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

ANNIE LOIS GRANT, *et al.*, *Plaintiffs*, v. BRAD RAFFENSPERGER, *et al.*, *Defendants*.	CASE NO. 1:22-CV-00122-SCJ

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

While titled a motion for partial summary judgment, Plaintiffs move for summary judgment on the *entirety* of their claims on six of the eight new majority-Black districts in the illustrative plans. [Doc. 189-1, p. 5, pp. 9-10]. In their motion, Plaintiffs ignore binding precedent and continue their efforts to over-simplify the "intensely local appraisal of the design and impact of a voting system," which this Court must undertake in a case involving Section 2 of the Voting Rights Act (VRA). *Johnson v. Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002). While it is typical for courts to grant summary judgment to *defendants* in VRA cases, grants of summary judgment to *plaintiffs* in Section 2 cases are "unusual." *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*,

775 F.3d 1336, 1345 (11th Cir. 2015). And this makes sense. Failure to establish even one of the *Gingles* preconditions is fatal to a plaintiff's Section 2 claim because each of the three preconditions must be met, so cases can routinely resolve at summary judgment in favor of defendants. *See Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567 (11th Cir. 1997).

But to find for Plaintiffs as they request, this Court must not only find they have met the three *Gingles* preconditions as to all six districts, but it must also review the non-exhaustive list of "Senate Factors" to assess the totality of the circumstances. *Nipper v. Smith*, 39 F.3d 1494, 1512 (11th Cir. 1994) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)); *Gingles*, 478 U.S. at 79; *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). This assessment of the totality of the circumstances happens "pursuant to a bench trial, with judgment issued under Federal Rule of Civil Procedure 52." *Fayette Cnty Bd. of Comm'rs*, 775 F.3d at 1343. A bench trial is necessary because, at summary judgment, "the district court may not weigh the evidence or find facts" and may not "make credibility determinations of its own." *Id.* (quoting *Morrison v.*

Amway Corp., 323 F.3d 920, 924 (11th Cir. 2003) and citing *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011)).

This Court should grant summary judgment to Defendants for all the reasons explained in Defendants' Motion [Doc. 190-1] and need not reach the totality of the circumstances. But if this Court disagrees, Plaintiffs have still failed to carry their burden to obtain summary judgment for any portion of this case on at least three grounds.

First, despite the district-specific nature of redistricting cases, Plaintiffs have presented no evidence of their standing to bring these claims as part of their Statement of Undisputed Material Facts. Without evidence on which to base determinations that Plaintiffs live in the districts they challenge, this Court cannot grant summary judgment to Plaintiffs and cannot even be certain that it has jurisdiction over Plaintiffs' claims.

Second, Plaintiffs gloss over their significant evidentiary shortcomings after discovery by claiming there are no disputes of fact. But disputes exist for facts necessary to find for Plaintiffs regardless of whether an opposing expert has contested each point. Mr. Esselstyn was unable to explain many of his decisions to connect different Georgia counties and regions in his illustrative plans. Instead, he turned on features to identify where Black voters were located and split counties in a racial manner. Dr. Palmer likewise testified that

he never looked at primaries or anything that would have allowed him to view polarization apart from politics. And Plaintiffs rely on non-admissible evidence like hearsay newspaper articles for some of their totality-of-the-circumstances proof.

Third, the existence of competing summary-judgment motions demonstrates that, at least on some points necessary for this Court to decide for *Plaintiffs*, there is a dispute of fact. Unlike Defendants, who can succeed on summary judgment by pointing to Plaintiffs' failure to support a threshold finding, Plaintiffs must carry their *entire* burden of proof. They have not, or at the very least, have demonstrated this Court must weigh the impact of certain pieces of evidence before it can decide in Plaintiffs' favor—meaning it cannot grant them summary judgment.

While this Court should grant summary judgment to Defendants for all the reasons outlined in their motion, it should not grant summary judgment to Plaintiffs, especially on the entire case as Plaintiffs seek. This Court should deny Plaintiffs' motion and allow this case to move to its resolution—either by granting Defendants' motion or after trial.

ADDITIONAL FACTUAL BACKGROUND[1]

I. Additional facts regarding map-drawing process.

When Mr. Esselstyn was creating his illustrative maps, he turned on features in the software to indicate where Black individuals were located, including using it to inform decisions about which populations were included and excluded from districts. SAMF ¶¶ 1-2, Esselstyn Dep. 76:21-77:12, 77:20-77:25. He also focused on areas with higher concentrations of Black voters for looking where additional districts could be drawn. SAMF ¶ 3, Esselstyn Dep. 85:6-10. His county splits were often racial in nature. SAMF ¶ 4, Morgan Report, ¶¶ 33, 54.

II. Additional facts regarding Senate Districts 25 and 28 on illustrative plan.

In drafting the illustrative Senate districts, Mr. Esselstyn sacrificed traditional redistricting principles to create majority-Black districts, connecting Black voters wherever he could find them. In his process of creating Senate District 25, Mr. Esselstyn could not recall why he decided to connect

[1] As required by this Court's instructions, III. I., all citations to the record are included in the brief and in the accompanying Statement of Additional Material Facts (SAMF) that is filed contemporaneously with this brief. The SAMF includes the full citations to the shortened deposition citations in the brief, along with the exhibits and deposition excerpts required by the Local Rules.

Clayton and Henry Counties in a single district or what united them. SAMF ¶ 5, Esselstyn Dep. 149:24-150:14. In doing so, he significantly altered Senate District 10 to include areas with significant white populations and lengthening the district to measure 43 miles from north to south. SAMF ¶ 6, Morgan Report, ¶¶ 26-28. As a result, the only county in Senate District 10 with a majority-Black voting age population is DeKalb County. SAMF ¶ 7, Esselstyn Dep. 152:25-153:4.

Similarly, to create Senate District 28, Mr. Esselstyn connected more-urban areas of Clayton County with more-rural areas in Coweta County. SAMF ¶ 8, Esselstyn Dep. 153:10-154:1. He was not trying to ensure that the district had areas in common with each other when drawing the district. SAMF ¶ 9, Esselstyn Dep. 154:2-24. Creating Senate District 28 also required changes to Senate District 35 that connected more-rural areas of Paulding County to Fulton County. SAMF ¶ 10, Esselstyn Dep. 155:12-156:13.

Mr. Esselstyn's illustrative Senate plan has higher total population deviations than the enacted plan. SAMF ¶ 13, Esselstyn Dep. 157:13-158:3. The illustrative Senate plan also splits more counties and precincts than the enacted plan. SAMF ¶ 14, Esselstyn Dep. 160:24-161:5. Mr. Esselstyn did not report the compactness scores of districts that he changed, instead only

reporting the average score for all districts, changed and unchanged.[2] SAMF ¶¶ 15-16, Esselstyn Dep. 158:23-159:7, 160:15-23.

III. Additional facts regarding House Districts 64, 117, 145, and 149 on illustrative House plan.

In drafting the illustrative House districts, Mr. Esselstyn also sacrificed traditional redistricting principles to create majority-Black districts, connecting Black voters wherever he could find them. In fact, of the new districts created, illustrative House Districts 64, 117, 145, and 149 are all less than 52% Black voting age population, with several barely above 50%. SAMF ¶ 17, Esselstyn Report, ¶ 48, Table 5. To create illustrative House District 64, Mr. Esselstyn connected parts of Paulding and Fulton counties but could not identify any basis for connecting those areas. SAMF ¶ 18, Esselstyn Dep. 180:16-23. To create illustrative House District 74, Mr. Esselstyn connected heavier concentrations of Black individuals in Clayton County with more heavily white portions of Fayette County, while lowering the compactness of the surrounding districts. SAMF ¶¶ 19-20, Esselstyn Dep. 180:24-181:13; Morgan Report, ¶ 54. To create illustrative House District 117, Mr. Esselstyn connected parts of districts from Clayton County to rural areas and was unable

[2] In his charts, Mr. Esselstyn did not include scores for other illustrative Senate districts that he altered. SAMF ¶ 16, Esselstyn Dep. 160:15-23.

to identify any community that was being kept whole in District 117. SAMF ¶¶ 22-23, Esselstyn Dep. 182:12-184:11, 185:5-8. To create illustrative House Districts 145 and 149 in Macon, Mr. Esselstyn lowered the Black percentages of the existing Macon districts to make Black population available to run into other counties and raise the Black percentages in Districts 145 and 149. SAMF ¶ 24, Morgan Report, ¶ 58; Esselstyn Dep. 187:8-19. As a result, all four districts that include portions of Macon are all very close to 50% Black VAP. SAMF ¶ 25, Esselstyn Dep. 188:21-25.

Mr. Esselstyn's illustrative House plan has higher total population deviations than the enacted plan. SAMF ¶ 27, Esselstyn Dep. 195:7-24. The illustrative House plan also splits one more county and one more precinct than the enacted plan. SAMF ¶ 28, Esselstyn Dep. 198:18-21. Mr. Esselstyn did not report the compactness scores of districts that he changed, instead only reporting the average score for all districts, changed and unchanged.[3] SAMF ¶¶ 30-31, Esselstyn Dep. 196:19-197:4, 197:11-198:1.

IV. Additional facts regarding polarized voting.

Plaintiffs' sole statistical expert, Dr. Palmer, declined to examine primary contests in his report. SAMF ¶ 34, Palmer Dep. 59:23-60:1. Without

[3] In his charts, Mr. Esselstyn did not include scores for other illustrative House districts that he altered. SAMF ¶ 31, Esselstyn Dep. 197:11-198:1.

those primary contests, which would remove partisanship from the calculation, Dr. Palmer found only highly polarized general-election contests. SAMF ¶¶ 35-36, Palmer Dep. 59:23-60:1. As a result, Dr. Alford opined that "one of the ways that you can recognize the limited nature of the general election fact pattern from what we care about in this case is to look at some elections where that party signal is not going to be such a strong driver…" SAMF ¶ 37, Alford Dep. 156:1-5. In Dr. Alford's view, the way to do that is by "looking at primaries." SAMF ¶ 38, Alford Dep. 156:6.

ARGUMENT AND CITATION OF AUTHORITIES

In order to prevail at summary judgment, Plaintiffs must show there is no genuine issue of material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Further, this Court must view all evidence and reasonable factual inferences in the light most favorable to Defendants. *Witter v. Delta Air Lines*, 138 F.3d 1366, 1369 (11th Cir. 1998). As explained by all parties, a plaintiff bears the burden of first proving each of the three *Gingles* preconditions to show a Section 2 violation. *Nipper*, 39 F.3d at 1510. After a plaintiff establishes the three preconditions, a court then reviews the "Senate Factors" to assess the totality of the circumstances. *Id*. at 1512; *Gingles*, 478 U.S. at 79; *De Grandy*, 512 U.S. at 1011.

Grants of summary judgment to plaintiffs in Section 2 cases are "unusual." *Fayette Cnty. Bd. of Comm'rs*, 775 F.3d at 1345. That is because "[n]ormally," Section 2 claims "are resolved pursuant to a bench trial." *Id.* at 1343. Granting summary judgment to a plaintiff is rarely appropriate "due to the fact-driven nature of the legal tests required by the Supreme Court and [Eleventh Circuit] precedent." *Id.* at 1348. This remains true even when the parties agree on many basic facts:

> Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999) (quoting *Clemons v. Dougherty Cnty., Ga.*, 684 F.2d 1365, 1369 (11th Cir. 1982)); *see also Wright v. Sumter Cnty. Bd. of Elections & Registration*, 657 F. App'x 871, 872 (11th Cir. 2016) (reversing grant of summary judgment to plaintiffs in Section 2 case).

Courts considering Section 2 claims must conduct an "intensely local appraisal" of the facts in the local jurisdiction, which is not generally amenable to resolution as a matter of law. *De Grandy*, 512 U.S. at 1020-21 (no statistical shortcuts to determining vote dilution); *Gingles*, 478 U.S. at 45, 78 (stating that courts must conduct a "searching practical evaluation of the 'past and

present reality'" of the challenged electoral system and whether vote dilution is present is "a question of fact"); *White v. Regester*, 412 U.S. 755, 769-70 (1983) (assessing the impact "in light of past and present reality, political and otherwise").

I. Plaintiffs have presented no evidence of their standing, as required to grant their Motion.

A federal court is not "a forum for generalized grievances," and the requirement that plaintiffs have a personal stake in the claim they bring "ensures that courts exercise power that is judicial in nature." *Lance v. Coffman*, 549 U.S. 437, 439, 441 (2007). Federal courts uphold these limitations by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: (1) injury in fact, (2) traceability, and (3) redressability. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016).

In redistricting cases alleging vote dilution, plaintiffs must reside in particular districts or geographic areas. "To the extent the plaintiffs' alleged harm is the dilution of their votes, **that injury is district specific.**" *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (emphasis added). And this matters for standing because "[a] plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance

against governmental conduct of which he or she does not approve.'" *Id.* (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)).[4]

Nowhere in Plaintiffs' brief or their Statement of Undisputed Material Facts do they point to any admissible evidence supporting the residence of particular plaintiffs at the time of the Complaint or currently.[5] Without these facts, this Court cannot enter summary judgment for Plaintiffs on the six districts on which they seek it.

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[4] While *Gill* involved a constitutional racial-gerrymandering challenge, Section 2 "is a constitutional exercise of congressional enforcement power under the Fourteenth and Fifteenth Amendments." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1550 (11th Cir. 1984). And district courts that considered standing for Section 2 cases have concluded that individuals must reside in particular geographic areas to have standing. *See, e.g.*, *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 818 (M.D. La. 2022); *LULAC v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2022 U.S. Dist. LEXIS 176337, at *31-32 (W.D. Tex. Sept. 28, 2022); *Harding v. Cnty. of Dall.*, Civil Action No. 3:15-CV-0131-D, 2018 U.S. Dist. LEXIS 35138, at *11-13 (N.D. Tex. Mar. 5, 2018); *Pope v. Cnty. Of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 U.S. Dist. LEXIS 10023, at *18 (N.D.N.Y. Jan. 28, 2014); *Broward Citizens for Fair Dists. v. Broward Cnty.*, No. 12-60317-CIV, 2012 U.S. Dist. LEXIS 46828, at *7-8 (S.D. Fla. Apr. 3, 2012).

[5] The stipulated facts used at the preliminary-injunction phase more than a year ago specifically were limited to those motions and did not bind parties later in the litigation. [Doc. 56, p. 2 n.1]. And in any event, "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of litigation." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

II. Plaintiffs' facts do not support a grant of summary judgment in their favor.

Plaintiffs have also failed to carry their burden on showing there is no disputed material fact about every element they must prove at trial, which is necessary to grant summary judgment in their favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A review of what Plaintiffs presented demonstrates that they cannot carry this burden at this stage of the case.

A. Plaintiffs' evidence on the first *Gingles* precondition.

Plaintiffs rely on Mr. Esselstyn's illustrative plans for their showing under the first *Gingles* precondition, but oversimplify the analysis of this precondition, relying on a new majority-Black district and breezily asserting that the illustrative plans "indisputably comply with traditional redistricting principles." [Doc. 189-1, p. 11]. But they ignore Mr. Esselstyn's inability to explain the reasoning behind his districts beyond simply drawing more majority-Black districts. SAMF ¶ 33, Esselstyn Dep. 149:24-150:14, 152:25-153:4, 154:2-24, 180:16-23, 182:12-184:11, 185:5-8. The various scores and calculations about the illustrative plan trumpeted by Plaintiffs do not provide much useful information to the Court and show that the illustrative plans score worse than the enacted plans on many metrics. And Plaintiffs must do more than just draw new districts—they must demonstrate connections between the

disparate geographic communities they unite that go beyond race. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (*LULAC*); *Bush v. Vera*, 517 U.S. 952, 997 (1996). Defendants incorporate their arguments in their Motion for Summary Judgment on the first *Gingles* precondition [Doc. 190-1, pp. 19-21] but will respond to several additional issues raised by Plaintiffs.

While Plaintiffs claim the illustrative Senate and House plans comply with population equality, both plans have higher deviations from the ideal district size than the enacted plans. SAMF ¶¶ 13, 27, Esselstyn Dep. 157:13-158:3, 195:7-24. Similarly, the illustrative plans split more counties and voting districts than the enacted plans. SAMF ¶¶ 14, 28, Esselstyn Dep. 160:24-161:5, 198:18-21. While claiming communities of interest are preserved, Plaintiffs ignore Mr. Esselstyn's inability to identify any connection between many of the areas he connected in districts. Instead, they cherry-pick two examples regarding House District 149—which is not a district about which this Court found Plaintiffs were likely to succeed, [Doc. 91, p. 152]—and ignore the fact that Mr. Esselstyn did not review any public comment or review any

documentation related to the Fall Line until after drafting his preliminary injunction plans.[6] SAMF ¶ 32, Esselstyn Dep. 148:23-149:6, 194:5-195:1.

Mr. Esselstyn did not even know about various communities that he kept whole in his proposed districts, making it impossible for Plaintiffs to carry their burden regarding the geographic compactness of the minority community in the areas on which they move for summary judgment. SAMF ¶ 33, Esselstyn Dep. 149:19-150:14 (Senate District 25), 154:2-155:9 (Senate District 28), 180:16-23 (House District 64), 181:14-23 (House District 74), 184:5-11 (House District 117). Because the Section 2 analysis of compactness is not centered on "the relative smoothness [and contours] of the district lines," but rather the compactness of the *minority population itself*, *LULAC*, 548 U.S. at 432-433, Plaintiffs have failed to carry this burden. This is because the inquiry is whether "the minority group is geographically compact." *Id.* at 433 (quoting *Shaw v. Hunt*, 517 U.S. 899, 916 (1996)).

All of these facts, combined with the facts outlined in Defendants' Motion about the racial predominance Mr. Esselstyn used in the creation of his illustrative plans [Doc. 190-1, pp. 19-21], which are incorporated by reference,

[6] While relying on Ms. Wright's statement for House District 149, Mr. Esselstyn agreed he did not follow what Ms. Wright said about Senate District 26 when he drew the Senate districts including those same counties on his illustrative plan. SAMF ¶ 26, Esselstyn Dep. 185:18-186:21.

demonstrate that Plaintiffs cannot prevail on their Motion regarding the first *Gingles* precondition.

Further, while Plaintiffs rely on it, the fact that the new majority-Black districts would elect Democrats is not surprising given the partisan polarization in Georgia. [Doc. 189-1, p. 14]. Again, Plaintiffs ask this Court to reduce Section 2 to a very simple checklist. If the only determination necessary to find in favor of Plaintiffs on the first *Gingles* precondition was drawing additional districts that elect Democrats, then courts have engaged in far more analysis than necessary for decades.

B. Plaintiffs' evidence on the second and third *Gingles* preconditions.

Plaintiffs likewise oversimplify Section 2 on the issue of racial polarization, devoting just three pages of their 35-page Motion to the topic. And in those pages, they make clear that they lack evidence proving this crucial element of their claim.

Plaintiffs claim that they satisfy the second and third *Gingles* preconditions merely because their lone racial polarization expert "found that Black voters in Georgia are extremely cohesive" [Doc. 189-1, p. 17], and in the relevant areas "the white majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate." [Doc. 189-1, p. 18]

(quoting *Gingles*, 478 U.S. at 51 (internal quotations omitted)). But Plaintiffs' approach relies on a legally and constitutionally untenable understanding of the *Gingles* plurality opinion and elevates the plurality opinion by Justice Brennan to majority status, effectively ignoring the *actual Gingles* majority's opinion on this crucial point, as well as federal circuit caselaw.

To prove vote dilution under Section 2, a plaintiff must establish that a bloc of voters "invidiously" cancels out his or her vote, *Regester*, 412 U.S. at 765, "on account of race," 52 U.S.C. § 10301. It is not enough to establish racial bloc voting merely by showing a divergence in voting patterns between Black and white voters, as shown below.

1. To establish vote dilution "on account of race," a plaintiff must prove racial bloc voting, not bloc voting attributable to ordinary partisan disagreement.

Where race-neutral, "partisan" preference determines electoral outcomes, there is no Section 2 violation. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 855 (5th Cir. 1993) (en banc) (*Clements*). "[E]ven when election returns in effect short-circuit a minority group's voting power, the electoral structure is not illegal if the defeat represents nothing more than the routine operation of political factors." *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir. 1995). And the Eleventh Circuit, on one of its first occasions to examine racially polarized

voting after the enactment of the 1982 amendments to Section 2, has at least tacitly endorsed this view. Describing the "significance of racially polarized voting," the Eleventh Circuit noted that "[i]n the *absence* of racially polarized voting, black *candidates* could not be denied office because they were black, and a case of … dilution could not be made." *Marengo County*, 731 F.2d at 1566 (emphasis added) (quoting *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978)). Thus, the focus of the Eleventh Circuit with respect to racially polarized voting fell on the *candidates* and not the *electorate* itself. This occurred several times in the opinion. "[B]loc voting may [also] be indicated by a showing of the consistent lack of success of qualified black *candidates*." *Id.* at 1567 n.34 (quoting *Nevett,* 571 F.2d at 223 n.18 (emphasis added)). And when confronted with the argument that the race of the candidate *should not matter* for purposes of determining whether minority groups are adequately represented, the Eleventh Circuit disagreed but said it "look[ed] hopefully toward the day when elections… are conducted without regard to the race of the candidates." *Id.* at 1567.

Here, Plaintiffs advocate for precisely the opposite standard, focusing exclusively on the race of the *electorate*, and ignoring the race of the *candidate*.

The Eleventh Circuit in *Marengo County*[7] never endorsed this view, and the majority of Supreme Court Justices considering the question two years later in *Gingles* never endorsed it, either. An examination of the text and relevant caselaw surrounding Section 2 explains why.

Beginning with the text, Plaintiffs have no answer to the plain statutory directive that race, as opposed to ordinary policy disagreements, must "cause" minorities to have less "opportunity" than other voters. *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1329-30 (11th Cir. 2021). Thus, if Black Democratic voters have the same opportunity to elect candidates of their choice as white Democratic voters, Asian Democratic voters, Latino Democratic voters, and so forth, they have the same "opportunity" as "other members of the electorate." 52 U.S.C. § 10301. In the absence of something more, the simple fact is that "in a majoritarian system, numerical minorities

[7] Defendants are not insensible to the fact that courts in this circuit, including this Court in prior rulings, have disagreed with this interpretation of racial polarization for purposes of the second and third *Gingles* preconditions. But a holistic review of the statutory language, and placing the controlling portion of the *Gingles* opinion on racial polarization in its proper context, reveals that failing to interpret those provisions in the way Defendants propose is not only inconsistent with the statutory language, but also threatens the ongoing constitutional viability of Section 2. Defendants return to the initial interpretations of Section 2 in this circuit not to suggest that their view of racial polarization is unquestionably settled law at this stage. Rather, it is simply to show that from the beginning, racial polarization was viewed as being something more than just conflicting bloc voting by different races.

lose elections." *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring) (citations omitted). But there is no injury under Section 2 if Black voters lose merely because the majority votes Republican.

While Plaintiffs assert that *Gingles* held that racial bloc voting is present anywhere that a minority group votes differently from the majority [Doc. 189-1, p. 19], even a cursory reading of the *Gingles* opinions reveals that five Justices *rejected* that view. Justice White could not have been more clear, saying he did "not agree" that "there is polarized voting" merely because "the majority of white voters vote for different candidates than the majority of [B]lacks." *Gingles*, 478 U.S. at 83 (White, J., concurring). And that is why he specifically declined to join the plurality opinion upon which this Court relied at the preliminary-injunction phase—the very portion that would have held that racial causation is not required. Justice O'Connor, with whom three other Justices joined, stated even more categorically: "I would reject the Court's test for vote dilution," *id*. at 97 (O'Connor, J., concurring), and explicitly stated, "I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case." *Id*. at 101.

Plaintiffs do not attempt to grapple with this repudiation of the four-Justice plurality on the meaning of racial polarization. As the Supreme Court

made clear in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), which *Gingles* did not overturn and which the Congress attempted to codify[8] through Section 2, where Black voters lose because they vote "predominantly Democratic" and Republicans tend to win, there is no vote dilution. 403 U.S. at 153. And it is not only *Gingles* itself that casts doubt on the Plaintiffs' casual claim that the race of the candidate is immaterial for purposes of establishing racial polarization. Indeed, several years after *Gingles,* the Supreme Court stated even more clearly that, "the ultimate right § 2 is equality of opportunity, *not a guarantee of electoral success for minority preferred candidates of whatever race*." *De Grandy,* 512 U.S. at 1014 n. 11 (emphasis added).

Against this legal backdrop, Plaintiffs' evidence of racial polarization is not enough to carry their burden of proof. Indeed, the only evidence from Plaintiffs' expert on racial polarization is insufficient to even *survive* summary judgment by Defendants, let alone *grant* it in favor of Plaintiffs. Plaintiffs' evidence on the question of racial polarization can be summed up in two sentences outlining the findings of their sole statistical expert. First, "Dr. Palmer found that Black voters in Georgia are extremely cohesive, with a clear

[8] "In enacting § 2, Congress codified the 'results' test this Court had employed, as an interpretation of the Fourteenth Amendment, in *White* and *Whitcomb*." *Gingles,* 478 U.S. at 97 (O'Connor, J., concurring).

candidate of choice in all 40 elections he examined…" [Doc. 189-1, p. 17]. Second, "Dr. Palmer found high levels of white bloc voting in opposition to the candidates whom Black voters cohesively supported…." [Doc. 189-1, p. 18]. Based on these statements alone, Plaintiffs claim they have presented incontrovertible evidence of racial polarization sufficient to be granted summary judgment. But as outlined above, the polarization that Dr. Palmer found tells us little (if anything) about the existence and extent of legally significant racially polarized voting in Georgia elections.

Dr. Palmer's data is lacking in several key respects—and because it is Plaintiffs' burden to prove racial polarization, this evidentiary defect is fatal to their Motion. First, Dr. Palmer only examined general-election contests. SAMF ¶ 36, Palmer Dep. 59:23-60:1. With no primary contests to use to compare voter behavior, there is no way to determine whether voters are voting for a particular candidate on the basis of race, or if they are voting for a particular party on the basis of politics. Second, Dr. Palmer's conclusion ignores the import of a crucial contest wherein both candidates for a major statewide United States Senate race were Black. This election contest, between Senator Raphael Warnock and Herschel Walker, offered an opportunity to determine whether racial considerations would *at all* affect the voting patterns or preferences of Georgia's electorate.

Dr. Palmer declined to examine primary contests in his report. SAMF ¶ 34, Palmer Dep. 59:23-60:1. And while Defendants' expert agreed that Dr. Palmer found highly polarized general-election contests, the lack of data related to primary elections (which take party out of the equation) leaves no way to determine the meaning of that polarization. "[B]ecause [Dr. Palmer] has no primary analysis, we really don't have anything other than the general election setting to look at." SAMF ¶ 39, Alford Dep. 29:12-14. And Dr. Alford opined that "one of the ways that you can recognize the limited nature of the general election fact pattern from what we care about in this case is to look at some elections where that party signal is not going to be such a strong driver…" SAMF ¶ 37, Alford Dep. 156:1-5. In Dr. Alford's view, the way to do that is by "looking at primaries." SAMF ¶ 38, Alford Dep. 156:6. Further, Dr. Alford conducted an analysis of the statewide primary election for the United States Senate, in which Herschel Walker prevailed, and noted that "the evidence here suggests that white voters in the Republican primary did support Black candidates." SAMF ¶¶ 40-41, Alford Dep. 157:5-7.

Of course, one election does not alter a finding of racial polarization *if there was evidence* that it otherwise existed. But the Court here has no evidence before it that such polarization exists. Instead, all the Court has before it is the unremarkable confirmation by Dr. Palmer that Black voters

support Democrats and white voters—to a lesser extent—support Republicans. And this support is stable regardless of the race of the candidate in either party. Where the white candidate is a Democrat in a given election contest, Black voters support that candidate. And where the Black candidate is Republican in a given election contest, Black voters overwhelmingly reject that candidate. Under a proper *Gingles* analysis, as outlined above, there is no legally significant racially polarized voting on this evidence.

2. Under the Plaintiffs' preferred racial polarization theory, § 2 of the Voting Rights Act is unconstitutional.

In addition, as outlined in Defendants' Motion, which is incorporated by reference [Doc. 190-1, pp. 30-32], endorsing Plaintiffs' approach to the second and third *Gingles* preconditions would render Section 2 unconstitutional. That is yet another reason to reject Plaintiffs' Motion.

C. Plaintiffs' totality of the circumstances analysis.

Plaintiffs quickly run through the Senate Factors in a way that defies the intensely local appraisal this Court must conduct. *Johnson*, 296 F.3d at 1074. As this Court is aware, weighing the totality is more than just checking off boxes. This Court must determine whether Black voters are subject to a "standard, practice, or procedure" that "results 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(a) (emphasis added). It is Plaintiffs' burden to show in the totality that "the political processes . . . in the State or political subdivision are *not equally open* to participation by members of a class of citizens . . . in that its members have *less opportunity than other members of the electorate to participate in the political process* and to elect representatives of their choice." *Id.* § 10301(b) (emphasis added). Section 2 thus requires Plaintiffs to show that the "challenged law… *caused*" them, "on account of race," to have less opportunity to elect their preferred candidates than members of other races. *Greater Birmingham Min.*, 992 F.3d at 1329 (emphasis in original).

The text explicitly does not "guarantee" partisan victories or "electoral success." *LULAC*, 548 U.S. at 428 (citation omitted). If minority voters' preferred candidates lose for non-racial reasons, such as failing to elect candidates because they prefer Democrats in Republican-dominated areas, they nonetheless have precisely the same opportunity as "other members of the electorate," and they have not suffered any "abridgement" of their right to vote "on account of race." 52 U.S.C. § 10301. Section 2 does not, in other words, relieve racial minorities of the same "obligation to pull, haul, and trade to find common political ground" that affects all voters. *De Grandy*, 512 U.S. at 1020.

1. History of discrimination.

Defendants acknowledge Georgia's history of discrimination, especially when the State initially drew redistricting plans after the passage of the VRA. But while citing a number of examples, Plaintiffs do not connect the challenged legislative plans to that history beyond claiming partisan incentives exist. [Doc. 189-1, p. 25] (citing Burton report about Republican officials). Further, in relying on past redistricting plans, Plaintiffs gloss over the 2011 legislative plans, which were precleared by the U.S. Department of Justice under Section 5 of the VRA on the first attempt. SAMF ¶ 42, Burton Dep. 63:18-25. Further, the 2015 House plan was never found illegal by any court. SAMF ¶¶ 43-44, Burton Dep. 73:19-74:2. Plaintiffs likewise rely on incorrect timelines for post-*Shelby County* impact voting changes; rely on the impact of polling-place closures, which is not the responsibility of state officials, *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021 U.S. Dist. LEXIS 261570, at *49 (N.D. Ga. Feb. 16, 2021); and voter-list maintenance, which this Court upheld, *Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021 U.S. Dist. LEXIS 261571, at *63 (N.D. Ga. Mar. 31, 2021). Response to Plaintiffs' Statement of Material Facts (RSUMF), ¶¶ 123-125. Plaintiffs even acknowledge that partisan motivations may be at issue here versus racial ones. [Doc. 189-1, p. 25].

Plaintiffs have not carried their burden, merely by reciting that history, to show this history of discrimination is causing Black voters "on account of race" to have less opportunity to elect their preferred candidates than members of other races. *Greater Birmingham Min.*, 992 F.3d at 1329. And by its own terms, Plaintiffs' arguments require this Court to weigh the evidence—something it cannot do at this stage. *Burton*, 178 F.3d at 1187.

2. Racially polarized voting.

Defendants will not repeat their prior discussion of the second and third *Gingles* preconditions, but as discussed above, Plaintiffs' experts never analyzed primary elections. Therefore, Plaintiffs cannot show that the polarization their expert found is on account of race or color instead of on account of partisanship.

3. Past voting practices.

Plaintiffs rely on "discriminatory" practices that this Court found in other cases are not actionable or are not a burden on the right to vote. *Compare* [Doc. 189-1, p. 28] *with Fair Fight Action*, 2021 U.S. Dist. LEXIS 261570, at *49 (polling place closures); *Fair Fight Action*, 2021 U.S. Dist. LEXIS 261571, at *63 (list maintenance). And Plaintiffs continue to claim that a majority-vote requirement "permanently" affects Black voters, [Doc. 189-1, p. 28] (quoting *Port Arthur v. United States*, 459 U.S. 159, 167 (1982)), when that very

requirement led to the election of two Black-preferred U.S. Senators from Georgia and the re-election of Georgia's first Black U.S. Senator in 2022.

4. Past discrimination affecting ability to participate.

In support of Senate Factor Five, Plaintiffs recite Census data, relying on several incorrect statements by Dr. Collingwood and not connecting those racial disparities to current inability to participate in district-based elections. RSUMF ¶¶ 176, 178, 183, 185. Further, Plaintiffs' expert agreed that socioeconomic disparities affect political participation, regardless of the race of the voters involved. SAMF ¶ 46, Collingwood Dep. 58:24-59:7. He also agreed that voter motivation can affect voter turnout. SAMF ¶¶ 47-49, Collingwood Dep. 64:1-25, 71:16-72:17 and Collingwood Report at 8, 12.

Significantly, Dr. Collingwood did not and would not offer an opinion that racism, rather than other factors, has caused lower turnout for Black voters compared to White voters in Georgia. SAMF ¶ 51, Collingwood Dep. 86:22-87:13. And he did not have an opinion on whether the 2021 Georgia redistricting (or prior redistricting since 2010) may have caused the lower levels of Black voting participation compared to White voting participation that he found in Georgia. SAMF ¶ 52, Collingwood Dep. 87:21-88:1.

Thus, while *Marengo County*, 731. F.2d at 1569, is relevant here, this Court must also weigh this additional testimony and the recent success of

Black-preferred candidates in Georgia. This is insufficient to demonstrate a continuing inability of Black voters to participate in the political process, as required by this Senate factor.

5. Racial appeals.

Despite their experts only citing non-legislative racial appeals in campaigns, Plaintiffs also claim that racial appeals pervade Georgia politics. As this Court found, racial appeals must be for the relevant elections that are challenged. *Rose v. Raffensperger*, Civil Action No. 1:20-cv-02921-SDG, 2022 U.S. Dist. LEXIS 140097, at *44 (N.D. Ga. Aug. 5, 2022). Plaintiffs have presented no evidence of racial appeals in legislative elections, despite challenging those district lines, meaning they have not carried their burden on this factor. SAMF ¶ 55, Burton Dep. 126:6-127:1. Further, several statewide races involved candidates who lost after making the alleged racial appeals. SAMF ¶¶ 56-57, Burton Dep. 127:14-23.

Plaintiffs also now claim that efforts to prevent voter fraud—which the Supreme Court found are legitimate, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021)—are proof of racism. And Plaintiffs rely extensively on hearsay for this factor, which is not admissible. Even if Plaintiffs presented admissible evidence here, to decide for Plaintiffs on this point, this Court must weigh evidence of these alleged appeals, especially because Plaintiffs claim

they are "more coded." [Doc. 189-1, p. 35]. This is not an analysis appropriate for summary judgment.

6. Rate of election of Black candidates.

Plaintiffs cite readily available statistics about the number of Black officials—ignoring judicial candidates and Black members of statewide courts—but again ask this Court to weigh evidence by connecting those elections (or lack thereof) to Black voters having less opportunity to participate in the political process, which cannot occur at summary judgment.

7. Responsiveness to Black residents.

In discussing Senate Factor Eight, Plaintiffs do not even attempt to show what particular issues or concerns would be unique to Black residents of Georgia to which elected officials have been unresponsive. Instead, they merely assume this factor based on socioeconomic disparities. [Doc. 189-1, pp. 37-38]. But disparate effect is not enough—more is required; and that additional evidence requires that this Court weigh what issues are unique and how elected officials in Georgia have been unresponsive. *See Rose*, 2022 U.S. Dist. LEXIS 140097 at *46. Without that evidence, they cannot carry their burden on this factor.

8. Justification is tenuous.

Plaintiffs reduce the additional factor of whether the justification for the plan is tenuous to a simple theory that, if the state failed to draw a particular district, the justification must be tenuous. [Doc. 189-1, p. 38]. But the veiled allegations of racism in drawing district maps is not enough, especially when the evidence before this Court shows state officials were motivated by partisanship. *Brnovich*, 141 S. Ct. at 2349 (rejecting cat's paw theory of intent). Plaintiffs do not even attempt to grapple with unrebutted testimony of legislators and staff about the impact of partisanship on the map-drawing process. *See* [Doc. 190-1, pp. 6-7].

D. Conclusions about Plaintiffs' evidence.

Plaintiffs have not carried their heavy burden to show that they can prevail without this Court weighing any evidence at trial, based on undisputed material facts on every component of their burden of proof. That alone is enough to deny summary judgment in their favor.

III. Competing motions require inferences about totality.

But even if Plaintiffs have presented evidence supporting each *Gingles* precondition and Senate factor—which they have not—Plaintiffs' Motion asks this Court to draw inferences about which plans are "better" and whether their Senate-factor evidence supports claims that Black voters have less opportunity

to participate in the political process. At the very least, those requests combined with Defendants' competing Motion for Summary Judgment demonstrates that, on points necessary to decide for Plaintiffs, inferences and weighing of facts are necessary. And this Court cannot weigh evidence or make inferences even from undisputed facts at this stage, so it must deny summary judgment to Plaintiffs. *Burton*, 178 F.3d at 1187.

CONCLUSION

Defendants' Motion for Summary Judgment is targeted at the *Gingles* preconditions and proportionality. Those are proper bases on which this Court can rule on the legal impact of the undisputed material facts in this case without weighing evidence. In contrast, Plaintiffs' attempt to avoid a trial requires this Court to weigh evidence and make inferences to find in favor of Plaintiffs on every point. Even if Plaintiffs had provided this Court with evidence of which districts they reside in, this Court cannot find in their favor at this point in the case.

This Court should deny Plaintiffs' motion and grant Defendants' motion, or at the very least, allow this case to proceed to trial for the intensely local appraisal of facts and law required by Section 2.

Respectfully submitted this 19th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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