MSJ [Dkt. 230-1] ("MSJ Br.") at 4; *see also* Oral Arg. Tr. [Dkt. 260] 13:20-21. As explained in detail already in Plaintiffs' opposition brief and at argument, there is extensive record evidence that a factfinder could credit in rejecting that proposition.

That evidence includes the undisputed fact that Mr. Cooper's maps meet or beat the Enacted Plans on numerous objective metrics, including average compactness scores, minimum compactness scores, county splits, precinct splits, and municipal splits—all while creating additional, compact, new Black-majority districts across the State of Georgia. *See* MSJ Opp. 11-12.[1] The evidence also includes Mr. Cooper's extensive deposition testimony regarding the numerous factors other than race that he considered in crafting each of his new illustrative

[1] Citing Pl.'s Statement of Additional Facts [Dkt. 246] ("SOAF") ¶¶ 93-98 and Dep. of John Morgan [Dkt. 236] ("Morgan Dep.") 277:15-23, 278:16-279:3 and Report of William Cooper Pt. 1 [Dkt. 237-1] ("Cooper Report Pt. 1") ¶ 114, Fig. 20 & ¶ 186 Fig. 36; SOAF ¶ 204 and Cooper Report Pt. 1 ¶ 9.

Black-majority districts. *See* MSJ Opp. 13-16[2]; *see also* Oral Arg. Tr. 23:9-25:5. It further includes Mr. Cooper's testimony that his approach was to balance all of the traditional districting principles by considering, among other things, compactness, population equality, political subdivision splits, communities of interest, socioeconomic information, and incumbent information. *See* MSJ Opp. 9-10.[3] It further includes his testimony that maximizing Black-majority districts is improper, Pl.'s Statement of Additional Facts [Dkt. 246] ("SOAF") ¶ 92; Dep. of William Cooper [Dkt. 221] ("Cooper Dep.") 41:17-42:5, and that he used only

[2] Citing SOAF ¶ 116 and Cooper Report Pt. 1 ¶ 105, Fig. 17D; SOAF ¶¶ 118-119 and Cooper Dep. 139:14-19 and Cooper Report Pt. 1 ¶ 127; SOAF ¶¶ 122-126 and Cooper Dep. 143:8-17, 143:18-23, 144:4-8, 144:20-24, 185:8-14 and Cooper Report Pt. 1 ¶¶ 18, Fig. 1, 109 & Fig. 19B and 129; SOAF ¶¶ 130-134 and Cooper Dep. 126:25-127:9, 127:10-19, 130:14-23, 131:3-10, 132:6-133:14 and Cooper Report Pt. 1 ¶ 125; SOAF ¶¶ 136-137 and Cooper Dep. 178:14-179:12 and Cooper Report Pt. 1 ¶ 198; SOAF ¶¶ 138-142 and Cooper Dep. 175:5-19, 175:23-176:7, 176:2-7, 176:17-22, 217:9-24 and Cooper Report Pt. 1 ¶ 198; SOAF ¶¶ 143-147 and Cooper Dep. 183:8-12, 186:1-16, 187:10-19, 188:12-18 and Cooper Report Pt. 1 ¶¶ 174, 199; SOAF ¶¶ 148-151 and Cooper Dep. 197:22-198:6, 198:24-199:4 and Cooper Report Pt. 1 ¶ 201; SOAF ¶¶ 152-156 and Cooper Dep. 189:2-7, 190:1-14, 191:22-192:5, 193:7-12, 193:18-25,2 17:25-218:8, 218:21-219:6 and Cooper Report Pt. 1 ¶¶ 178, 200.

[3] Citing SOAF ¶ 75 and Cooper Report Pt. 1 ¶ 10; SOAF ¶ 76 and Cooper Dep. 37:2-6, 49:3-50:13; SOAF ¶ 77 and Cooper Dep. 53:17-19; SOAF ¶ 78 and Cooper Dep. 210:7-8; SOAF ¶¶ 83-84 and Cooper Report Pt. 1 ¶¶ 111, 184 and Cooper Dep. 61:6-15, 121:20-122:7; SOAF ¶ 86 and Cooper Dep. 50:14-51:5; 207:9-208:17; SOAF ¶ 87 and Cooper Dep. 48:24-49:2.

limited racial demographic information in drawing his maps, and did so only intermittently, SOAF ¶¶ 88-89; Cooper Dep. 60:15-61:1, 63:16-21. Finally, it includes his unequivocal response to the question of whether he prioritized race over other districting principles: "Absolutely not." SOAF ¶ 91; Cooper Dep. 221:4-7.

A factfinder could credit all of this evidence over Defendant's thinly sourced, contrary inferences regarding Mr. Cooper's supposed overemphasis on race, and conclude that Mr. Cooper drew additional majority-Black districts that are reasonably compact and consistent with traditional districting principles. MSJ Opp. 19-25. Under the established *Gingles* 1 standard, *e.g.*, *Alpha Phi Alpha*, 587 F. Supp. 3d at 1263-1264; *accord Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1325 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020), nothing more is required to deny summary judgment. Defendant's *Gingles* 1 argument for summary judgment rested on the hope that the Supreme Court might alter that standard to require some type of "race-neutral" approach—some new pronouncement that a holistic process like Mr. Cooper's, in which race is considered and balanced along with all of the traditional districting factors, now constitutes an "improper focus."

But the Supreme Court rejected that invitation. Indeed, and of particular

relevance to Defendant's motion, the Court expressly and completely rejected Alabama's request to change "the law as it exists" in order to impose some type of "race-neutral benchmark" on the *Gingles* 1 test. *Milligan*, 2023 WL 3872517, at *11-*15, *17, *19. Instead, a majority of the Court reaffirmed the basic precept that, in drawing illustrative plans that meet the *Gingles* 1 standard, race *necessarily* must be considered. *See id.* at *15 (Opinion of Roberts, C.J.) ("The question whether additional majority-*minority* districts can be drawn, after all, involves a 'quintessentially race-conscious calculus.'" (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994))); *id.* at *22 (Kavanaugh, J., concurring) ("[T]he effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations." (collecting cases)). As Chief Justice Roberts's opinion explained, an illustrative plan cannot be faulted merely because a map-drawer tried to draw districts with over 50% Black populations, because that is what *Gingles itself requires*: "For all those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. *That is the whole point of the enterprise*." *Id.* at *16 (Opinion of Roberts, C.J.) (emphasis added).

The Supreme Court not only rejected Alabama's arguments, but expressly reaffirmed the well-established *Gingles* standard that this Court applied in the preliminary injunction hearing and that has been "'the baseline of our §2 jurisprudence' for nearly forty years." *Milligan*, 2023 WL 3872517, at *13; *see also Alpha Phi Alpha*, 587 F. Supp. 3d at 1264. As Chief Justice Roberts explained, to satisfy *Gingles* 1, a plaintiff needs to "adduce[] at least one illustrative map that comport[s] with our precedents," and is "required to do no more." *Milligan*, 2023 WL 3872517, at *16 (Opinion of Roberts, C.J.). The Court held that *Milligan* plaintiffs had met that standard, affirming an order requiring a new Alabama congressional map that includes an additional district that provides Black voters an opportunity to elect their preferred representatives. *Id.* at *21; *see also Singleton v. Merrill*, 582 F. Supp. 3d 924, 1033 (N.D. Ala. 2022), *aff'd sub nom. Allen v. Milligan*, No. 21-1086, 2023 WL 3872517 (U.S. June 8, 2023).

Applying that same legal standard here, summary judgment cannot be granted. *See* MSJ Opp. 24. Indeed, the record on which the Supreme Court premised its holding in *Milligan* was similar to the record here. There, as here, plaintiffs' illustrative maps included plans drawn by Mr. Cooper. *Milligan*, 2023 WL 3872517, at *10; *see also id.* at *15-16 (Opinion of Roberts, C.J.) (discussing Cooper's testimony in detail). There, as here, Mr. Cooper's plans meet or beat the

enacted plans with respect to objective metrics like splits and compactness scores. *Id.* at *10; *id*. at *22 & n.2 (Kavanaugh, J., concurring). There, as here, Mr. Cooper testified (and a factfinder found credible) that he balanced the various traditional districting principles, and that race did not predominate among the various considerations. *Id.* at *15 (Opinion of Roberts, C.J.). There, as here, plaintiffs were able to point to factors in addition to race that supported the illustrative plans. *Id.* at *3, *11 (discussing with approval evidence that illustrative plans respected Black Belt community of interest). Given all of the evidence here, summary judgment on *Gingles* 1 *in Defendant's favor* would be starkly inconsistent with the result reached in *Milligan*.

Milligan also highlights the extent to which *Gingles* 1, and the ultimate, totality-of-the-circumstances test, are fact-sensitive inquiries that are not typically appropriate for resolution at the summary judgment phase. The Supreme Court, in reaffirming the overall *Gingles* framework and affirming the Alabama preliminary injunction, emphasized the "intensely local" nature of the inquiry, relying extensively on the district court's specific factual conclusions and its credibility determinations with respect to Mr. Cooper and others. *Milligan*, 2023 WL 3872517, at *9-10; *see also id.* at *11 (concluding on review that there was "no reason to disturb the District Court's careful factual findings"). And the Court

emphasized the particularly fact-intensive nature of any inquiry into the role of race in a map-drawer's process, noting how "[d]istricting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality," and yet "[q]uantifying, measuring, prioritizing, and reconciling these criteria" requires map drawers to "make difficult, contestable choices." *Id.* at *18. The Court's emphasis on the importance of factfinding and credibility determinations in resolving Section 2 vote dilution cases further counsels in favor of denying summary judgment so that this case may be resolved at trial.

II. Under *Milligan*, Defendant's Summary Judgment Motion on Gingles 2 and 3 Must Also Be Denied

Nor does *Milligan* upend the legal standard governing *Gingles* 2 and 3. Rather, the Supreme Court expressly reaffirmed the existing *Gingles* 2/3 standard in concluding that the Alabama district court "faithfully applied our precedents and correctly determined that, under existing law, HB1 violated §2." *Milligan*, 2023 WL 3872517 at *11 (upholding determination that *Gingles* 2 and 3 preconditions were met where "there was 'no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a

bloc to usually defeat Black voters' preferred candidate'" (quoting *Singleton*, 582 F. Supp. 3d at 1016)).

Notably, the Alabama district court applied the same standard that this Court did at the preliminary injunction phase, under which the *fact* of racial polarization is sufficient to satisfy the *Gingles* preconditions, and any evidence regarding partisan causes was considered only at the totality of the circumstances stage. *See Singleton*, 582 F. Supp. 3d at 1017 (concluding *Gingles* 2 and 3 were met where Black and white voters voted cohesively for different candidates and that the candidates preferred by white Alabamians consistently defeated candidates preferred by Black voters in the relevant areas); *id.* at 1018-19 (addressing and ultimately rejecting defendant's argument that voting patterns are attributable to politics rather than race as part of the totality of circumstances analysis); *see also Alpha Phi Alpha*, 587 F. Supp. 3d at 1303, 1312. After hearing the evidence presented at the preliminary injunction hearing, this Court concluded that Plaintiffs were likely to prevail under that standard (i.e., under the law as it exists). *Id.* at 1234. And Defendant essentially conceded at oral argument that he *cannot* prevail on his summary judgment motion as to *Gingles* 2 and 3 unless the existing standard changes. *See* Oral Arg. Tr. 57:18-25; 59:2-4, 75:3-77:21, 89:12-90:11. *Milligan*'s reaffirmance of the existing *Gingles* framework closes the door on

Defendant's summary judgment motion on those preconditions as well.

As with *Gingles* 1, the evidence in this case on racial polarization heading into trial is at least as strong (if not stronger) than the evidence on which the Alabama district court granted its now-affirmed injunction. There, the undisputed evidence showed that Black voters voted with over 90% cohesion, and yet "'the candidates preferred by white voters in the areas [of focus] regularly defeat the candidates preferred by Black voters.'" *Milligan*, 2023 WL 3872517, at *11. Here, Dr. Handley's undisputed analysis shows greater than 90% cohesion among Black voters in the areas of focus, and yet Black voters are unable to elect candidates of their choice absent a majority or near-majority Black population in the district due to white bloc voting. MSJ Opp. 26-27.[4] Under the law as it exists—and as reaffirmed in *Milligan*—Plaintiffs have established *Gingles* 2 and 3. *See* MSJ Opp. 25-27; *see also, e.g.*, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1304, 1306 (11th Cir. 2020).

And even accounting for some potential further developments in the law (for example, from the Eleventh Circuit's pending *Rose v. Raffensperger* case, *see* Oral

[4] Citing, *inter alia*, SOAF ¶¶ 166-168 and Report of Lisa Handley [Dkt. 222, Ex. 3] ("Handley Report") 9; SOAF ¶¶ 176-177 and Handley Report 9-10, 31.

Arg. Tr. 6:7-12), Plaintiffs' record provides multiple bases on which a factfinder could conclude that race best explains the evident and undisputed racial polarization that can be seen in election after election after election in Georgia. Those include historical evidence demonstrating that the partisan divide developed out of racial division and biases, MSJ Opp. 33-34[5]; sociopolitical evidence showing that racial appeals in political campaigns in Georgia persist into the present, MSJ Opp. 34-35[6]; and statistical evidence indicating the presence of racial polarization in Democratic primary elections, where Defendant's own expert concedes that partisanship cannot explain the observed racially polarized voting patterns, MSJ Opp. 35[7]. Even if *Milligan* had not reaffirmed the existing *Gingles* framework, there is ample evidence in the record from which a factfinder could conclude that race better explains voting patterns in Georgia. Therefore, Defendant's summary judgment motion must be denied on this ground as well.

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[5] Citing SOAF ¶¶ 189-190 and Report of Jason Ward [Dkt. 242-6] ("Ward Report") 17-18; SOAF ¶ 191 and Ward Report 1, 22; SOAF ¶ 192 and Dep. of Jason Ward [Dkt. 242] ("Ward Dep.") 77:20-78:6; SOAF ¶ 193 and Dep. of Adrienne Jones [Dkt. 239] ("A. Jones Dep.") 170:5-172:13.

[6] Citing SOAF ¶¶ 195-200 and Report of Adrienne Jones [Dkt. 239-8] ("Jones Report Pt. 2") 37-44 (cleaned up) and A. Jones Dep. 172:8-13 and Ward Report 1, 23.

[7] Citing SOAF ¶ 180 and Dep. of John Alford [Dkt. 229] ("Alford Dep.") 186:4-7; SOAF ¶ 183 and Handley Report 9-10.

CONCLUSION

Defendant's motion should be denied.

Respectfully submitted,

By: /s/*Rahul Garabadu*
Rahul Garabadu (Bar 553777)
rgarabadu@acluga.org
Cory Isaacson (Bar 983797)
Caitlin F. May (Bar 602081)
ACLU FOUNDATION OF GEORGIA, INC.
P.O. Box 570738
Atlanta, Georgia 30357
Telephone: (678) 981-5295
Facsimile: (770) 303-0060

/s/*Debo Adegbile*
Debo Adegbile*
debo.adegbile@wilmerhale.com
Robert Boone*
Alex W. Miller*
Cassandra Mitchell*
Maura Douglas*
Juan M. Ruiz Toro*
Joseph D. Zabel*
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

Charlotte Geaghan-Breiner*
WILMER CUTLER PICKERING

/s/*Sophia Lin Lakin*
Sophia Lin Lakin*
slakin@aclu.org
Ari J. Savitzky*
Ming Cheung*
Kelsey A. Miller*
Casey Smith*
Jennesa Calvo-Friedman*
ACLU FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 519-7836
Facsimile: (212) 549-2539

George P. Varghese*
Denise Tsai*
Tae Kim*
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000

Ed Williams*
De'Ericka Aiken*
Ayana Williams*
Sonika R. Data*
WILMER CUTLER PICKERING

HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
Telephone: (650) 858-6000
Facsimile: (650) 858-6100

HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, D.C. 20037
Telephone: (202) 663-6000
Facsimile: (202) 663-6363

Anuj Dixit*
Marisa A. DiGiuseppe*
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 443-5300
Facsimile: (213) 443-5400

Counsel for Plaintiffs
*Admitted *pro hac vice*

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

/s/ Rahul Garabadu

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing ***Plaintiffs' Supplemental Submission in Opposition to Defendant's Motion for Summary Judgment*** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel or parties of record on the service list:

This 22nd day of June, 2023.

/s/ Rahul Garabadu