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

GEORGIA STATE CONFERENCE OF THE NAACP, ET AL., PLAINTIFFS, v. STATE OF GEORGIA, ET AL., DEFENDANTS.	Case No. 1:21-CV-5338-ELB-SCJ-SDG
COMMON CAUSE, ET AL., PLAINTIFFS, v. BRAD RAFFENSPERGER, DEFENDANT.	Case No. 1:22-CV-00090-ELB-SCJ-SDG

VIDEO RECORDED DEPOSITION OF PEYTON MCCRARY
(TAKEN by DEFENDANTS)
ATTENDING VIA ZOOM IN WASHINGTON, D.C.
MARCH 3, 2023

VIDEOGRAPHER: Maya Carter
REPORTED BY: Meredith R. Schramek
Registered Professional Reporter
Notary Public
(Via Zoom in Mecklenburg County,
North Carolina)

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Deposition of Peyton McCrary, taken by the defendants via Zoom on the 3rd day of March, 2023, at 10:19 a.m., before Meredith R. Schramek, RPR, Notary Public.

C O N T E N T S

The Witness: PEYTON MCCRARY
Examination By Mr. Boyle 6
Examination By Mr. Davis 104

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P R O C E E D I N G S

THE VIDEOGRAPHER: Today's date is March 3, 2023, and the time is 10:19 a.m. This will be the videotaped deposition of Dr. Peyton McCrary.

Will counsel please identify themselves for the record.

MR. BOYLE: Donald Boyle for the defendants.

MR. DAVIS: Alex Davis, Lawyers' Committee for Civil Rights, for the Georgia NAACP plaintiffs.

MR. ROLLINS-BOYD: Marlin David Rollins-Boyd, for -- from the Lawyers' Committee for Civil Rights, for the Georgia NAACP plaintiffs.

MR. MELLMAN: Aryeh Mellman, from Crowell & Moring, for the Georgia NAACP plaintiffs.

MS. HOUK: Good morning. It's Julie Houk, on Zoom, from the Lawyers' Committee for Civil Rights, and I'll be representing the Georgia NAACP plaintiffs.

MS. BERRY: Good morning. Crinesha Berry with Crowell & Moring, also on behalf of the Georgia NAACP plaintiffs.

MR. MONTOYA-ARMANIOS: Good morning. Vincent Montoya and the Dechert LLP law firm, on behalf of the Common Cause plaintiffs.

THE COURT REPORTER: Is that everybody?

MS. SMITH: Casey Smith, from the ACLU, for

the Alpha Phi Alpha plaintiffs.

Whereupon,

PEYTON MCCRARY,

having been duly sworn,

was examined and testified as follows:

MR. BOYLE: This will be the deposition of Dr. Peyton McCrary taken by the defendants in these cases. Deposition is being taken pursuant to notice and agreement of counsel for all -- to be used for all purposes allowed under the federal rules of civil procedure.

If the stipulation is agreeable with counsel, I would propose we stipulate that all objections, except as to the form of the question and responsiveness of the answer are reserved until such time as the deposition may be used at hearing, trial, or otherwise in this matter.

MR. DAVIS: That's fine with counsel except for the fact that attorney-client privilege as well we'd make if anything arises.

MR. BOYLE: Of course. Thank you.

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MR. BOYLE:

Q Sir, could you state your full name and address for the record?

A My full name is James Peyton McCrary. My address is [redacted] Arlington, Virginia.

Q Dr. McCrary, again, I'm Donald Boyle, I'll be taking your deposition today. Do you understand you've just been given an oath, and it's the same oath as if you were in court to tell the truth?

A I'm sorry. Could you repeat that? I didn't hear what you --

Q Do you understand, you've just been given an oath, and it's the same oath as if you were in court to tell the truth?

A Oh, of course.

Q I understand you've had your deposition taken before today; correct?

A That's correct.

Q It always helps, I think, to go over the basics, both for me and for a witness. The reporter will be taking down all my questions and your answers, so we always have to express ourselves in words so the reporter can get that down. It's important that we not interrupt each other, for purposes of the transcript.

You understand that?

A Yes.

Q If I ask any questions that are hard to

understand or are confusing, which very well likely will happen, just let me know and I'll rephrase it.

Is that all right?

A Yes.

Q I don't expect this to be a full-day deposition. But as we go through, it's customary to take a break every hour, or a little over an hour, and if we're getting to that point, and you think you want to take a break, as long as a question's not pending, you just let me know and we'll take a break.

Is that okay?

A Yes.

Q Dr. McCrary, I think I'll need you to speak up a little bit, because I can barely hear you.

A Okay. Sorry about the volume.

Q Okay. That's a little better.

(Discussion off the record.)

MR. BOYLE: Mr. Davis, is Dr. McCrary going to read and sign?

MR. DAVIS: Yes.

BY MR. BOYLE:

Q Dr. McCrary, do you have any health problems, or are you taking any medication that would prevent you from giving full and accurate answers to my questions today?

A No. I should explain that I may have to pop a cough drop once in a while, because I have a chronic cough.

Q Okay. Thank you. That's fine.

What immediate, specific preparation did you do to come to give the deposition today? I understand you gave a -- you've produced a report.

But in order to come here today for your deposition, what did you do?

A I reviewed my report, principally.

Q About how much time do you think you spent on that to get ready for today?

A On reviewing my report?

Q Yes, sir.

A Three, four hours.

Q Did you also meet with anybody to get ready to testify today?

A Yes.

Q About how long did that last?

A Two hours, two and a half hours.

Q That was with counsel?

A Yes.

(Exhibit 1 Marked for Identification.)

BY MR. BOYLE:

Q I've put into the Exhibit Share as -- marked

as Exhibit 1, the notice of deposition.

Can you see that on your screen?

A Yes.

Q I'll just ask. Have you seen that before today?

A Probably.

Is there a question?

Q No. I'm just -- I'm working with the Exhibit Share. I'm getting the next Exhibit ready.

(Exhibit 2 Marked for Identification.)

BY MR. BOYLE:

Q All right. There should now be an Exhibit 2, a marked Exhibit 2 in the Exhibit Share folder.

Do you see that?

MR. DAVIS: Yes, we have it.

BY MR. BOYLE:

Q This is a copy of your CV, Dr. McCrary, which was attached as Exhibit 1 to your report. You should be able to -- or your counsel should be able to scroll through it. Do you recognize that as your CV?

A Yes.

Q When was this CV last updated?

A Roughly at the time I prepared the report. Before January 3rd, I assume.

Q That's of this year?

A Yes. 2023. Sorry.

(Exhibit 3 Marked for Identification.)

BY MR. BOYLE:

Q We're going to come back to that later on. Let me get to one more exhibit here. This is a larger exhibit. It's taking a minute to complete.

All right. You should now have a -- Exhibit 3, which was your transcript of your deposition taken in 2020. Do you see that?

A It's loading.

MR. DAVIS: It's loading. Sorry about that.

MR. BOYLE: Well, that's all right. I mean, it's a large document. I guess it takes a little while.

BY MR. BOYLE:

Q While we're waiting for it, let me ask you, Dr. McCrary, do you recall serving as an expert in the litigation styled Fair Fight Action, Inc. v. Raffensperger?

A Yes.

Q And you recall giving a deposition in that matter on May 22, 2020?

A I don't remember the exact date. But I remember being deposed in that case.

Q Do you recall having a chance to review your

transcript of your deposition?

A In the Fair Fight Action case? No. Oh, you mean at the time?

Q Right. At the time. Have you ever reviewed it? Yes.

A I did review it at the time to fill out an errata sheet if there were any changes. I haven't reviewed it since then.

Q That's fine.

MR. DAVIS: Sorry, Counselor, it still says "Generating file. Preview may take a while."

BY MR. BOYLE:

Q Okay. Well, let me keep moving forward.

Dr. McCrary, as you recall -- and I appreciate that you haven't reviewed the transcript from Fair Fight recently, do you recall there was anything in your testimony there that -- where you were asked about your background of your education and your employment history, is there anything that was inaccurate that you would want to change today, or do you think we can still rely on that as accurate?

A As far as I recall, there were no changes that needed to be addressed.

MR. DAVIS: I can say it's loaded.

BY MR. BOYLE:

Q Okay. All right. Well, that's really all I wanted to do there. I wanted to put that on the record. And that way we don't have to go back over Dr. McCrary's publications -- or, excuse me. Not his publications, his education and employment history because we've got that established from prior testimony. Thank you.

I would like to go back to the CV at this time, Exhibit 2.

In your CV, Dr. McCrary, you list various publications. You have a book. You have book chapters. You have law review articles. You have review essays.

Could you tell me, which of your publications have dealt with redistricting?

A My coauthored publication with Steven Lawson some years ago dealt with Georgia redistricting in 1962, '63, and '64, almost entirely. I dealt with redistricting in more general ways, in a variety of publications, including an essay entitled "Bringing Equality to Power," which was a study of the first 25 years of the enforcement of the Voting Rights Act published in the University of Pennsylvania Journal of Constitutional Law some years ago.

I discussed objections to various redistricting plans and also litigation regarding redistricting, including in Georgia in that essay, and also in an essay entitled "The End of Preclearance as We Knew It," coauthored -- that was published in the journal of -- just a moment. The Michigan Journal of Race and Law.

And a revised, abbreviated version of that in a book published in 2008 by the Russell Sage Foundation, which is cited in my curriculum vitae. And also in -- a book chapter in a book edited by Daniel McCool. My essay was entitled "The Constitutional Foundations of Section 5." And it dealt with redistricting issues and decisions regarding redistricting, including in Georgia.

Well, as I sit here, that's the primary publications I can recall. Oh, I'm sorry. Also, two chapters, one dealing with Alabama and the other one in South Carolina that were coauthored chapters in a book of essays entitled "Quiet Revolution in the South: The Impact of the Voting Rights Act." It was published by Princeton University Press in '94, and redistricting was part of the matters considered in those essays.

Q As I look through your CV, Mr. McCrary, it appears that your last written work outside of

1 litigation was a -- the last book chapter that's noted
2 on page 1 -- on page 1 from 2013?
3 Am I correct about that.
4 A No. There's also a journal article published
5 in 2014 that's listed in the curriculum vitae,
6 published in the Journal of Policy History. "The
7 Interaction of Policy and Law."
8 Q Is that on your CV?
9 A That's on my CV. That's the first thing --
10 Q Here it is. I gotcha.
11 A Yes.
12 Q So that's the last written product of 2014?
13 A That's correct.
14 Q Do you have any current publications in
15 progress, up -- again, outside of litigation work?
16 A Yes.
17 Q Describe what you have in process.
18 A A book that deals with the adoption and
19 implementation of the Voting Rights Act and its
20 background in the constitutional litigation of the
21 period from World War II, the end of World War II
22 through 1990. And that consists of subjects I have
23 dealt with in my prior publications, listed in the
24 curriculum vitae, and filling in gaps that I have not
25 yet written up of research that I have done.

Q Has working on that book, which as I as understand would be partly based on prior work, partly based on new work, has it involved your doing research specific to Georgia for that book?

A Yes, it does.

Q So what new research have you done with regard to Georgia for that book?

A With regard to Georgia, that's not previously published? Is that the nature of your question?

Q Yeah. Well, I guess let me try to rephrase it.

So I understand you're saying you have a book in process that you're trying to incorporate -- you're trying to incorporate prior work you've done and fill in the gaps on the Voting Rights Act from the end of World War II to 1990. So as you're filling in the gaps, which I assume means new research, what new research have you undertaken for that book, specifically with regard to Georgia in any way?

A With regard to Georgia, there are a number of subjects that I have researched and not written up. Dealing with, among other things the majority vote requirement as it was -- as it evolved in the 1960s.

The experience of various local counties in Georgia, including a county on the southeast coast of

Georgia, Brunswick, the county that Brunswick's in, which I'm -- Glynn County. No, Camden County, just south of Brunswick, I think.

Another case involved -- another case involving the sole commissioner form of government in Bleckley County and other counties in Georgia in the 1950s and 1960s. Research relating to the adoption of at-large elections in Griffin, Georgia. Let's see.

I'm having trouble running through all of the files in -- but there are other Georgia matters that I've previously researched that will be incorporated. But as I sit here, I'm having trouble recalling all of the different subjects. Some of them, the research was done back in the 1980s.

Q I think the last specific item you mentioned was at-large elections in Griffin.

When was -- when were at-large elections adopted in Griffin, approximately?

A This was research I did 40 years ago. To the best of my recollection, they were adopted in the 1960s or the 1970s.

Q Okay. Dr. McCrary, on your previous expert work that you list in your CV, I guess starting on page 3, you had courtroom testimony as an expert witness. And then on the bottom of page 4, you have

sworn written testimony as an expert witness. That's on pages 4 and 5.

Have you had further courtroom testimony as an expert witness that's not listed on this CV?

A No.

Q Have you had -- have you submitted further sworn testimony as an expert witness that's not listed on this CV, I suppose, other than your report in this case?

A Both of those answers are, of course, to the best of my recollection.

Q Okay. I didn't hear your answer about the sworn written testimony. There's nothing further?

A I said, to the best of my recollection, that's -- I've listed everything that falls into the category of either courtroom testimony or sworn written testimony.

Q I just noticed under the sworn written testimony, the last item you have there is May 28, 2021. So there's been nothing since then?

A Yes.

As I think about it, I probably should have added -- although it was produced after the CV was developed, the report in this case.

Q Right. Thank you.

A If I can have a further correction, when I -- sworn written testimony, I didn't intend to include all expert witness reports, but, simply, written testimony that was submitted as an exhibit in a court case.

Q Okay. So what else would there be?

A I'm sorry?

Q So what else would there be?

A What else, beyond written testimony submitted as an exhibit?

Q Yes, sir.

A Well, obviously, I swear that all of my written reports are accurate. And I haven't listed expert witness reports in cases unless they were made an exhibit in a court case. Most of the sworn written testimony, or some of the sworn written testimony was submitted in cases in which I did not testify as an expert, nor was I deposed or anything of that nature. They were simply attached to motions.

Q Okay. So, well, let's -- I appreciate your trying to be clear and I'm trying to understand.

Other than what's on your CV, have you -- have you given a deposition as an expert?

A Well, I've been in many depositions, yes.

Q Yes. I'm not finished. Have you given a deposition as an expert since -- in the last two years?

A Yes. I'm assuming I was deposed in -- if you can switch back to the courtroom testimony. In the question of -- in Christian Ministerial Alliance versus Hutchinson, in Fair Fight Action versus Raffensperger, as you know. And I suppose that's all the cases in the last two years.

Q Okay. Well, Dr. McCrary, how did this assignment -- how did your assignment in this case or these cases come about, that you were asked to be an expert in these cases?

A I was asked by lawyers for the Lawyers' Committee for Civil Rights Under Law if I were available to serve as an expert in this litigation.

Q Okay. Do you have an engagement letter with the attorneys?

A I'm sorry. Yes.

(Exhibit 4 Marked for Identification.)

BY MR. BOYLE:

Q I'm going to go ahead and make your report an exhibit at this time. It probably makes sense.

All right. Can you see your report?

A No.

MR. DAVIS: It is loading.

MR. BOYLE: Okay. All right.

MR. DAVIS: We will let you know when it

stops loading.

MR. BOYLE: Okay. Thank you.

MR. DAVIS: Unfortunately, we got the same line that we got last time, saying "file preview may take a while."

MR. BOYLE: Sure.

MR. DAVIS: It is loaded.

BY MR. BOYLE:

Q All right. Your report's marked as Exhibit 4, Dr. McCrary. I notice your report's in the form of a declaration rather than a report, is there a particular reason why you did it that way?

A Yes. So that it does -- doesn't -- does not have to be notarized.

Q You say on paragraph 1 that you were -- you were asked to examine the congressional and state legislative redistricting plans in Georgia after the 2020 census, and that you were examining Senate Factors 1, 5, and 7 as your primary focus, but also looking at Factors 3 and 6. Is that a sort of good summary of what you say on pages 1 and 2 -- or 1 to 3?

MR. DAVIS: I can't tell you anything, Peyton, but if you want to read the report, you're welcome to. I'll -- you tell me when to scroll, and I'll scroll for you.

THE WITNESS: The rest of that paragraph, to see whether I mention Senate Factor 6.

MR. DAVIS: Okay. You tell me when you're done reading Peyton -- Dr. McCrary.

BY MR. BOYLE:

Q I think at the top of page 3 you mention Factor 6.

A You can scroll down a little bit. I see -- I guess it does refer to Senate Factor 6, which I don't think I addressed.

Q Okay. So as you sit here today, are you able to talk about the Georgia redistricting plans in the context of Senate Factor 6?

A Senate Factor 6 doesn't actually deal with the redistricting process, it deals with campaign appeals. And I didn't end up focusing on that in the report. And I should have deleted the reference to Senate Factor 6 in that sentence.

Q In your expert work in other cases, have you ever performed a similar analysis to what you've done in your report in this case, Exhibit 4?

A Yes.

Q Okay. How many other times? And tell me about those cases.

A Most of the cases in which I have testified

since I retired from the Department of Justice in December of 2016, all of which are listed on the CV.

Q Okay. So most of those have dealt with redistricting?

A I'm sorry?

Q Most of those cases have dealt with redistricting?

THE WITNESS: Can you switch back to the CV again?

(Discussion off the record.)

MR. DAVIS: Oh, absolutely.

Okay. For the record, I've put Exhibit 2, Peyton McCrary's CV on the screen for Peyton.

BY MR. BOYLE:

Q Yeah. By all means, Dr. McCrary, use your CV to help you talk about your other work. That's fine.

MR. DAVIS: Just tell me when you want to scroll.

THE WITNESS: Okay. Chestnut versus Merrill dealt with Alabama redistricting. And that was a case in which, I guess, I testified in 2019. And, I guess, that's the only one that dealt with redistricting, per se.

BY MR. BOYLE:

Q So what ended up happening in that Chestnut

case? How did the court rule?

A To be honest, as I sit here, I can't recall exactly the outcome. But my recollection is that the defendants prevailed in the case.

Q I was looking up the opinion, I think I saw that the Court ended up ruling that because of the upcoming 2020 census, the allegations were moot, essentially.

A Thank you for that correction.

Q Is that consistent with what you remember?

A It's consistent with what I remember in that the -- I don't remember a final Court decision.

Q Okay. If you go back to your report, then -- and we're going to be spending a lot of time sort of paging through your report, Dr. McCrary.

On page 3, paragraph 2, you have a paragraph, that paragraph deals with your understanding of the proper role of an expert witness?

A Yes.

Q Do you believe an expert witness in litigation should be objective?

A Yes.

Q In your understanding of working as an expert, and working with experts, is it the proper role of an expert to summarize expert testimony from other

1 litigation?
2 A I'm sorry. I missed a part of that question.
3 Could you rephrase? Repeat.
4 Q In your -- from your experience, both serving
5 as an expert and working with experts when you were at
6 the Department of Justice, do you believe it's the
7 proper role of an expert witness to summarize testimony
8 of other experts in other cases?
9 A Certainly.
10 Q Why is that?
11 A Because it's factual evidence to be
12 considered, just like journal articles or law review
13 articles or books written by scholars, if it meets
14 the -- if the expert witness testimony meets the
15 standards of the scholarly community in which that
16 expertise is based.
17 Q Do you see a difference between an expert --
18 an expert testifying as to facts introduced by experts
19 in other cases versus an expert repeating the opinions
20 as testified to by experts in other cases?
21 A Well, the important thing to draw from expert
22 witness testimony is the factual evidence that the
23 expert has produced as a course of -- as a consequence
24 of the research that expert has done but, of course,
25 the opinion about that evidence is a part of what

should also be considered.

Q Let's go back a page, Dr. McCrary, page 2 of your report. It actually doesn't have page numbers on every page. But there's a long footnote, Number 3.

Do you see that?

A Yes.

Q And in that Footnote 3, you talk about a publication of yours in 1990 in social science history. And you describe the evolution of statistical methods in voting rights litigation. Do you see that?

A Yes.

Q What is your expertise in statistics?

A As I cite in that same footnote, I have published research both in a book and in a journal article, in which I used both ecological regression analysis and multiple regression, which I, of course, was trained to use in my course in quantitative methods when I was in graduate school at Princeton, and also in further research that I did in the early 1970s, where my students and I were learning the technique of ecological regression from W. Phillips Shively, one of the scientists who advanced the methodology in regard to ecological progression.

And so beginning with graduate school, and continuing in my ongoing learning, I came familiar with

and utilized ecological regression, and I also knew how to do multiple regression analysis, and I used both in my prior publications about 19th century voting behavior in Louisiana -- and Mississippi and Alabama, come to think of it.

Q So when you're given your assignment in this case, were you told what the plaintiffs wanted to prove, or their position on the issues in this case?

A Well, I read the complaint, if that's, you know, if that's what you mean.

Q Okay.

A Which I think I've done in every case.

Q Great. Did you read the amended complaint as well?

A I don't recall. I probably just read the amended complaint, since that would have been the more recent.

Q Well, if I told you the amended complaint was dated in May of last year, do you think you might have read that?

A I think I probably read both. But I'm not certain, as I sit here.

Q How much are you charging for your work in this case?

A $350 an hour.

Q Do you know how much you've billed so far?
A Through the last invoice that covered the period up through the completion of the expert witness report, I think it was around 115 hours.
Q So in total about $35,000?
A Sounds about right. But I don't recall exactly what the math is.
Q And where do you send your invoices?
A My recollection is the invoices were sent to an attorney at Crowell & Moring.
Q How much more time do you expect to bill in the case?
A Well, I haven't done an invoice for work done preparing for this deposition or sitting for this deposition. And I, of course, haven't done any work subsequent to this deposition. So I would have to estimate. And I have, frankly, no idea, but it would be a lot less than time spent preparing the report.
Q Do you sometimes do expert work for government entities?
A I'm sorry? Do I -- have I done expert witness work for government entities?
Q Yes, sir.
A Well, for the Department of Justice, if you mean state or local governments.

There were instances, I think in which the Department of Justice was a defendant/intervenor in cases where we -- the department was aligned with local or state jurisdictions.

Q So it sounds like you're saying in your role as an expert witness since you've left the Department of Justice you have not been retained by a state or a subdivision of a state or a municipality to work for that government entity as an expert witness?

MR. DAVIS: Objection to form.

You may answer.

THE WITNESS: That's correct.

BY MR. BOYLE:

Q In your report, on page 3 -- I'm sorry. Let me strike that.

Are all the sources of data for your report listed in the notes?

A To the best of my recollection, all the evidence on which I rely is cited in the footnotes.

Q Did plaintiffs' counsel provide you with any facts or data not listed in your report that you considered in any way for your report?

A Not listed or discussed in my report --

Q Correct.

A -- is the nature of your question?

Q Yes, sir.
A No.
Q Did plaintiffs' counsel tell you to assume anything for purposes of your expert opinions?
A No.
Q Have you ever previously worked with the Lawyers' Committee for Civil Rights under Law?
A Yes.
Q All right. Describe your previous work with that group.
A Can we switch back to my curriculum vitae here?
Q Yes, of course.
A To refresh my memory.
MR. DAVIS: For the record, I've put the curriculum vitae on the screen.
(Discussion off the record.)
THE WITNESS: Actually, the only cases would be cases -- recent cases since my retirement from the Department of Justice. And that would be -- scroll down a little bit. But not that far. Surely, there's at least one. Hang on.
I remember that I was working on a case for the Lawyers' Committee in which the plaintiffs were challenging the mid-decade redistricting in Georgia,

that was eventually dismissed by the plaintiffs. It had to do with two congressional districts that had been -- in which the boundaries had been realigned between 2010 and 2020.

And the plaintiffs, as I understand it, dismissed their case because minority candidates prevailed in the two congressional districts that they were challenging. Therefore, they had -- the case was moot, essentially. That, I believe, is the only one I recall of the cases listed here.

BY MR. BOYLE:

Q Have you previously worked with the Advancement Project?

A Not that I recall.

Q How about Crowell & Moring?

A I don't think I worked with Crowell & Moring on -- well, scroll up. Well, I'm sorry -- scroll up a bit. Actually, I don't -- it seems to me, I worked on one case in which the Lawyers' Committee was working with Crowell & Moring, but I -- that would have been, I guess, only the mid-decade redistricting case that I previously mentioned. And that -- that's all. That's all I remember.

Q How about the Dechert firm? Have you previously worked with the Dechert firm?

A Yes. And, again -- which case was that?
(Discussion off the record.)
THE WITNESS: I know, this was a case involving Texas redistricting, and that's a case in which the Lawyers' Committee and Dechert -- working on the case, that is to say the Lawyers' Committee had Dechert, I assume, working pro bono in the -- on the case. That's the only one I recall.
BY MR. BOYLE:
Q And do you list that case here in your previous testimony?
A No. Because it's -- it's pending.
Q I see.
A The only thing -- the only thing that was done is my expert report and the deposition in that case. It's an ongoing case.
Q Do you remember the style of the case, parties involved?
A I don't.
Q And had you previously worked with the Southern Poverty Law Center as an expert?
A In the late 1980s, briefly. And then I was hired as a social science analyst by the Department of Justice. And the lawyers for the Southern Poverty Law Center moved the Court to have the Department of

Justice provide my expert testimony in a friend of the court capacity, I guess, for the United States. That would have been in 1989 or '90. 1989, probably.

Q Have you attended any meetings with regard to this case, other than meetings with attorneys?

A No.

Q Are any corporations pay -- any grants to support research you're doing?

A No.

Q So as you were preparing your report, Dr. McCrary, what documents did you gather and pull together to help you prepare your report?

A Well, that's going to be a long answer. I have read many of the documents produced in the course of this litigation, and in consolidated cases relating to Georgia redistricting that I was able to locate on the Internet.

I have done a good bit of newspaper research using a searchable database of newspaper articles called News Bank, to which I have access in my capacity as an adjunct professor at George Washington University law school. And that was early on in the work on the case.

I have incorporated research from my prior expert witness testimony in Georgia Exact Match case

and in Fair Fight Action versus Raffensperger. I have examined the record from earlier court cases as well as court decisions on early cases.

I have examined publications dealing with the implementation of HAVA and the requirements of HAVA, and how it affected Georgia redistricting. I've looked at Department of Justice records, both records of objections and specific documents introduced into the Exact Match procedure and findings by the Department of Justice.

I've looked at -- I'm trying to recall everything I've cited in my footnotes in a hundred-page report.

Q Sure.

A And so that covers the bulk of the work. Of course, I include in that -- when I reference documents produced in the course of litigation, expert witness reports in prior litigation, and the facts produced in those by the social scientists doing that expert testimony and other -- other declarations in court cases, including by some fact witnesses.

I've included a good bit of evidence from documents from the Secretary of State's office, memoranda made available to county registrars, other -- other public sources including the OEVs produced by

Ms. Harvey. I've looked at deposition transcripts of persons employed by the Secretary of State's office in connection with the voter verification procedures of the state.

I've looked at research on racially-polarized voting and the evolution of a party system in Georgia, including evidence about different -- differential rates of voter registration and turnout in published work by persons writing about Georgia politics and other secondary literature that I've cited in my footnotes.

That probably covers the bulk of the types of documents that I have examined and all of which I've -- all of which -- where I rely on the evidence, I have cited in the numerous footnotes that I have in the expert report.

Q So you mentioned online archives or databases several times. Did you physically visit any document depositories or archives to do your research for this report?

A No.

Q Did you interview anyone for purposes of this report?

A No. I rarely interview people in the course of my research as an historian and social scientist.

Q Okay. Could you just describe for me your process of how you put the report together, from when you got your first assignment to just, generally, how you -- what your workflow was like in putting this together to get to the final product?

A Well, I approach it the same way I approach research on a journal article, book, or other scholarly research that I do as historian and social scientist. I try to familiarize myself with all the relevant secondary literature. I utilize newspaper research as a pattern searching device.

In other words, to investigate the general publicly available knowledge about whatever I'm investigating, which I then try to follow up on with research in documents so that I'm not necessarily forced to treat newspaper evidence as the best available evidence. But sometimes that is what is necessary where other documents are not available.

But when I -- when I do research, I -- whether it's for a scholarly publications or on litigation matters where I'm serving as an expert, I look at quantitative evidence as well as documentary evidence regarding the decision-making process.

And that becomes particularly important -- or that was particularly important back in the 1980s when

I was focusing in a lot of my testimony on the issue of discriminatory intent where I would necessarily look at all the available evidence from -- regarding legislative decision-making, which was pretty bare bones in the 1980s compared to -- and earlier decades compared to what is currently available, thanks to the Internet.

And I had to do a lot of field research in order to read newspapers back in the 1980s because they weren't available online. There wasn't any Internet availability in the 1980s.

So in the earlier days I had to do a lot more field research than is necessary in the 21st century.

Q Did you prepare any drafts of the report in the sense of a, you know, an initial draft, which was then later refined or revised to a final?

A Yes. I routinely revise as I add to the research. And so there are a lot of separate drafts that I retained internally. And at a certain point, attorneys always want to see a draft that reflects where you are in the development of a report.

And when they've asked that, I provided a draft that is identified as -- which I identify as a partial draft or an internal or an interim draft and so forth that I will revise as I go forward.

Q Do you recall about how long it took you to prepare the report? I mean, I think -- I think you said earlier that you had about 115 hours. Was that how long it took you to prepare the report?

A Well, the word "prepare" is problematic in your question. Because preparing the report doesn't refer only to drafting the document. It refers to the research that precedes the drafting of the document. In terms of the actual writing of the report, my best recollection is I started writing the report around September or October of 2022, and continue to do research as I proceeded to other subject matter in court.

And, of course, in some cases, as I have previously testified, I was incorporating material from earlier expert reports in other cases and revising it, and usually abridging it. And of course, the summary of my credentials and my qualifications is more or less boilerplate that's only slightly revised to update it from earlier reports. So the writing -- the bulk of the writing process was done from, I'm thinking, October of 2022 through January, early January of 2023.

Q There are at least two places in the report where you talk about doing some calculations. And we'll get to those as we page through.

Did you use any separate software to do your calculations for the report?

A No. A simple calculator.

Q Did you have any collaborators for this report, any research assistants or other sort of collaborators?

A I had no research assistant. If you mean by collaboration, there was a point at which I requested assistance from -- from counsel -- from counsel in the case at the Lawyers' Committee, who I believe utilized a social scientist employed by the Lawyers' Committee to format some data for me. The Census.

Q Who is that?

A I don't know. I don't remember the person's name. I just dealt with the lawyers who provided the formatted data I had requested, which I assume they didn't have the skills to produce themselves, and they must have relied on their social scientist.

Q Is there a particular part of the report you could direct me to that would reflect that assistance you had from the --

A Specifically, it went to census data cited in connection with Senate Factor 5. Some of the census data was provided by the route I have just described. Other census data, I downloaded myself and worked with.

MR. BOYLE: Well, this is the stage where I'm going to start going through the report in detail. If anybody thinks it's a good time to take a short break we might do that. What do you think?

MR. DAVIS: Up to you, Dr. McCrary.

THE WITNESS: Yes. I think, in light of my age, this would be a -- an effective time to take a break.

MR. BOYLE: All right. We're about the right time. Say a 10-minute break?

THE WITNESS: That works.

MR. BOYLE: Okay. See you at 11:37.

(Off the record 11:27 a.m. to 11:40 a.m.)

THE VIDEOGRAPHER: The time is 11:40 a.m. And we are on the record.

BY MR. BOYLE:

Q Dr. McCrary, if you'll look at your report on page 2, Exhibit 4, top of the page, you talk about the purpose of your report. Do you see that?

A Yes.

Q And you say the purpose was to assess evidence relating to specific aspects of the totality of circumstances test. And then you go on to talk about your primary focus to look at Senate Factor 1, 5, and 7. And I believe we went over this a little bit

earlier in your deposition. Where if we go to page 3, you mention Factors 3 and 6, but I think you've said 6 -- 6 shouldn't actually be in there; right?

A Yes.

Q You say on page 2 that your discussion of Senate Factor 1 includes evidence to provide context for quantitative analysis by another expert for plaintiffs, who's addressing Senate Factor 2.

Do you know who the expert is?

A Now I do. I think I'm -- I can't recall his name as I sit here. But I have -- I have reviewed his expert report.

Q Could it possibly be Joseph Bagley?

A No.

Q Did you read Joseph Bagley's report?

A Yes. But he wasn't doing the quantitative analysis regarding racially polarized voting.

Q Well, I understand. How would you say your report is different from Dr. Bagley's report?

A Well, we covered a good bit of the same material. I didn't actually know what he was addressing when I was writing my report. And of course, I hadn't seen his report. He covers, however, material later than I. That is, he talks specifically about the current redistricting process, which I was

not asked to address.

And I covered material that he was not -- that he did not address regarding the exact match process of voter verification and the evolution of Georgia politics that I -- in the 21st century that I discuss in connection with the realignment process and other aspects of Georgia politics in the last two decades.

Q Do you recall anything in the first half of Bagley's report where he was covering history that you disagreed with?

A That I disagreed with? No.

Q Footnote 3 on page 2 references prior articles of yours from 1990. So that's over 30 years ago now. Do you believe that article still stands up, or do you think it would need to be revised?

A No, it is still an accurate account of the methodology used up -- in the 1970s and 1980s. Obviously, the analysis of racially-polarized voting has changed some since 1990, including, for example, the development of the ecological inference technique created by Professor Gary King at Harvard, a political scientist who came up with a different procedure for analyzing racially-polarized voting that differed somewhat from ecological regression.

Although in my experience working at the Department of Justice for 26 years with expert witnesses, you get almost exactly the same findings with either ecological regression or with ecological inference, the Gary King technique. But most political scientists now favor relying on the EI technique developed by Gary King rather than the ecological regression.

Although Stephen Ansolabehere here at Harvard continues to prefer ecological regression, and the last time I checked, historian Allan Lichtman at American University also prefers using ecological regression, since they produce essentially the same findings regarding racially-polarized voting.

Q Well, could you give a thumbnail description or longer if you need to of what each one of those methods is? Ecological inference, ecological regression?

A Well, ecological regression uses the standard procedure of bivariate regression analysis, in which you examine the behavior of election precincts in conjunction with the racial composition, racial and ethnic composition of the voter registration and/or turnout data that are available, to assess the relationship between race and voter choice.

That is essentially what ecological inference, the King methodology does, except that it has variations on that in that it incorporates a minimum maximum analysis of the data and has a complex formula for looking at the demographic plots and a variety of other procedures that allows the King EI procedure to establish confidence intervals for the results, which could be done also with ecological regression.

And he claims that it avoids having findings that are -- that show negative estimates or estimates of over a hundred percent of the voter choice. But, in fact, when you apply it to multiple candidates in elections, that turns out not to be quite true.

So I worked with experts using both techniques when I was at the Department of Justice, talked with Professor King remotely and by phone about various methodological issues in our first work with experts using ecological inference, and read substantially in his book and other essays, talking about different variations on the original King methodology using R and other ways of adjusting the findings that other political scientists and statisticians have written, so that I'm fairly knowledgeable about the -- the way in which King's EI

is approached, in addition to my own experience in using ecological regression and working with experts using ecological regression over a period of two or three decades.

Q On page 3, Note 4, you talk about cross-referencing prior judicial findings.

So as I understand it, your opinions are based in part on court orders or court opinions, which themselves are based on the works of other historians; is that right?

MR. DAVIS: Objection to form.

You may answer.

THE WITNESS: You're asking me specifically about Footnote 4, and I don't see any reference in that footnote to court decisions. Is there? The last -- the last phrase in that -- yes. When I say "relevant court decisions," I'm looking at the court decisions to assess the factual evidence produced in the findings of fact of the courts.

And I refer to that elsewhere in the -- in the introductory section of this report. And in, I think, another footnote is how I addressed that. And I've also discussed that in my most recent journal article that you referenced earlier in this deposition, published in 2014, where I quote from what I wrote

there about how I used those decisions to assemble factual evidence from the findings of fact.

BY MR. BOYLE:

Q As you say in Footnote 5 you're a historian by training, not an attorney; correct?

A That's correct.

Q Did you ever go to law school or take any law school courses?

A I'm sorry. What was the question?

Q Did you ever go to law school or take any law school courses?

A No.

Q Turning to page 4, paragraph 4, you say your analysis, so far, has been handicapped by the limited nature of relevant state documents available through discovery.

What if -- what more would you want to see in state documents that you haven't been able to see?

A Well, that sentence anticipated talking about the redistricting -- the current districting process that is at issue in this litigation. But in the end, I was not asked to do that.

But I would have been interested in -- even though I wasn't actually analyzing it, in knowing more about the districting process that was at issue in this

1 litigation. And, of course, had there been discovery
2 in which I -- which I'm used to having available in a
3 court case, that would have included depositions of
4 fact witnesses.
5 It would have included legislative records
6 regarding the redistricting process and so on. The
7 sort of things, for example, that I was able to examine
8 when I was looking at the mid-decade redistricting in
9 Georgia some years earlier. So that's what that refers
10 to.
11 Q Okay. Well, from your response just now, so
12 it sounds like your assignment changed, or your
13 understanding of your assignment changed, so that you
14 originally thought you would be looking at the
15 redistricting process as Dr. Bagley did, but you ended
16 up having a different assignment?
17 A Yes.
18 Q Ah. So when you say in paragraph 4 that your
19 effort was handicapped, as it turned out, your effort
20 actually was not handicapped as far as the documents
21 that you needed for purposes of the actual report you
22 did do.
23 A For the expert report that I did submit in
24 this case, yes.
25 Q Is your statement in paragraph 4 about having

to rely on newspapers rather than other kinds of documents, does that apply to this -- to the report you ended up doing, or would that only apply to the effort you thought you were going to be doing in looking at the redistricting in 2021?

A It refers primarily to what I thought I was going to be examining, but ended up not being asked to address.

Q Now, are you offering an opinion about discriminatory intent behind the 2021 redistricting?

A No.

Q Are you offering any opinion about the design of the districts that were adopted in 2021?

A I'm sorry. The districts that were adopted when?

Q In 2021.

A Could you repeat your question, so I'm sure I'm answering the question I thought I heard?

Q Are you offering an opinion about the design of the districts that were adopted in 2021?

A No.

Q Okay. At the top of page 6, you talk about your voting rights law course at George Washington law school. Tell me about that course.

A It's a course that considers the evolution of

voting rights law, from essentially the adoption of the one person, one vote standard in the early 1960s, and the evolution of voting rights litigation beginning with the 1960s and moving to the present case law. And it focuses, in part, on the legal issues that would be normal in almost any law school course on a particular subject matter.

But it also includes, at my -- at my insistence, although I don't have any resistance from my colleague with whom I teach the course, the full range of the litigation process, from the trial court up through the appellate decisions in cases, with a particular attention to the fact finding that goes on in voting rights litigation and the sort of evidence that is produced as a result of the testimony of both the fact witnesses and expert witnesses, so that it gives lawyers a better idea of how voting rights lawyers actually -- it gives law students -- I'm sorry.

A better idea of how voting rights lawyers actually operate, the way in which they approach the litigation process from beginning to end.

Q So would you say that course, in part, is designed to equip law students to litigate voting rights cases from a plaintiff's side?

A For any side.

Q Okay. So you cover -- you cover the arguments made on both sides?
A Yes.
Q Did you say yes?
A Yes.
Q Okay. I'm sorry. You were faint.
A I did say yes.
Q Page 7, paragraph 9, you say some of your published work focuses specifically on Georgia. And then you cite several publications of yours over on page 8.
A Yes.
Q And on the top of page 8, you specifically mention Georgia congressional redistricting in 1981 and Georgia legislative redistricting in 2001.
Do you see that?
A Yes.
Q Now, in both of those instances, the Georgia legislature was controlled by Democrat -- by the Democratic Party; is that right?
A Yes.
Q Okay. Thank you. The next section of your report starts with paragraph 11, "Senate Factor 1, History of Discrimination Affecting Voting." I'll make sure. Are you there?

A Yes.
Q And this short section, which is just one paragraph, you have several citations there and those are all court decisions; correct?
A Yes.
Q You don't actually cite to any historical studies in this section; correct? In that paragraph?
A The purpose of the paragraph is to the -- to refer to the court decisions that I quote and what they found.
Q Okay. And your next section is "State of Minority Voting Rights in Georgia '45 to '65"?
A Yes.
Q And that carries through for the next six pages. Got that?
On page -- if you go to page -- not numbered, but with paragraph 15 and 16, which is the 12th page.
A Yes.
Q You're citing a previous article of your own there on the dynamics of minority vote dilution, the case of Augusta, Georgia?
A Yes.
Q Tell me about that article, what you remember about -- what you were treating in that article?
A Well, it -- first of all, it reviews the

process by which the City of Augusta decided to switch from ward elections to at-large elections for the city council, which culminated in a decision in 1953. And it talks about the operation of the at-large election system as it was implemented in Augusta over the next 30 years.

Q So through 1965. Is it -- it says it's a 20-year period in the title.

A 1953 to the mid 1980s.

Q Okay. And then on the next -- the next page of your report, in Note 23 you refer to another article coauthored with Steven Lawson, "Race and Re-apportionment." What was that article about?

A As I said earlier in this deposition, it dealt with Georgia senate redistricting after the one person, one vote decision by the district court in Toombs versus Fortson, I think was the name of the case, in which the State decided to use multimember districts for basically metropolitan counties, a single on Fulton County, for the state senate.

They could address the one person, one vote connection in the state senate without a constitutional amendment and -- which would have been necessary for the house. And so they focused on the senate, despite the fact that the state constitution actually required

the use of single-member districts for state senate districts at the time.

But they were explicit, some of the legislators were explicit about the racial purpose of using multimember districts to prevent the election of a negro, as they said in the language at the time to the state senate of Fulton County, which they said would necessarily have occurred had -- if the same districts been used for the state senate.

And that decision by the legislature was rejected by a state court judge in 1963, as I recall, because it violated the state constitution.

And that the sequence of events there was later, in a later phase, part of the factual record in a case known as Fortson versus Dorsey, which was decided by the U.S. Supreme Court in 1965, to which I think we referred in the article as well.

Q The next section of your report is on numbered page 15, "How the Voting Rights Act Worked"?

A Yes.

Q And this covers, as it says in the subhead, 1965 to 1999?

A Yes.

Q If you turn three more pages to note 43, there's a citation to an article of yours:

"Discriminatory Intent and Continuing Relevance of Purpose Evidence in both Dilution Lawsuits."

A Yes.

Q So what was that about?

A It was a discussion of how the intent requirement set forth in City of Mobile versus Bolden in 1980 by the Supreme Court had evolved, and how it was applied in the years following that decision, both before and after the amendment of 1982 to Section 2 of the Voting Rights Act.

And in the course of talking about that evolution, I discussed a case, Lodge versus Buxton, which the Supreme Court was known as Rogers versus Lodge, which dealt with Burke County, Georgia, and I was referring specifically to evidence in the Burke County, Georgia, case in the paragraph to which the footnote relates.

Q Let's go to page 20, which is -- got paragraphs 25 and 26.

A Okay.

Q And in note 52, you're citing to a book chapter that you wrote, "History in the Courts"?

A Yes.

Q What was that book chapter about?

A It's about the decision on remand in Bolden

1 versus City of Mobile, on remand from the Supreme
2 Court, that was tried in 1981 and decided by the trial
3 court in 1982. Along with a companion case involving
4 the Mobile County School Board, that was also on remand
5 from the Supreme Court and tried in 1981, and decided
6 by the trial court judge in 1982.
7 Q Let's go to numbered page 23 and look at the
8 footnote there. Are you there?
9 A Yes. Which paragraph?
10 Q Well, let's look at the very bottom of the
11 page, the end of Note 64.
12 A Okay.
13 Q So in that note you say that, at the time of
14 the November 1990, general election only 52.3 percent
15 of voting age blacks were registered compared to
16 62.1 percent for voting-age whites.
17 And do you believe those numbers are correct?
18 A Yes. I was quoting from the record of the
19 Department of Justice decision. That is to say, what
20 is -- I assume was cited in -- cited in the objection
21 to -- which I had --
22 Q All right. So if -- if we scroll back up to
23 some numbers that you had on page 16, Footnote 20 --
24 let's see. Do I have that wrong -- I'm sorry. Hold
25 on.

A That takes us back before I think you intended.

Q Yeah, yeah. I had my page number wrong. I'm sorry. No, just page -- page -- the one with paragraph 20.

A Okay. I'm in paragraph 20.

Q Yeah. At the end of paragraph 20 it says, as of 1971, black registration in Georgia had jumped to 68 percent of the voting-age population while whites had increased to only 71 percent of the white voting-age population?

A Yes.

Q So it sounds like the registration fell for both whites and blacks from '71 to 1990, according to the data you've got. If we compare the data here in paragraph 20 with what you had on page 64?

A That appears to be the case.

Q Do you know why that would be?

A I'm sorry?

Q Do you know why that would be?

A No. I don't know why that would be. I didn't address that question.

Q Well, do you think that black voter turnout fell from 1971 to 1990 because of racial discrimination in Georgia?

A I have no idea, but I don't have any reason to think that.

Q Let's go to paragraph 31, and in that paragraph, you're talking about DOJ action between 1965 and the Holder decision, Shelby v. Holder, which was 2014?

A 2013.

Q 2013? And you've got a hyperlink in Note 69 for your source; right?

A Yes.

Q Okay.

A That is specifically a citation to the website of the Civil Rights Division and the voting section where all the -- all the objectionable letters are reproduced as PDFs, and you can access them online.

(Exhibit 5 Marked for Identification.)

BY MR. BOYLE:

Q I've just marked as Exhibit 5, my printout from that page that you've cited in Exhibit -- or in Note 69. Do you see that on your screen?

A It's loading.

Q Very good.

A It's probably a big document. There it is.

Q Okay. Does that appear to be the right document that you were citing?

A Yes. That's what I'm citing to.

Q What you say -- you say in the text in your report, that the DOJ blocked 177 proposed changes over that period of 1965 to 2013. It looks like the -- the rate, if you will, fell off, somewhat, just looking at the last 30 years or so from 1994 on. There may only be about 23 or 24 such actions.

Does that sound right to you?

A From 1993 or '94 forward? Probably.

Q Do you have any idea why that would be?

A Yes. I can speculate. Obviously, I don't have a definitive answer because it involves decision-making by all those jurisdictions that submitted voting changes. But there was a learning process that went on as the preclearance requirements of Section 5 were implemented, and people read the guidelines and they saw what was required.

And they had experience with working with preclearance decisions. So they knew how the process worked, and so they learned things that would figure objections and try to make an objection.

In addition, there was a process by the 1990s -- actually, I think it probably began in the 1980s, but before I worked in the Department of Justice, where the department would send a letter where

there was insufficient evidence to make a decision, a determination about the voting change at issue, explaining what factual evidence was missing from the submission. It was known in the section, informally, as a "more-info letter" asking for more information.

And often, that triggered a decision by jurisdictions to change what they were proposing to do in order to avoid what they may have interpreted as a possible objection to the change. And so that was a part of the educational process that went on. And some time, a smaller percentage of the submitted changes were the subject of objections because jurisdictions were more effective in complying with the requirements of Section 5.

Q And again this was your source for Note 69. As I scroll to the bottom it says, "updated August 7, 2015." Do you know where more current data could be found?

A Well, Section 5 decisions haven't been made since the Shelby County decision. So you wouldn't find any subsequent information because it didn't exist and were never created.

Q I'm sorry. I was just trying to get back to where I was. Let's go to your next section of your report, and that's realignment of the Georgia party

system starting on page 25.
A Okay.
Q You say in Note 72 that the legislative redistricting plans in place at time -- at the time of the 2002 elections were adopted by the State in 1997; correct?
A Yes.
Q And at the time, the Georgia General Assembly was controlled by the Democrats; is that right?
A That's correct.
Q Do you have a -- do you have an answer, or any idea how Sonny Perdue as a Republican was elected governor in 2002, pursuant to redistricting that had been done by Democrats.
MR. DAVIS: Objection to form.
You may answer.
THE WITNESS: I'm sorry. I'm not sure I grasp your question fully. Can you repeat it?
BY MR. BOYLE:
Q Okay. Do you have an explanation or any opinion on how the governor, Sonny Perdue, was elected in 2002 as a Republican, even though the districting in place had been created by a Democrat-controlled general assembly?
A He won more votes.

Q Right. Okay.
All right. Let's look at the next section, and the long history of racially-polarized voting?
A Yes.
Q And let's see. I want to look at Note 82.
Yeah, explain -- could you just explain what you're saying in 82?
A Sure.
Q Yeah.
A Racially-polarized voting existed when Democrats were the majority party in Georgia, and it continued to exist when Republicans became the majority party in Georgia. And what I was saying in this particular footnote is the fact that partisan identification was becoming more racially polarized than in the past does not suggest that the cause of the polarized voting was partisanship rather than race.
That, in fact, racially-polarized voting, the predominant pattern under both Democratic majorities and Republican parties. Republican majorities, I should say. And this anticipates what has become an issue in voting cases over the last -- well, ever since the early 1980s, which is that defendants have often argued that it was necessary to show that polarized-voting patterns were caused by race and not

by other variables such as party, incumbency, name recognition, campaign funding, and so forth.

As North Carolina had argued in the case, it was decided by the Supreme Court as Thornburg versus Gingles. And, of course, the plurality decision in Thornburg versus Gingles rejected that causality defense, and that was the actual background that I was referring to in Footnote 82.

Q Okay. So is it possible that racially-polarized voting, say, before 1965 in Georgia was due, in part, to racial discrimination as racially-polarized voting in 2022 is due to partisanship?

A No.

Q And why?

A Because there's no way of providing reliable evidence on why voters cast their ballots. You know, it's a -- it's a secret ballot. And voters have their own constitutional right to determine why they're voting for particular candidates, and there's no way of knowing what the cause of their voter choice might be. Statistical analysis has, basically, no way of solving that problem and providing reliable evidence about the cause of the voter choice.

You can analyze a lot of things about voting

behavior using statistical methods, but not the cause of the voter choice. And so, you know, the one thing we know about the period you started your question with, about the period before 1965, is that Georgia was, essentially, a one-party state, so party could hardly have anything to do with the racial choice.

And we know from other evidence about that period in Georgia that there was racially discriminatory process of voter registration in the state, which was the subject of lawsuits, and where I have cited evidence regarding the political science research at the time on the way in which the voter registration process operated.

So the causality defense couldn't possibly be interposed in talking about the period before 1965. And it's also impossible, as I've said earlier, to provide evidence, reliable, systematic evidence from statistical analysis of the cause of the voter choices that are at issue, and that's why the Supreme Court insisted that it is the correlation between race and voter choice observed in precinct data that can be analyzed, and that the causes of the pattern of polarization along racial lines is something that cannot be determined.

Q What about using voter surveys or interviews

of voters to get at the cause?

A Well, the problem with survey research to address this question is that survey research involves estimation procedures, survey questions are subject to challenge, depending on the way they are phrased. You can get some idea, for example, if you have a survey that asks voters to which party they belong, or with which party they identify, you get some idea of how people view the parties.

But you can't determine from that survey research why they identify themselves as either Republicans or Democrats. Survey research does have its limitations, and that applies, of course, to exit polls as well as independent survey -- surveys conducted by either the Bureau of the Census or by social scientists doing survey research.

You know, I cite exit polls for the evidence of what they're worth, but they don't -- they don't provide any reliable evidence about the causes of the voter choice, merely what those choices were, quantitatively summarized.

Q Do you feel that -- that you're of the opinion you've just expressed is the majority view in your field, or is there a substantial disagreement about the utility of survey research in this regard?

A There is not substantial disagreement about that. Although there are occasional political scientists who have a different view, some of whom served as expert witnesses in cases where I have observed their testimony.

Q Can you give me some names of some of those people?

A Sure. John Alford is an example of someone whose testimony usually addresses the causality defense and finds that it's necessary to prove that the choices made by voters are caused by race -- I'm sorry -- caused by race or party.

And he says that without any substantial evidence, the party is normally the determination in the 21st century of the voter choices, and there's very little support for that among political scientists or sociologists or historians with whose research I'm familiar. And in addition, it's hard to know what sort of evidence could be adduced to demonstrate Professor Alford's claim.

Of course, I actually recall sitting in court in Washington in a preclearance decision, in which Professor Alford testified on cross-examination that the lawyers had written his report. And he had been asked if he approved every paragraph of that report.

My recollection is that it was the Texas redistricting case after the 2010 census, but I could be mistaken about the exact case it was in. But I was so shocked by just -- by Professor Alford's concession in cross-examination, that I vividly remember the experience.

Q Have you read his report in this case?

A No, I have not.

Q Have you read the reports of any other experts in this litigation?

A I have not read any of the defendants' experts, but I hope to be able to read them following my deposition.

Q Turn to page 29 of your report, in paragraph 38 there.

A Okay.

Q The second half of that paragraph you talk about turnout in the 1996 presidential election, then 2000, and then 2004, and from the numbers you're showing in that paragraph it appears that the turnout for both black and white voters consistently increased during that period; correct?

A Yes.

Q And then if we turn to the next paragraph on the next page, about the fifth line down on page 30,

you say turnout among blacks increased from 2004 to 2008; correct?

A Yes.

Q Go to page 32, paragraph 42.

A Yes.

Q About two thirds of the way down, you say that between 1990 and 2016, Georgia's black population now included modest percentage of African immigrants?

A Yes.

Q What is -- what's the voting pattern for, I guess, new African immigrants to Georgia in the 21st century, compared to other African-Americans in Georgia?

A The data don't allow us to address that question. In -- the data reports the race of -- the Georgia official data reports the race, but not the immigrant -- immigration status of the voters who classified as black or African-American.

But I understand from other sources that I cite in the report that there is some degree of African immigrants coming into Georgia in this period, and so that in order to be comprehensive in characterizing the black population, I thought it useful to mention there were modest percentages of African immigrants, but you can't analyze their behavior separately.

Q I guess you're saying from the data that you think is legitimate to use, it's not possible to break out people who are recent immigrants to Georgia from Africa versus African-Americans whose families have been here for a longer period. Whereas somebody who was using, say, survey or interview data might be able to break out voting patterns for those immigrants separately?

MR. DAVIS: Objection to form.

You may answer.

THE WITNESS: Let me break your question down into a couple of different points that need to be addressed separately. I'm not aware that the secretary of state's data on voter registration by race or turnout by race distinguishes the black population by whether they're native born or foreign born, or of any other source that's available.

And the official state data are more reliable than any estimates derived from survey research, of any kind, including by the Bureau of the Census. So if you look at survey research, you might find evidence that describes the percentage of the black population in Georgia that is foreign born or that has immigrated from elsewhere.

But those would be estimates that are subject

to the qualifications I mentioned earlier in answering one of your questions. Survey research is not as reliable as being able to analyze the official data that is available in a state like Georgia, using the standard statistical techniques of ecological regression or ecological inference.

BY MR. BOYLE:

Q On page 32, do you see where paragraph 42 is? It's not numbered. You say at the bottom of that page, because in the 21st century, "minority voters routinely support Democratic candidates." Do you see that?

A I answered the question, yes.

Q Okay. But you don't have a citation for that statement. Do you, where -- where is that supported?

A I'm actually quoting or paraphrasing what's said in the journal article by Hood -- and I think that's Hood and McKee's article. That's what they maintain. And I believe it's correct.

Q Let's go to the next section, immigration and citizenship issues.

A Okay.

Q Have you done any of your own research, Dr. McCrary, on immigration and citizenship issues, because I didn't see that on the CV?

A I'm sorry. Can you repeat the question? I'm

not sure I got the first part of it.

Q Does your CV reflect any of your own research on immigration and citizenship issues?

A No. I'm citing to work of other persons.

Q Okay. So you've never done your own research on immigration and citizenship?

A That's correct.

Q Okay. Have you ever testified on immigration and citizenship?

A No. Well, except to the degree as here that I'm citing other studies of that process. That's usually incidental to my own testimony.

Q What's your understanding of why you were asked to put this in your report, if you've never researched it before?

A Historians and social scientists generally, routinely cite secondary studies by other scholars where they believe the evidence cited is reliable. That's a normal parcel -- that's a normal part of the process of scholarly research -- so it's naturally the case that every expert will quote secondary sources that discuss subject matter.

But to answer your question fully, I wasn't asked to discuss immigration. I chose to discuss the attitude toward immigration in Georgia because it

influenced the process of legislation, and it fueled political attitudes in Georgia in the -- particularly in the 21st century, which is the period I'm talking about here.

Q Do immigration and citizenship issues, as you discuss them in your report, have specific bearing on any of the senate factors that you say are in the scope of your report?

A Well, it's part of the history of discrimination affecting voting. And it is potentially relevant to Senate Factor 6, although, in fact, I didn't cite any evidence on that particular subject in this report. And it could be relevant to addressing the causality defense if that could be analyzed, which I personally don't think it can reliably be analyzed.

Q What's your understanding of the causality defense?

A The argument is that the polarized voting patterns are caused by variables other than race, and it's required to prove that the polarized voting patterns are, in fact, caused by race and not by other factors such as party, name recognition, incumbency, campaign expenditure differentials and so forth, as I discussed earlier in talking about Thornburg versus Gingles.

Q Do you see your discussion in this section of immigration and citizenship issues as being relevant to allege the discrimination of and black voters in the 2021 redistricting plans?

A It doesn't relate to the discrimination of black voters directly. It is only relevant to understanding that part of the persons of color who register and vote in Georgia who are Hispanic or Asian, or, conceivably, African immigrants, although I don't have any separate way of knowing that.

But it clearly is related to that part of the coalition that consists of persons who are foreign born, particularly Hispanics, but to a -- in a numerical sense to a less -- lesser degree Asian-Americans.

Q In Footnote 97 on this page, you cite to a study that says that -- presumably around 2014, there were over 10,000 black noncitizens in Georgia, mostly from Africa?

A Yes.

Q Am I right? Do you -- is it your understanding that that was in 2014, or were they referring to some earlier time that there were 10,000 such people?

A Well, the study is citing American community

survey data, which I don't recall whether they were citing the one person or the five -- the one year or the five year estimates but I'm guessing, since the five-year data are more reliable, in general, they are probably citing five-year estimates. So not just from 2014, but the 2014 in the preceding five years, but it's possible it relates specifically to the one-year data for 2014.

Q Do you know how the figure of 10,000 black noncitizens compared to the total black population in Georgia around that time?

A It's a very small percentage of the black population in Georgia, but I don't recall the specific percentage, or the specific total number of black citizens in Georgia, or the black population in general, citizen and noncitizen. I'm not sure there is a way of knowing that.

Q Let's scroll down to page 36, Note 106?

A Footnote 106?

Q Footnote 106. That's right.

You say in that footnote that "identifying undocumented immigrants was a legitimate goal, that the laws were drafted in such a way that at least as implemented they swept more broadly than necessary, risking a discriminatory effect." That's your opinion?

A Yes.
Q When you say it was a legitimate goal, do you mean a constitutional goal or something else?
A I meant legitimate in the sense of a legitimate state interest. It happens that it's also a constitutional requirement, but what I was referring to there is a legitimate state interest.
Q What do you mean when you say that "it swept more broadly than necessary, risking a discriminatory effect"?
A I'm talking specifically about the exact match system for verification, which has other evidence I cite in the report demonstrates was routinely inaccurate in identifying citizenship or non-citizenship status of persons seeking to register.
Q On the next page, you're talking about Governor Perdue and some statements he made, in your paragraph 48.
A Yes.
Q And you say his statements rose to the level of demagoguery. What's your definition of "demagoguery" here?
A Demagoguery is an appeal to the prejudice of voters by reciting facts that are not specific facts and that are intended to inflame opposition to

1 particular groups, in -- usually to particular groups.
2 Q And then continuing on to the next -- the top
3 of the next page, still on paragraph 48, you say that
4 "the State's voting process at the time made the
5 governor's claim extremely unlikely."
6 Is that based on something you read
7 somewhere, or is that just your opinion?
8 A Well, it is -- it is, in fact, based on what
9 I know about the photo identification requirement as it
10 operated in Georgia. And I know that from a lot of
11 different sources, including familiarity with cases
12 involving the photo ID requirement in Georgia that have
13 been decided over the years.
14 And as a practical matter, the State has
15 evidence at its disposal that would basically eliminate
16 the possibility of noncitizens voting as Governor
17 Perdue was alleging, because the existing state laws
18 would have prevented that, assuming that they were
19 enforced, as I believe they were enforced in Georgia.
20 Q Turn to the top of page 41, please?
21 A Which paragraph?
22 Q I guess it's 51, carry-over paragraph 51?
23 A Okay.
24 Q And you cite there -- and I believe you're
25 citing here to a Gwinnett Daily Post article that's

cited in Note 117, you say at the top of 41 that a lawyer at the chamber of commerce meeting saw little practical need for such restrictions.

Do you know who that lawyer was?

A I do not. I do not recall whether the -- I think the lawyer was named in the newspaper article in the Gwinnett County newspaper. But I don't recall it.

Q Do you know if that lawyer happened to be an activist of any kind?

A No way of knowing. He appeared at the meeting sponsored by the Chamber of Commerce.

Q Turn to page 44, please.

And at the very end of that paragraph, you're quoting from a Macon Examiner article, and you say in your report, "many of these farmers who are losing their crops in his rural counties, the reporter added, had voted Republican for years."

A Yes.

Q Do you have any idea what the -- what "for years" was supposed to mean? How many years?

A No. I'm quoting the reporter, for what it's worth.

Q Before 2002, the statewide offices in Georgia were held by Democrats; correct?

A I'm sorry. What's the question?

Q Before 2000 - before 2002, statewide offices in Georgia were held by Democrats rather than Republicans; correct?

A Statewide offices. Yes.

Q Okay.

A But as I recall, Republicans had a majority in at least one house of the legislature during some years of the 1990s.

Q Okay. So do you think it -- to the extent the reporter has a point there that's accurate, that four years could really have meant more than two decades?

A I have no idea what he means by "years." But he could well have been referring to the period before 2002 when Democrats were the majority party, and where statewide officials were, I think, uniformly Democrats. Democrats until the 2002 election.

Q Right. But I mean, as an historian, Dr. McCrary, I mean, you don't -- you don't believe that farmers in Georgia were voting Republican in the '70s or '80s or '90s, do you?

A I don't have any way of knowing what percentage of farmers in south Georgia or elsewhere in Georgia were voting Democratic or Republican. I'm just aware that, by this time the reporter believed that

they were voting Republican and had done so for years.
Q Well, why would you put that quote in your report unless you thought it was true?
A Well, I do think it was true. I just don't know how many years he's talking about. That's the question you asked me to begin with, remember.
Q Sure. So it could have been 20 years. It could have been 20 years, or it could have been -- but probably not more than 20 years?
Would you agree with me there?
A It's a guess. It's speculation as to how many years he was talking about.
Q On page 45, you're talking about House Bill 87 --
A Yes.
Q -- and a court challenge to House Bill 87?
A Yes.
Q Is it correct that the district court, or the 11th Circuit ended up -- strike that.
My understanding is that House Bill 87 was challenged on federal preemption grounds.
Is that your understanding?
A I'm not sure I understand your question. But let me review what I've said in the report about the court decision, including the footnotes.

By "preemption decision" are you referring to the passage in the sentence that ends with the citation to Footnote 143?

Q Yes.

A And -- yes, that's what the court decided. And that was the basis for the court's decision, I should say.

MR. BOYLE: All right. It's -- we've been going about an hour and 15 minutes. I mean, theoretically, we could -- we could keep going and I could probably finish around 2:00 or something like that, but I'm sure people want to take a break. And at least want to take a short break, and maybe we want to take a lunch break. So what do you think?

MR. DAVIS: Yeah. I mean, from the -- my perspective, I think it would be great to take a lunch break for the court reporter's sake as well.

MR. BOYLE: Sure. Absolutely.

(Discussion off the record.)

THE VIDEOGRAPHER: The time is 12:54 p.m. And we are off the record.

(Off the record 12:54 p.m. to 1:38 p.m.)

THE VIDEOGRAPHER: The time is -- the time is 1:38 p.m. And we are on the record.

BY MR. BOYLE:
Q Dr. McCrary, now that we're back, did anything occur to you during the break that -- where you'd want to correct any of your testimony from this morning?
A No.
Q I'm sorry. I didn't hear the response.
A I said no.
Q Thank you.
THE WITNESS: Are we on?
MR. DAVIS: We're on, yeah.
BY MR. BOYLE:
Q All right. Stay with your report, then, on page 47, mid-section there. "Implementation of the Help America Vote Act"?
A Yes.
Q Had you previously done research on the Help America Vote Act?
A In earlier cases, yes.
Q Which earlier cases?
A The Exact Match case and the Fair Fight Action case.
Q Okay. Turn to page 55, Note 177. You note in Footnote 177 that, at the time -- which I assume you mean 2010 -- you were employed as a social science

analyst in the voting section, Civil Rights Division, but not involved in the Section 5 litigation or administrative review of the submission.

A That's correct.

Q Why did you include that?

A I'm sorry?

Q Why did you include that statement in the footnote?

A To avoid any questions about with whether I had knowledge of the internal deliberations or internal documents involved in that decision.

Q Is anything in this section on pages 47 to 56 about the Help America Vote Act bear on your opinions about the redistricting plans in 2021?

A Yes.

Q What -- in what way?

A Well, it establishes that over a period of almost two decades, prior to the current redistricting that's at issue in this litigation, the State of Georgia was carrying out a system of voter verification for voter registration. In Georgia, that had a discriminatory effect. And that -- that effect was -- could have been avoided by more systematic and effective database matching.

Q Is it your opinion that the actions of

Georgia officials that you describe in this section relating to the Help America Vote Act and the implementation of it in Georgia, had a bearing on discrimination against black voters in 2021?

A Whether it had a bearing on discrimination against black voters in Georgia, generally, or in -- was your question specific to 2021?

Q Yeah, it is. It's specific. Yes. Exactly. 2021.

A Well, remember I was addressing Senate Factor 1, the history of racial discrimination affecting voting, and I was bringing that history up close to the present, but only going so as far as 2018.

Q Okay. Your next section starts on page 56, "Georgia's flawed system of voter verification in operation." Is this something you've testified about before?

A I testified in a written report and in deposition on this subject in the Exact Match case and in the Fair Fight Action case.

Q Am I correct that on pages 57 to 62 you're essentially summarizing the opinions of Gary Bartlett and Michael McDonald in the NAACP v. Kemp case?

A I wouldn't characterize it that way.

Q Well, what part of 57 to 62 is your own

product rather than a summary of their opinions?
A I was citing the factual evidence available through the expert testimony of Professor McDonald and Mr. Bartlett. That's not the same thing as summarizing their reports.
Q Well --
A I was -- so -- and let me finish my answer.
Q Yeah, of course.
A I was also citing secondary studies as, for example, in page -- in Footnote 182, and relating that to the general subject that I was discussing. And so I was actually doing the same thing with regard to secondary studies published by political scientists that I was doing with the expert testimony of McDonald and Bartlett.
Q Well, I mean, you tell me if I'm wrong, Dr. McCrary, but, I mean, starting on page 58, Note 184, you're -- you're citing to Bartlett and McDonald's reports and declarations, and the following footnotes through Footnote 200 are citing to those same sources all the way through?
A In addition to other things. Secondary sources that are also cited in the footnotes in that para -- in that section.
Q Yeah, but I mean -- okay. But those

secondary sources are sources that were cited by Bartlett and McDonald; right? Not something you went out and found separately; correct?

A No, that's not true. Some of them, one of them, one or two of those were cited by McDonald, the rest I had -- I had identified myself. In addition -- can you scroll up.

MR. DAVIS: You just tell me where to scroll.

THE WITNESS: I'm sorry. Down. I want to look at more of the footnotes. Keep going. I see that I also cite evidence from Chris Harvey's deposition in 2019 in Footnote 194. I think that's within the page -- pages you were referring to; right?

BY MR. BOYLE:

Q Yeah. But I mean -- okay. That's fair enough. But anything else?

A No, I didn't -- I didn't take Mr. Harvey's deposition. I'm not an attorney, but I think I'm entitled to quote from his deposition transcript, just as I do from secondary sources or expert witness reports; right?

Q I'm sorry. Are you asking me a question now. You know how this works, Doctor.

A Sorry. The last word I would -- I wish I had not made that comment because it's not my job to ask

1 questions. Sorry.
2 Q That's all right. No problem. No offense
3 taken.
4 Anyway, I was just trying to confirm. And
5 you correctly pointed out, 194, you do cite to that
6 Harvey deposition, which is something different from
7 Bartlett and McDonald. But I think I'm right. That
8 otherwise, in that sequence of footnotes, or that text
9 and sequence of footnotes from 184 to 200, it's really
10 just from Bartlett and McDonald; right?
11 A Those are the predominant sources I'm citing
12 in addition to the secondary studies that I --
13 secondary sources that I just referred to earlier in my
14 answer. Your question suggests that drawing evidence
15 from expert witness reports is somehow invalid as a
16 methodological matter. And I don't agree with that
17 characterization.
18 Q Well, is there anything you did on pages 57
19 to 62 that attorneys couldn't have done by summarizing
20 those same reports?
21 A Sorry. Could you repeat the question? You
22 were speaking pretty fast.
23 Q Okay. Is there anything you did on pages 57
24 to 62 in your discussion of Bartlett and McDonald that
25 draws on your historical expertise and allowed you to

1 describe the findings of McDonald and Barrett that
2 couldn't have been done by an attorney?
3 A Well, I'm not casting aspersions on an
4 attorney, but I am drawing on my own training as a
5 social scientist and evaluating the quantitative
6 evidence in McDonald's report, and I'm drawing on my
7 training as a social scientist and my experience as a
8 social scientist in analyzing the comments of
9 Mr. Bartlett about the way in which election
10 administration has operated in the past and was
11 operating in Georgia. I don't see anything there that
12 suggests that my analysis is not involved.
13 Q You have another section starting on page 67,
14 "Continuing Flaws in Georgia's Voter Verification
15 System."
16 A I'm not there yet. Beginning at
17 paragraph 83, yes. I'm there.
18 Q And you discussed House Bill 268. Did you
19 testify about House Bill 268 in prior litigation?
20 A In written reports and in deposition -- in
21 both the Exact Match case and the Fair Fight Action
22 case.
23 Q On page 73, paragraph 91.
24 A Okay.
25 Q Okay. You lead off that paragraph saying

"the State's exact match methodology on applicants flagged as potential noncitizens continued to have a racially-discriminatory effect."

A Yes.

Q And there, you're citing to the court opinion. Are you citing to -- do you recall, is that -- is that the judge citing to McDonald again?

A I don't recall, but I would guess that that's the case. And of course, I note that the State did not contest the analysis of Professor McDonald at the time of the preliminary injunction hearing.

Q Let's go to the next section starting at page 77. Senate Factor 5, "The Continuing Effects of Past Discrimination."

A Yes.

Q If you go to page -- the next page, 78, paragraph 97?

A Okay.

Q You've got a lot of numbers here, and I was just trying to read through it to understand it, and I sort of got lost in the middle. Maybe you can help me out. The sentence about six lines down, "the same sort of disparities," the same -- the same sort of -- anyway, I read that sentence and I just couldn't quite make sense of it. I wonder if you could read it over

and try to explain it to me?

A All right. The same sort of the -- of disparities is a reference to this, preceding sentences in the paragraph and the data cited in those sentences. And so I am -- I am noting that when you shift from talking about the high school graduation rates to college education, or graduate education or professional education, in the sentence that you're asking about, I'm saying that you also find racial disparities in those data.

Q Okay. So you're -- so you're saying that 25.1 percent of blacks had bachelor's degrees or higher, 19 -- Hispanics had 19 -- 19 percent of Hispanics had bachelor's degrees or higher, but nonHispanic whites had -- 35.8 percent of them had a bachelor's degree or higher.

Is that what you're saying?

A Yes.

Q Okay. Thank you.

In -- on that page, on Footnote 259, you talk about calculations that you made. And I think, earlier, you just talked about using a calculator.

Is that all you did in those calculations?

A Yes. I could even have used long division.

Q I get it. Turn to page 81. On page 81,

which is carryover paragraph 100, you have figures of turnouts in 2022 for whites, for blacks, for Asians, and Hispanics, and also in the 2006 presidential election, turnout for whites, blacks, Hispanics, and Asians, why is the turnout figure for Hispanics and for Asians relevant to your opinions in the case?

A Relevant to whom?

Q Why do you cite the turnout for Hispanics and for Asians in your report? How are -- how is their turnout relevant to your opinions in the case?

A I'm writing about the whole demographic complexion of Georgia, Georgia's electorate. And that includes Hispanics and Asians as well as blacks. As I -- I never suggested that I was only focusing on blacks.

Q Do you have an opinion that there's been discrimination in Georgia that's affected the voter turnout of Hispanics or of Asians?

A Actually, there's a different pattern for Asians. They have a different experience. But the differences between Hispanics and nonHispanic whites is a part of the complex. I'm not suggesting that it's caused by a history of discrimination. I'm simply trying to describe the reality of voter registration patterns and turnout patterns in Georgia. Seems to me

relevant.

Q I guess -- so as I understand you, as you say in your report, Georgia's demographic makeup has changed, certainly, in the last few decades so that there are more Hispanics, more Asians in Georgia than there were, say, 50 years ago; do you agree with that?

A Yes.

Q Okay. And whereas in looking at voter turnout in, say, 1970, talking about white turnout versus black turnout might pretty much reflect the whole electorate. Now you have to talk about Asian turnout and non- -- and Hispanic turnout as well; right?

A Well, there wasn't much of an Hispanic population or an Asian population in the 1970s, so -- and inconsequential.

Q Okay. But the -- okay. But I'm just trying to make sure I understand you. I think you're -- you were saying you were trying to get -- maybe this wasn't your right word, but you were trying to give the whole picture, a complete picture of the -- of what was happening. And if you're going to describe the black and white voter turnout in 2022 and 2016, you also need to give Hispanic turnout and the Asian turnout in order to be more complete; that right?

A That's true. But recall that I've already discussed the hostility to Hispanics to the degree that they were the dominant group of immigrants in the country in an earlier section of the report that we've discussed. So that's a part of the history that's relevant to understanding in Factor 1. And that would apply specifically to Hispanics.

Q But you don't --

A It's recent.

Q Okay. But you don't have an opinion that the 2021 redistricting plans were in any way affected by an intent to discriminate against Hispanics, do you?

A As I said, I haven't -- I haven't opined on that, and do not intend to address that question in my -- in my -- in a supplement report or in testimony at trial.

Q All right. And your answer would be the same as to Asians; is that correct?

A Yes.

Q No intent to --

A Okay. Thank you.

MR. DAVIS: Objection to form. Just -- he didn't say no -- sorry. Objection to form.

BY MR. BOYLE:

Q Okay. I think -- I think Dr. McCrary knew

where I was going. But let me just -- to clear the record, you're also testify -- you're also not testifying that the redistricting plans in 2021 were motivated by an intent to discriminate against Asians?

A That's correct.

Q Thank you.

Turn to paragraph 102.

And you're summing up there for that section. You say, in short, "there is overwhelming empirical evidence that in Georgia the longstanding racial disparities in both socio-economic characteristics continue along with lower voter participation by minority citizens in very recent elections, even where candidates preferred by minority voters have won."

And you refer back to paragraphs 14 and 28 for a pattern of racial discrimination against blacks.

Feel free to do so, but I believe in paragraph 14, you were referring to data in 1940 and 1952, and paragraph 28 you were referring to 1981.

A You're correct.

Q Given that -- given that you're referring back to data that's at least 40 years old, why do you see a continuity between that earlier period and today rather than a -- rather than a new period with no connection to the earlier period?

A I'm not sure I understand your question because I've cited disparities in educational achievement using very recent data that reflects on the history of discrimination from earlier decades. I haven't also had evidence from the racially-integrated schools in the period since school desegregation occurred, culminating around 1969, '70, and, of course, those data are more complex to locate, and I didn't feel the necessity to do that.

Q All right. Your next section is on 83, Senate Factor 7, "Minority Group Members Elected to Public Office."

A Yes.

Q Now, is this an issue that you covered when you were at the Department of Justice?

A That I covered, or that --

Q Yes?

A -- or expert testimony, testimony of experts with whom I worked with the experts and the attorneys. Which question are you asking?

Q Well, I guess it could be either one, but I think I know where you're going.

A I mean, I don't recall doing much independent research that addressed Senate Factor 7. But expert witness testimony that the department put on where the

experts were developing that evidence, I would have been associated with it and evaluated what they had to say and make -- potentially made suggestions about their reports.

Q Okay. Did you ever testify on this subject before?

A Yeah, I think I have in several cases since I retired from the Department of Justice, when I'm addressing Senate Factor 7 -- I mean, senate factors, in assessing the totality of circumstances test. I believe I have addressed Senate Factor 7 before.

Q Can you give me a specific example?

A Sorry?

Q Can you give me a specific example of when you testified on this before?

A Well, I could go back to the list in my CV. But I'd have to recall exactly which factors I discussed in each report. I'm not able to do that as I sit here. But if I had a chance to look at the expert reports, I would certainly be able to answer the question.

Q In that first paragraph on page 83, paragraph 103, you mention that black Georgians are currently 29.5 percent of registered voters; right?

A Yes.

Q And you agree -- and I think you say later on in this section five of the current 14 U.S. House members from Georgia are African-American; right?

A I'm sorry. Where are you? Paragraph 106?

Q Yeah. Yeah, and maybe you recall off the top of your head, but it is in your report five out of 14 Georgia house members are African-American?

A Yes.

Q Okay. And five out of 14 is a higher percentage than 29.5; right?

A Right.

Q You talk about judicial elections on paragraph 112. It's page 89.

A Yes.

Q Were you aware that, I believe, starting in 2012, the Georgia judicial elections went to the primary date?

A I'm sorry. Do I recall what?

Q Georgia judicial elections are now held on the primary date, not on the general election date?

A I don't recall that.

Q Okay. Well, if I told you it's been that way for the last ten years, would that affect your opinion about judicial elections in any way?

A I don't see why it would.

Q And that's just not something you're familiar with at all?

A No.

Q Paragraph 114, you talk about the current members of the Georgia Supreme Court.

A Yes.

Q And if I understand you correctly, even though those are statewide elections, you don't believe that the election of those minority members of the court that you identify in that paragraph has anything to say with ability of black Georgia voters to vote representative -- to vote for representatives of -- who are also black?

MR. DAVIS: Objection to form. Sorry. Objection to form.

You may answer.

THE WITNESS: Okay. That was what I was waiting to hear. As I noted in discussing the elections to -- it represents a special case because of the role of appointments in Georgia in creating a situation where minority candidates, if appointed -- I'm sorry -- minority persons if appointed could run as incumbents for reelection.

And that is a situation that's totally different from other kinds of elections, like for

1 legislature and for Congress. And that's why I made a
2 special point of saying these elections were different.
3 And so you see a much higher degree of minority
4 representation in some instances, precisely because of
5 the role of the appointment process.
6 And I recall testifying in a recent case in
7 Arkansas that the fact that in Arkansas that advantage
8 of an appointment system that Georgia has in place was
9 absent in Arkansas, and that helped to explain why
10 there were much greater differences in the pattern of
11 minority representation in that state as compared with
12 Georgia.
13 So in other words, it wasn't a surprise to me
14 that you would have something approaching
15 proportionality in some instances for certain judicial
16 offices because of the differences between that method
17 of election, broadly conceived, as a result of the
18 appointment process and other elections, such as for
19 Congress, state senate, state legislature, or, for that
20 matter, statewide offices of an executive character, or
21 for that matter in local elections.
22 BY MR. BOYLE:
23 Q Okay.
24 A And if I can add one comment, I was trying to
25 be as comprehensive in answering the questions posed in

that regard of Senate Factor 7 as I could be, not in suggesting that all of the evidence would suggest a pattern of a racially discriminatory effect. Because by and large, that wouldn't be true of the judicial elections that I've discussed.

Q Let's go to your conclusion, paragraph 117. You say: "Georgia has a long history of discriminating against black voters and other voters of color and restricting their franchise." Does your report talk about discrimination against other voters of color? I'm not sure I saw that.

A In the 21st century, it is a subject I discussed in terms of the exact match system of voter verification.

Q Are you aware that Judge Steve Jones in the Fair Fight case held that the citizenship verification was not adopted with a discriminatory intent?

A I am familiar with Judge Jones' discussion. I don't remember that there was any evidence of discriminatory intent that the Court found -- found reliable. But recall that Judge Jones was addressing the system of voter verification following 2019's -- I forget the name of it -- HB 316 I think it was, and not the preceding roughly 15 years that I had discussed in my testimony in that case.

(Exhibit 6 Marked for Identification.)
BY MR. BOYLE:
Q I'm going to put another exhibit in here.
Do you see Exhibit 6?
MR. DAVIS: It's loading.
MR. BOYLE: Sure. It's kind of long.
THE WITNESS: 288 pages, as I recall.
MR. DAVIS: We'll let you know when it's loaded.
MR. BOYLE: Thanks.
MR. DAVIS: Sorry. It's still loading.
MR. BOYLE: Yeah, well, I'm looking at it now. I'm -- you know, I'm afraid it may not have -- it may have gotten corrupted in the upload.
MR. DAVIS: Okay. Should we go off it. I'm scared to go off it. Because if I go off it, it would start over it again. No, it just loaded. It seems to be 84 pages.
BY MR. BOYLE:
Q Right. Yeah. Well, unfortunately I had highlighted the portion I wanted to talk about. And something got all compressed. So now it's not legible. Well, I'm going to try one more time. And if it doesn't work then we'll just -- we'll just move on.
MR. DAVIS: Okay. Just let us know when the

next one's in and I'll refresh the page.

MR. BOYLE: I will. It will take a second here.

MR. DAVIS: Yep.

MR. BOYLE: We're getting there. Hold on. Thanks for your patience. All right. I think we're going to have to move on because it's -- I tried it again, the same thing happened.

BY MR. BOYLE:

Q All right. So -- but getting back to your report, Dr. McCrary, and your conclusion in paragraph 117, you say that "the history of discrimination stubbornly persists to this day."

So how does the discrimination persist to this day? I mean, I understand the testimony about the effects of past discrimination may persist to this day. But how does the discrimination itself persist?

A The discrimination continued through the period that I was examining in my report, which extends through 2018 where there continued to be discriminatory effects in the voter verification system that is responsible for creating the voter registration list that is effective with codes.

Q Okay. But, I mean -- I'm sorry. Finish your answer.

A And I would note specifically that my findings stopped with the period before Judge Ross's preliminary injunction decision in the Exact Match case. And to the degree that the system has -- the system of voter verification has changed pursuant to Judge Ross's order, and the State's implementation of that order and the passage of HB 316, I have not addressed that in my analysis.

And as I recall, Judge Jones' opinion in the Fair Fight Action case is specifically talking about how the system operates currently, which I have not addressed in my report here, or in the Fair Fight Action case or in the Exact Match case.

Q Okay. But -- and, I mean, as I'm reading the first two sentences of your conclusion, and as I read it, you're saying there's a long history of discrimination against black voters and other voters of color and the discrimination persists to this day.

So I'd like you to itemize for me all the instances of discrimination, restricting the franchise, as you say against black voters and other voters of color, that is currently happening, or was happening in 2018.

A I'm talking now about the discriminatory effects of the system of voter verification,

specifically. And "to this day" is a phrasing that I intended to be limited to the period I considered in this report, not literally to this day. But perhaps that was an unfortunate choice of words, "to this day." Maybe I should have said instead "persists through the period I have analyzed in this report."

Q Okay. And if the courts conclude or have concluded that the voter verification procedures that you believe are discriminatory are actually not discriminatory, you would have to -- you would have to yield to what the courts say; right?

A Well, of course. I don't recall that that's what Judge Jones found. What I recall that he found was the system, as it currently operates in 2021 and 2022, operates in a way that does not meet the standard for discriminatory effects in current voting rights law as construed in the period after the Brnovich decision.

Q Are you saying you disagree with current voting rights law?

A It's not my prerogative to disagree with the current voting rights law. I'm simply describing the effects of a recent Supreme Court decision on the way in which I think Judge Jones felt compelled to assess the evidence, because it's a recent Supreme Court decision.

Q And then you say in your third sentence "assuming plaintiffs meet the Gingles preconditions, it's your opinion that the senate factors you've examined weigh in favor of finding Georgia violated Section 2 of the Voting Rights Act."

So is it your opinion that if they don't meet the Gingles preconditions there's no violation?

A Yes. And that's my understanding of the case law.

Q Right.

A But recall that I'm not an attorney, and I'm not offering a legal opinion when I answer your question.

Q But you didn't analyze the preconditions in this report; right?

A That's correct. Another expert was charged with that assignment.

Q Is any portion of this report going to go into that book that you say you're working on?

A I'm sorry. What was your question?

Q Is any portion of this report going to end up in your book that you're currently working on?

MR. DAVIS: Objection.

You can answer.

THE WITNESS: It's entirely possible. But I

have no idea. It certainly won't go in the book that ends in 1990.

MR. BOYLE: Let's go off the record for just a minute. I think I'm about done. But I just want a few minutes.

(Discussion off the record.)

THE VIDEOGRAPHER: The time is 2:28 p.m. And we are off the record.

(Off the record 2:28 p.m. to 2:32 p.m.)

THE VIDEOGRAPHER: The time is 2:32 p.m. And we are on the record.

MR. BOYLE: Dr. McCrary, I've got no further questions for you. Thank you for your time.

THE WITNESS: Thank you.

MR. DAVIS: Okay. I have a few questions. Would you have any objection if I -- because I wanted to show him an exhibit if -- is it okay if I scroll or would you like someone else to scroll while I'm sitting here. Would you have any objection if I pull it up on Exhibit Share here?

MR. BOYLE: No, no problem at all. Go ahead.

MR. DAVIS: Okay.

EXAMINATION

BY MR. DAVIS:

Q I only have a few questions for you,

Dr. McCrary. If we could pull up Exhibit 0002, his CV. I am scrolling down to your expert assignments. On page 4, do you see where it says "sworn written testimony as an expert witness"?

A Yes.

Q And you see the first entry under there is for the Georgia Coalition for the People's Agenda?

A Yes.

Q Do you recall if that was a case you worked on with the Lawyers' Committee?

A Yes. Did I not mention that?

Q I'm just clarifying for the record. I just have a few more questions. Could you describe what Senate Factor 5 means to you?

A Senate Factor 5 addresses the degree that which there are racial disparities in political participation between minority voters and the majority group, nonHispanic whites in this case, and how that relates to the history of discrimination affecting voter -- of voting as measured in Senate Factor 1, or is addressed in Senate Factor 1.

Q And in this report, do you find that there are lingering socio-economic disparities between black Hispanic voters and white voters?

A Between black Hispanic? Or --

Q Black and Hispanic.
A -- Hispanic?
Q For the record -- in this report, is there an opinion that are socio-economic disparities between black and Hispanic voters and nonHispanic white voters?
A Yes.
Q And that continues to this day?
A Yes. Well, of the period of the census data that I cited.
Q And do you find in this report that there are disparities in voter turnout between black voters and white voters?
A Yes.
Q And do you find the same disparities between Hispanic voters and nonHispanic white voters?
A Not the same level of disparities, but disparities, yes.
Q And those continue to this day?
A The disparities in registration and turnout continue to this day, yes.
MR. DAVIS: I have no further questions.
MR. BOYLE: No questions from me.
THE VIDEOGRAPHER: This concludes this video deposition. The time is 2:36 p.m. And we are off the record.

(Signature reserved.)

(Deposition concluded 2:36 p.m.)

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF MECKLENBURG)

I, MEREDITH R. SCHRAMEK, hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

I further certify that I have no direct contract with any party in this action, and my compensation is based solely on the terms of my subcontractor agreement.

Nothing in the arrangements made for this proceeding impacts my absolute commitment to serve all parties as an impartial officer of the court.

This, the 16th day of March, 2023.

MEREDITH R. SCHRAMEK, RPR, CCR 3040

ALEX DAVIS, ESQ.
drollins-boyd@lawyerscommittee.org

March 16, 2023

RE: Georgia State Conference Of The NAACP, Et Al. v. State Of Georgia, Et Al.
3/3/2023, Peyton McCrary , Ph.D. (#5780061)
The above-referenced transcript is available for review.
Within the applicable timeframe, the witness should read the testimony to verify its accuracy. If there are any changes, the witness should note those with the reason, on the attached Errata Sheet.
The witness should sign the Acknowledgment of Deponent and Errata and return to the deposing attorney. Copies should be sent to all counsel, and to Veritext at litsup-ga@veritext.com

Return completed errata within 30 days from receipt of testimony.
If the witness fails to do so within the time allotted, the transcript may be used as if signed.

Yours,
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1 Georgia State Conference Of The NAACP, Et Al. v. State Of Georgia, Et Al.
2 Peyton McCrary , Ph.D. (#5780061)
3 ACKNOWLEDGEMENT OF DEPONENT
4 I, Peyton McCrary , Ph.D., do hereby declare that I
5 have read the foregoing transcript, I have made any
6 corrections, additions, or changes I deemed necessary as
7 noted above to be appended hereto, and that the same is
8 a true, correct and complete transcript of the testimony
9 given by me.
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Georgia Code

Title 9, Chapter 11

Article 5, Section 9-11-30

(e) Review by witness; changes; signing.

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by paragraph (1) of subsection (f) of this Code section whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed. If the deposition is not reviewed and signed by the witness within 30 days of its submission to him or her, the officer shall sign it and state on the record that the deposition was not reviewed and signed by the deponent within 30 days. The deposition may then be used as fully as though signed unless, on a motion to suppress under paragraph (4) of subsection (d) of Code

Section 9-11-32, the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE STATE RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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

GEORGIA STATE CONFERENCE OF THE NAACP, et al. *Plaintiffs*, v. STATE OF GEORGIA, et al. *Defendants.*	)	Case No. 1:21-CV-5338-ELB-SCJ-SDG
COMMON CAUSE, et al., *Plaintiffs*, v. BRAD RAFFENSPERGER *Defendant.*	)	Case No. 1:22-CV-00090-ELB-SCJ-SDG

DEFENDANTS' NOTICE TO TAKE THE EXPERT DEPOSITION OF PEYTON MCCRARY, Ph.D.

PLEASE TAKE NOTICE that, pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, counsel for Defendants the State of Georgia, Governor Brian Kemp, and Brad Raffensperger, in his official capacity as Secretary of State of Georgia, will take the oral examination of Plaintiffs' expert, Peyton McCrary, Ph.D. on Friday, March 3, 2023, beginnin

Exhibit
0001

a.m. via Zoom videoconferencing through Veritext Legal Solutions and continuing thereafter until completed. Details regarding the videoconferencing will be emailed to those participating once all arrangements are finalized.

The deposition shall be taken before a Notary Public or some other officer authorized by law to administer oaths for use at trial. The deposition will be taken by oral examination with a written and/or sound and visual record made thereof (*e.g.*, videotape, LiveNote, etc.). The deposition will be taken for the purposes of cross-examination, discovery, and for all other purposes permitted under the Federal Rules of Civil Procedure or any other applicable law.

This 21st day of February, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I caused a copy of the foregoing to be served by electronic mail on all counsel of record.

/s/ Bryan P. Tyson
Bryan P. Tyson

Attorney for Defendants

Exhibit 1

Exhibit
0002
Peyton McCrary

CURRICULUM VITAE: PEYTON McCRARY

Professorial Lecturer, George Washington University Law School, 2006 - pmccrary@law.gwu.edu

Historian, U.S. Department of Justice, 1990-2016 (retired)
Civil Rights Division, Voting Section

Principal Functions in the Department of Justice: Research for voting rights litigation; identifying consultants and expert witnesses to be used in cases; working with attorneys and experts to prepare for direct testimony and cross-examination; supervising the preparation of contracts and processing the reimbursement of consultants and expert witnesses; drafting presentation of factual evidence in memoranda, briefs, and proposed findings of fact; legislative history research.

EDUCATION:

University of Virginia: B.A. (Honors), 1965
M.A., History, 1966

Princeton University: Ph.D., History, 1972

TEACHING FIELDS: Voting Rights Law; Minority Voting Rights; U.S. History; History of the South; Southern Politics; Civil War and Reconstruction; American Political Parties and Voting Behavior; Theory and Methods of Historical Analysis

CAREER RECOGNITION:

Maceo Hubbard Award, U.S. Department of Justice, Civil Rights Division, 2011

PAST ACADEMIC AND RESEARCH APPOINTMENTS:

Eugene Lang Professor of Social Change [Visiting], Department of Political Science, Swarthmore College, Swarthmore, Pennsylvania, 1998-1999.

Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C., 1987-1988.

Associate Professor of History, 1978-82, Professor of History, 1982-90, University of South Alabama, Mobile, Alabama.

Assistant Professor of History, 1976-1978, Vanderbilt University, Nashville, Tennessee

Instructor, Assistant Professor of History, 1969-1976, University of Minnesota, Minneapolis, Minnesota

BOOK:

Abraham Lincoln and Reconstruction: The Louisiana Experiment (Princeton, N.J., Princeton University Press, 1978), 423 pages. Winner, Kemper Williams Prize, Louisiana Historical Association, 1979.

BOOK CHAPTERS:

"Minority Representation in Alabama: The Pivotal Case of *Dillard v. Crenshaw County*," in Raymond Arsenault and Orville Vernon Burton (eds.), *Dixie Redux: Essays in Honor of Sheldon Hackney* (Montgomery, Al., New South Books, 2013), 403-22.

"The Constitutional Foundations of the 'Preclearance' Process: How Section 5 of the Voting Rights Act Was Enforced, 1965-2005," in Daniel McCool (ed.), *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act* (Bloomington, Indiana University Press, 2012), 36-66.

"Race and Municipal Reform in the Progressive Era: The Adoption of At-large Elections in Norfolk, Virginia, 1914-1918," in Orville Vernon Burton, et.al. (eds.), *The Struggle for Equality: Essays on Sectional Conflict, the Civil War, and the Long Reconstruction* (Charlottesville, University Press of Virginia, 2011), 238-53.

"The Law of Preclearance: Enforcing Section 5," co-authored with Christopher Seaman and Richard Valelly, in David Epstein, et.al. (eds.), *The Future of the Voting Rights Act* (New York, Russell Sage Foundation, 2006), 20-37.

"Alabama," co-authored with Jerome A. Gray, Edward Still, and Huey Perry, and "South Carolina," co-authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen, in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994), 38-66, 397-409. Winner, Richard Fenno Prize, American Political Science Association.

"History in the Courts: The Significance of *City of Mobile v. Bolden*," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

LAW REVIEW ARTICLES:

"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," *South Carolina Law Review*, 57 (Summer 2006), 785-825.

"The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," co-authored with Christopher Seaman and Richard Valelly, *Michigan Journal of Race & Law*, 11 (Spring 2006), 275-323. [An unpublished version was printed in *Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the Subcomm. On the Constitution, H. Comm. On the Judiciary, 109th Cong., 96-181 (2005) (Serial No. 109-69).]*

"Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law*, 5 (May 2003), 665-708.

"Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case," *Chicago-Kent Law Review*, 70 (No. 3, 1994), 1275-1305.

"Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases," co-authored with J. Gerald Hebert, *Southern University Law Review*, 16 (Spring 1989), 101-28.

"Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits," *Howard Law Journal*, 28 (No. 2, 1985), 463-93.

JOURNAL ARTICLES:

"The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58.

"The Struggle for Minority Representation in Florida, 1960-1990," *Florida Historical Quarterly*, 86 (Summer 2007), 93-111. Jillian Prescott Memorial Lecture, Florida Historical Society, 2006.

"Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting," co-authored with Steven F. Lawson, *Journal of Policy History*, 12 (No.3, 2000), 293-320.

"The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1946-1986," *Journal of Urban History*, 25 (Jan. 1999), 199-225.

"Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *Social Science History*, 14 (Winter 1990), 507-31.

"The Party of Revolution: Republican Ideas About Politics and Social Change, 1862-1867," *Civil War History*, 30 (December 1984), 330-50.

"Class and Party in the Secession Crisis: Voting Behavior in the Deep South, 1856-1861," co-authored with Clark Miller and Dale Baum, *Journal of Interdisciplinary History*, VIII (Winter 1978), 429-57.

REVIEW ESSAYS:

"Race and Misrepresentation: Review of Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*," H-Net, Feb. 2002. www.h-net.msu.edu/reviews/showrev.cgi?path=214111015008351.

"Review of David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interest in Congress*," H-Net, May 1998. www.h-net.msu.edu/reviews/showrev.cgi?path=23313895266679.

"Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act," co-authored with Pamela S. Karlan, *Journal of Law and Politics*, IV (Spring 1988), 751-77.

"The Political Dynamics of Black Reconstruction," *Reviews in American History*, 12 (March 1984), 51-57.

ENCYCLOPEDIA ARTICLE:

"The Reconstruction Myth," in Charles Reagan Wilson and William Ferris (eds.), *Encyclopedia of Southern Culture* (Chapel Hill, University of North Carolina Press, 1989), 1120-21 [reprinted in Jonathan Birnbaum and Clarence Taylor (eds.), *Civil Rights Since 1787: A Reader on the Black Struggle* (New York, New York University Press, 2000), 150-53.]

BOOK REVIEWS: American Historical Review, Journal of Interdisciplinary History, Journal of Southern History, Social Science History, American Review of Politics.

COURTROOM TESTIMONY AS AN EXPERT WITNESS:

(Plaintiffs), *Christian Ministerial Alliance v. Hutchinson*, E.D. Ark. (Little Rock), April 2022. [Challenge to the method of electing appellate judges in Arkansas]

(Plaintiffs), *Fair Fight Action v. Raffensperger*, N.D. Ga. (Atlanta), April 2022. [Challenge to methods of voter registration in Georgia]

(Plaintiffs), *Chestnut v. Merrill*, N.D. Ala. (Birmingham), November 2019. [Challenge to the congressional redistricting plan for Alabama]

(Plaintiffs), *Alabama NAACP v. Alabama*, M.D. Ala. (Montgomery), November 2018. [Challenge to the statewide election of appellate judges in Alabama]

(United States as Amicus Curiae), *SCLC v. Evans*, M.D.Ala. (Montgomery), December 1991. [Challenge to the method of electing certain circuit judges in Alabama]

(Plaintiffs), *Vereen v. Ben Hill County*, M.D.Ga. (Macon), December 1989. [Challenge to the state law requiring appointment of county school boards by the local grand jury, as applied in more than a dozen counties]

(Plaintiffs), *Hall v. Holder*, M.D.Ga. (Macon), December 1989.
[Challenge to the sole commissioner form of government in Bleckley County, Georgia]

(Plaintiffs), *Irby v. Fitzhugh*, E.D.Va. (Richmond), June 1988.
[Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(Plaintiffs), *Whitfield v. Clinton*, E.D.Ark. (Helena), March 1988. [Challenge to the use of the statewide majority vote requirement in Phillips County, Arkansas]

(Plaintiffs), *Dent v. Culpepper*, M.D.Ga. (Macon), Preliminary Injunction Hearing, November 1987.
[Challenge to the at-large election of the City Commission in Cordele, Georgia]

(Plaintiffs), *Jackson v. Edgefield County, School District*, D.S.C. (Columbia), April 1986. [Challenge to the at-large election of the Edgefield County School Board]

(Plaintiffs), *Dillard v. Crenshaw County, et.al.*, M.D.Ala. (Montgomery), Preliminary Injunction Hearing, March 1986. [Challenge to the at-large election of public officials in more than 180 Alabama counties, municipalities, and school boards]

(Plaintiffs), *Harris v. Graddick*, M.D.Ala. (Montgomery), February 1985. [Challenge to the procedures by which election officials are selected and elections conducted in Alabama]

(Plaintiffs), *Woods v. Florence*, N.D.Ala. (Birmingham), August 1984. [Challenge to the method of appointing the Jefferson County Personnel Board]

(Plaintiffs), *Collins v. City of Norfolk*, E.D.Va. (Norfolk), May 1984. [Challenge to the at-large election of the Norfolk City Council]

(United States), *County Council of Sumter County, S.C. v. U.S.*, D.D.C., February 1983. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

(United States), *U.S. v. Dallas County Commission*, S.D.Ala. (Selma), October 1981. [Challenge to the at-large election of the Dallas County Commission]

(Plaintiffs), *Bolden v. City of Mobile*, S.D.Ala. (Mobile), May 1981. [Challenge to the at-large election of the Mobile City Commission]

(Plaintiffs), *Brown v. Board of School Commissioners of Mobile County*, S.D.Ala. (Mobile), April 1981.
[Challenge to the at-large election of the Mobile County School Board]

SWORN WRITTEN TESTIMONY AS AN EXPERT WITNESS:

(Plaintiffs) May 28, 2021, *Georgia Coalition for the Peoples' Agenda v. Raffensperger*, C.A. No. 1:18-cv-04727, N.D. Ga. [Challenge to Georgia's exact match voter verification process]

(Plaintiffs) May 25, 2021, *Christian Ministerial Alliance v. Hutchinson*, C.A. No. 4:19-cv-00402, E.D. Ark.
[Challenge to the method of electing appellate judges in Arkansas]

(Plaintiffs) April 24, 2020, *Thompson v. State of Alabama*, C.A. No. 2:16-cv-783 (N.D. Ala.) [Challenge to felon disfranchisement provisions in Alabama]

(Plaintiffs) April 24, 2020, *Fair Fight Action v. Raffensperger*, C.A. No. 1:18-cv-05391 (N.D. Ga.) [Challenge to methods of voter registration in Georgia]

(Plaintiffs) March 8 and May 6, 2019, *Chestnut v. Merrill*, C.A. No. 2:18-CV-907 (N.D. Ala.) [Challenge to congressional redistricting plan in Alabama]

(Plaintiffs) December 22, 2017, and February 12, 2018, *Georgia State Conference NAACP v. State of Georgia*, C.A. No. 1:17-cv-01247 (N.D. Ga.) [Challenge to the re-redistricting of state house districts in 2015]

(Plaintiffs) November 20, 2017, *Alabama State Conference NAACP v. State of Alabama*, C.A. No. 2:16-cv-731, M.D. Ala. [Challenge to the method of electing appellate judges in Alabama]

(Plaintiffs) July 24, 2017, *Thompson v. State of Alabama*, C.A. No. 16-cv-783, M.D. Ala. [Challenge to felon disfranchisement provisions in Alabama]

(United States) June 25, 2012, and July 20, 2012, *State of Florida v. United States*, C.A. No. 1:11-cv-01428, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(United States) August 1, 2011, *Laroque v. Holder*, C.A. No. 1:10-0561, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(United States) November 15, 2010, and February 16, 2011, *Shelby County, Alabama, v. Holder*, C.A. No. 1:10-cv-00651, D.D.C. [Defense of the constitutionality of Section 5 of the Voting Rights Act]

(United States as Defendant-Intervenor) July 31, 1996, *Cook v. Marshall County, Mississippi, and United States*, C.A. No. 3:95 CV 155-D-A, N.D. Miss. [Defense of Marshall County's redistricting plan]

(United States as Defendant-Intervenor) July 19, 1994, *Hays v. State of Louisiana*, C.A. No. 92-1522S, W.D. La. (Shreveport). [Defense of Louisiana's congressional redistricting plan]

(United States) March 25, 1991, *State of Georgia v. Thornburg,* C.A. No. 90-2065, D.D.C. [Defense of Section 5 objection to the method of electing certain superior court judges in Georgia]

(Plaintiffs) January 20, 1988, *Irby v. Fitzhugh*, C.A. No. 87-0633-R, E.D.Va. (Richmond). [Challenge to the appointment of all school boards in the Commonwealth of Virginia]

(United States) June 25, 1984, *U.S. v. Halifax County, N.C.*, C.A. No. 83-88-CIV-8, E.D.N.C. (Wilson). [Challenge to the at-large election of the Halifax County Commission]

(Plaintiffs) April 22, 1983, *Wilson v. Powell*, C.A. No. 383-14, S.D.Ga. (Dublin). [Challenge to the appointment of the Johnson County School Board by the county grand jury]

(United States) September 28, 1982, *County Council of Sumter County, S.C. v. U.S.*, C.A. No. 82-0912, D.D.C. [Defense of Section 5 Objection to the at-large election of the Sumter County Council]

CONGRESSIONAL TESTIMONY:

"Testimony of Peyton McCrary Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the U.S. House Committee on the Judiciary," [accompanied by oral testimony by Zoom], August 16, 2021.

"Written Testimony of Dr. Peyton McCrary Before the United States House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties," [accompanied by live testimony] March 12, 2019.

"Testimony Before the Subcommittee of National Parks and Public Lands, Committee on the Interior, U.S. House of Representatives, June 14, 1988.

"Written Testimony of Dr. Peyton McCrary," in *Extension of the Voting Rights Act: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives*, 97th Cong., 1st Sess., Serial No. 24 (3 vols., Washington, D.C., G.P.O., 1982), III, 2749-76.

OTHER PUBLIC TESTIMONY:

Testimony Before the United States Commission on Civil Rights, "An Assessment of Minority Voting Rights Access in the United States," Raleigh, North Carolina, February 2, 2018.

CONFERENCE PAPERS:

"The Deep South Fights Back: Constitutional Challenges to Section 5 of the Voting Rights Act, 1966-1980." Southern Historical Association, November 2012.

"From *Gomillion v. Lightfoot* to *City of Pleasant Grove v. United States*: Annexations, De-annexations, and the Voting Rights Act." Constitution Day Conference, San Francisco State University, September 2010.

"Two Kinds of Vote Dilution: From *Baker v. Carr* to *White v. Regester*." Organization of American Historians, April 2010.

"How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005," University of South Carolina School of Law, October 2005; [revised version, Southern Historical Association, November 2005].

"Bringing Equality to Power: Federal Courts and the Transformation of Southern Electoral Politics, 1960-2000." Organization of American Historians, April 2002.

"Why the Voting Rights Act Worked: A Judicial Model of Policy Implementation." Social Science History Association, October 1997; [revised version, Association of Public Policy Analysis and Management, November 1997].

"Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case." Southern Historical Association, November 1992.

"The Impact of the Voting Rights Act in Alabama," co-authored with Jerome Gray, Edward Still, and Huey Perry. American Political Science Association, 1989 [revised version presented at a Conference on the Impact of the Voting Rights Act, Rice University, Houston, Texas, May 1990].

"Taking History to Court: The Issue of Discriminatory Intent in Southern Voting Rights Cases." Joint Center for Political and Economic Studies, Washington, D.C., June 13, 1988.

"Keeping the Courts Honest: Expert Witnesses in Voting Rights and School Desegregation Cases," co-authored with J. Gerald Hebert. Southern Historical Association, November 1986.

"Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits." Conference on Voting Rights Law, Howard University School of Law, Washington, D.C., January 1985.

"The Subtle Gerrymander: Discriminatory Purposes of At-large Elections in the South, 1865-1982." Organization of American Historians, April 1983.

"The Party of Revolution: Republican Ideas About Politics and Social Change, 1861-1868." Southern Historical Association, November 1980.

"After the Revolution: American Reconstruction in Comparative Perspective." American Historical Association, December 1979.

"The Civil War Party System, 1854-1876: Toward a New Behavioral Synthesis?" Southern Historical Association, November 1976.

CHAIRPERSON, PANELIST, OR COMMENTATOR:

Alabama Association of Historians, 1983.
Alabama Department of Archives and History, 1988.
American Historical Association, 2017.
American Political Science Association, 1987, 2003.
Brookings Institution, 1990.
National Association of Secretaries of State, 1983.
Organization of American Historians, 1979, 1995.
Social Science History Association, 1981, 1987, 1996, 1997, 1999.
Southern Historical Association, 1973, 1985.
University of Alabama, 1983.
University of Utah, 2007.
United States Commission on Civil Rights, 2018.

ACADEMIC REFEREE:

Book-length manuscripts: Princeton University Press, University of North Carolina Press, University of Tennessee Press, University of Alabama Press, Louisiana State University Press, University of Georgia Press.
Article-length manuscripts: Journal of American History, American Historical Review, Sociological Spectrum, Gulf Coast Historical Review, Social Science History.

CONSULTANT:

Archival: Re-organization of Section 5 Objection Files, Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., January to July 1989.

Litigation Research: Civil Rights Division/Voting Section, U.S. Department of Justice, Washington, D.C., August 1989 to August 1990.

FELLOWSHIPS AND GRANTS:

John D. and Catherine T. MacArthur Foundation, 1987-1988: Distinguished Scholar, Joint Center for Political and Economic Studies, Washington, D.C.

American Philosophical Society, 1983: Research Travel Grant.

Rockefeller Foundation, 1982-1983: Research Fellowship.

Carnegie Corporation of New York, 1982-1983: Research Fellowship.

National Endowment for the Humanities, 1980: Summer Research Stipend.

University of South Alabama, 1978-1987: Faculty Research Grants; Research Council Grant.

Vanderbilt University, 1976-1978: Manuscript Preparation Grant.

University of Minnesota, 1969-1976: Faculty Research Grants.

Princeton University, 1966-69: University Fellow; Herbert Osgood Fellow; NDEA Fellow.

University of Virginia, 1961-1966: Echols Scholar; Du Pont Scholar; Ford Foundation Fellow.

VERITEXT
LEGAL SOLUTIONS

Deposition of:

Peyton McCrary , Ph.D.

May 22, 2020

In the Matter of:

Fair Fight Action, Inc., Et Al. v. Raffensperger, Brad, Et Al.

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Exhibit
0003
Peyton McCrary

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

FAIR FIGHT ACTION, INC., et al.,

Plaintiffs,

vs.

CIVIL ACTION FILE

NO. 1:18-cv-05391-SCJ

BRAD RAFFENSPERGER, in his official Capacity as Secretary of State of Georgia, et al.,

Defendants.

DEPOSITION OF
PEYTON MCCRARY, PhD
TAKEN BY REMOTE VIDEOCONFERENCE
May 22, 2020
9:41 a.m.
Arlington, Virginia
Robyn Bosworth, RPR, CRR, CRC, CCR-B-2138

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MR. TYSON: This will be the deposition of Dr. Peyton McCrary taken by Defendant, Brad Raffensperger, for purposes of discovery and all purposes allowed under the Federal Rules of Civil Procedure. And given that we are conducting this via Zoom, we have a stipulation first that this is taking place remotely but will be treated as if it was under oath and in the same room. And is that acceptable to y'all?

MS. FINK: Yes.

THE WITNESS: Yes.

MR. TYSON: And all objections except those going to form and responsiveness and privilege we'll reserve until trial or first use. Is that also acceptable, Sarah?

MS. FINK: Yes.

MR. TYSON: All right. If you could please swear the witness.

THE REPORTER: Before I swear the witness, could I get a stipulation from all counsel that the court reporter is allowed to give the oath remotely?

MS. FINK: Yes.

MR. TYSON: Yes, on behalf of defendants.

PEYTON MCCRARY, PhD.,

having been first duly sworn, was examined and

testified as follows:

EXAMINATION

BY MR. TYSON:

Q Good morning, Dr. McCrary. My name is Bryan Tyson. I represent the defendants in this case, and I look forward to talking with you today about your report in this case. I'm assuming that you've been deposed any number of times before; is that correct?

A Yes.

Q And so you're familiar with our basic ground rules. Talking over each other gets a little bit complicated with the virtual platform, but we'll do our best to start a question, and I'll pause to wait for your response; having yes and no answers as opposed to uh-huh or huh-uh; we obviously, just like in a normal deposition, can take breaks as needed, and my only request is that we answer the last question I posed prior to taking a break. Both Ms. Fink and Mr. Kaiser have been in enough depositions, and Leslie too, with me to know that when -- sometimes I ask a question that makes absolutely no sense, and I get to the question mark, and I have no idea what I'm asking, you have no idea what I'm asking. If that happens, just let me know,

and I'll work to rephrase it. Will that work for you?

A Yes.

Q Okay.

And so just to put on the record as well how we're handling the depositions, the kind of formal introduction of the depositions will be through the exhibit share platform that the court reporting service has provided, but all counsel has PDF copies of what will be uploaded through that. Dr. McCrary, you have received paper copies of those as well. And, Dr. McCrary, have you reviewed any of the paper exhibits prior to the start of the deposition today?

A No.

MS. FINK: Just if I can I'll just put on the record that when Dr. McCrary received all the exhibits, he opened them up to take out the folders. There was one document that was not in a folder, so he saw what that was. He told me about that. I instructed him not to talk to me about it anymore, and that was the extent of our conversation about it.

MR. TYSON: Got it. Thank you for that. We were trying to manage putting those together

across multiple people with a skeleton staff at the office, so I apologize for that, so thank you.

MS. FINK: Yes.

BY MR. TYSON:

Q Dr. McCrary, what I'm planning to do today is just start out with some background information about your involvement in the case, kind of what you did to get ready for the deposition today. We'll talk through that, we'll move into your CV and biographical background materials, and then we'll move into your report in the case.

So if we can go ahead and start this morning by you telling me what you did to get ready for your deposition today.

A In the immediate background let's say this week I reviewed my report, I reviewed some of the documents I had referenced in the report.

Q Okay. And beyond some of the documents in the report and your report, did you review any other documents to get ready for your deposition today?

A Not that I recall.

Q Okay. And I know we'll get into this with the report officially, but you're being compensated at a rate of $300 an hour; is that correct?

A Yes.

Q Do you know approximately how much you billed in this case so far?
A I do not.
Q Do you have an estimate of how many hours you spent preparing your report?
A I don't really have an estimate on the tip of my tongue. It was a lot of time.
Q Have you sent a bill to the plaintiff counsel at this point in the case?
A Yes.
Q And do you recall approximately how much the bills that you sent would be?
A No, because I was instructed to bill monthly, and I did so. So there were --
Q Okay.
A -- numerous monthly invoices.
Q Got it. And I'm assuming you've been paid on those invoices as well?
A I'm sorry, repeat your question.
Q Certainly. I'm assuming you've been paid on those invoices as well?
A Yes.
Q Okay. All right. We are going to see how this works. I'm going to just review, Dr. McCrary, document 01, which is just a Notice of Deposition.

A Yes.
Q Okay. Give that for the record.
(Defendant's Exhibit 1 was marked for identification.)
BY MR. TYSON:
Q So let's go ahead and start about the lawsuit. How did you first hear about the Fair Fight Action case?
A My recollection is I was contacted by Sarah Fink, and she told me the basic outlines of the case they had filed and asked if I would consider working on it.
Q And do you recall approximately when that conversation would have taken place?
A My recollection is that the initial conversation took place in November of 2018.
Q And did you begin working on your report immediately at that point, or was there a gap in time from the time you initially were contacted to the time you began working on your report?
A There were two or three months, I think, before I was provided with a retainer agreement and began working on the case.
Q Now, did plaintiff's counsel provide you with any data or documents that you used in

preparing your report?
A Yes.
Q And what were those data or documents -- and document?
A Well, to the best of my recollection, of course, I received the complaint in the case, and during the last phase of the case I received copies of reports of other experts retained by the plaintiffs, although that was -- that was pretty late in the preparation of my report. And I had a paralegal at KaiserDillon, who was assigned to serve as a research assistant, who sent me various documents with -- at my request with links to legislative documents and other documents from the Secretary of State's office, that sort of thing. And that's about all I recall.
Q So we have the complaint, the reports of the other experts. And then in terms of the research assistant role who was assisting you, what would a request look -- would you ask for specific categories of documents, or what role did the research assistant play, I guess, is what I'm really asking versus what research you did?
A Right. I requested particular categories of documents, and some of the time he was able to

find them, and some of the time he was not. Much of the research is research that I undertook myself.

Q Now, have you read any of the -- well, I'm assuming you've read the complaint in this case, correct?

A Yes.

Q And have you read any of the other pleadings filed in this case?

A I don't recall seeing any of the pleadings. There were a couple of orders, such as a discovery schedule order and that sort of thing that were provided to me, but I don't recall looking at pleadings in the case.

Q Okay. And throughout your report you also reference sets of documents that were produced by the Secretary of State's office to the plaintiff in the litigation. Did you receive those through the kind of research assistant process you described, you would ask for documents related to something and were provided those, or did you receive them some other way?

A My recollection is that Sarah Fink provided most of the documents that were received through discovery.

Q Okay. And are there documents that were

part of the discovery documents that you reviewed but did not reference in your report?

A Oh, yes, there were a lot of discovery documents that I received, and only -- only some of them seemed relevant for the -- for the analysis that I was doing. Well, they were -- often documents were relevant in the sense that they provided a broader context but were not -- not things that needed to be cited as evidence in the report.

Q So then you just personally made the decision after reviewing those documents as to which document to include -- reference in your report and which ones not to, that was your decision?

A Oh, yes.

Q Did plaintiff's counsel ask you to make any assumptions in the process of preparing your report?

A No.

Q So in your own words, could you describe to me what you believe the Fair Fight Action case is about?

A Well, let me begin with the portion of the case that I referenced in my report. There were a lot of different aspects of the Georgia voter

verification process and other aspects of the way in which the Secretary of State's office administered the registration process that I did not address in my report. I have, however, seen documents relating to a wide variety of the other issues that were raised in the complaint by Fair Fight -- by Fair Fight Action.

Q Okay. Thank you. I appreciate that.

Could you describe to me globally, though, your understanding of what the case as a whole is about, not your specific portion?

A Well, it's concern with the claim that aspects of the state's administration of the registration process that have a racially discriminatory effect and therefore would violate either Section 2 of the Voting Rights Act, or I think there were constitutional claims as well.

Q Okay. Thank you.

In terms of some of the specific documents that you reviewed, did you review preclearance submissions as part of the preparation of your report?

A Yes, that was a category of documents I requested early on.

Q And did you review any e-mails from the

Secretary of State's office as part of the preparation of your report?

A There probably were some. I don't remember that there was a large volume of them.

Q Do you recall when you last received documents from plaintiff's counsel that had been produced by the defendants that you relied on in the preparation of your report?

A Well, you're really asking two questions.

Q Okay. I can try it again. Let's do it this way: When did you receive the last set of documents from the plaintiff's counsel that were -- that were subcategory of documents produced by the defense that you relied on in the preparation of your report?

A You're still asking two questions. One, when I received them, and the other was you were restricting it to particular category, documents that I relied on. It seems to me that's two different questions.

Q Okay. I'm trying to use the documents you rely on and modifying the when did you receive. I'm asking only as to the subset of documents produced by the defendants. So to category one, also documents that you relied on that were produced by

the defendants, when did you last receive those categories of documents -- documents that fit in those categories?

A It was pretty recent, but I don't recall an exact date, but it was certainly in 2020.

Q Okay. As part of the research for your report, did you speak with anyone other than plaintiff's counsel to -- in Georgia?

A Not that I recall.

Q Okay. So you didn't talk to any voter registrars or election officials as part of the preparation of your report?

A No.

Q Let's turn next to your CV. Ms. Fink yesterday sent a revised CV from May 2020. Do you have a copy of that document?

A I don't have it in front of me.

Q Okay.

MR. TYSON: Let's do this then. Sarah, is that something you could forward to Dr. McCrary just so we're talking about all the same documents at once?

MS. FINK: Absolutely. Do you have your e-mail open and I can forward it to you, Dr. McCrary?

THE WITNESS: I think I just messed up our Zoom connection by trying to access it.

MS. FINK: We see you fine.

MR. TYSON: We can still see you fine.

THE WITNESS: I see nobody. I'm sorry.

MS. FINK: Can we go off the record for a minute and just try to fix this?

MR. TYSON: We'll do that.

(Off-the-record discussion.)

MR. TYSON: For purposes of clarity here, we've marked as Exhibit 2 the updated CV, the changes to which Dr. McCrary has made to his CV.

(Defendant's Exhibit 2 was marked for identification.)

MR. TYSON: We are going to now mark as Exhibit 3 Dr. McCrary's report, which also includes a prior version of his CV, and he's aware of the differences there, and we can discuss those as needed.

(Defendant's Exhibit 3 was marked for identification.)

BY MR. TYSON:

Q I don't expect the questions will involve anything that's changed, Dr. McCrary.

So Exhibit 3 is titled Expert Report of

Dr. Peyton McCrary. I'm assuming you're familiar with this document, correct?

A Yes.

Q And so at the end of this document Exhibit 1 is your CV that was filed with the report, and on the PDF it's page 103, but it's six pages from the end, Dr. McCrary, in the paper version.

A I see it.

Q And as we've discussed, the most recent version of your CV we've marked as Exhibit 2, but for convenience we're going to work off of the CV attached to Exhibit 3, correct?

A Yes.

Q Now, kind of getting started on your background, I ran across another version of your CV in another case that mentioned that you were originally from Danville, Virginia; is that correct?

A That's correct.

Q And that's funny to me because I've been reading through Taylor Branch's history of the civil rights movement and recognized Danville. I had not heard of Danville except there was a Student Nonviolent Coordinating Council protest there in 1963. Are you familiar with that incident?

A Yes.

Q And were you in Danville at that time?
A I was.
Q Were you involved at all in the operations that were happening then?
A No.
Q Okay. Do you have any familiarity with the Danville city officials that were involved at the time, the police chief McCain or Mayor Stinson?
A I remember who they were. That's the extent of what I recall from reading the newspaper.
Q Okay. If we could begin with your educational background. If you could just maybe give me a brief summary of your educational history.
A I went to the public schools in Danville, Virginia, where I graduated from high school in 1961. I was an undergraduate at the University of Virginia and received my BA in 1965. I stayed for an additional year and took a master's degree in 1966, and then I went to Princeton, where I completed my PhD degree in 1972.
Q Great. And for your master's at UVA, what was the topic of your thesis; do you recall?
A Yes. John Spencer Bassett: The Scholar as Social Critic.
Q The scholar and social critic, you said?

A Scholar as social critic.
Q Got it.
And was there -- do you recall any references to Georgia in that thesis?
A No.
Q Now, for your PhD at Princeton, what was the topic of your dissertation there?
A Title of the dissertation was Moderation in the Revolutionary World: Abraham Lincoln and Reconstruction in Louisiana. That's an approximation. I may have gotten the subtitle wrong.
Q It refers to Louisiana. I'm assuming that was the primary focus of the work?
A That's correct.
Q Okay. You mentioned that you are currently teaching at George Washington University Law School. What does the role of professional lecturer mean?
A Professorial lecturer is the term that the university gives to adjunct faculty members.
THE REPORTER: Adjunct faculty...
THE WITNESS: Adjunct faculty.
MR. TYSON: Members.
BY MR. TYSON:

Q And so what courses are you currently teaching at George Washington Law School?

A The only course that I've taught there is a course I co-teach with a former colleague in the voting section of the Department of Justice, a course on the voting rights law.

Q Who is that former colleague from the Department of Justice?

A Stephen Pershing.

Q And is it correct that the topic of your class on voting rights law does not involve the area of election administration?

A No.

Q What parts of election administration are addressed in your voting rights law course?

A Well, first of all, we talk about cases involving voter registration before 1965, particularly from Smith versus Allwright, through -- through the cases in 1961, '65, and election administration was the primary focus of those cases.

Additionally, we discussed election administration in the context of explaining the evolution of the operation of Section 5 of the Voter Rights Act on the preclearance reviews by the Department of Justice or in lawsuits that -- some of

which dealt with election administration.

In addition, we give close attention in the last part of the course to several recent cases involving election administration issues in various states.

Q And is your teaching role as one of the co-teachers in that class focused on the historical components?

A Well, first of all, you recall that I am not an attorney, but if you hang around voting rights lawyers for about 40 years you pick up a little law, and so I confess that I often discuss the evolution of case law, but one of the focus -- one focus that I try to bring to the course is to explain how the fact-finding in voting rights in election law cases develops the role of expert witnesses in cases, the sort of empirical issues the courts had to address, and how the courts have addressed those issues.

So I wouldn't characterize that necessarily as historical, but it's certainly -- certainly deals with social science as well as how litigation is conducted. We actually try to teach law students how litigation operates.

Q That sounds fascinating. I'm assuming in

the course of that as part of your course you're obviously teaching about several cases from Georgia in that Voting Rights Act litigation experience; is that correct?

A Yes. Certainly.

Q So let's take a look at your publications in your CV. We'll begin with that. And I was looking just kind of at the list, and seems to be a lot about Alabama and Florida, and I was looking for some Georgia-specific items, and I found three, and I wanted to make sure I've got that right and haven't missed something.

So the first one on page 3 of the CV is an analysis of the -- of Georgia state senate redistricting in 1962, top of page 3. Are you with me on that?

A Yes.

Q And that was a publication that involved, obviously, looking at the state of Georgia, correct?

A Yes.

Q And the next item on that page, The Dynamics of Minority Vote Dilution: The case of Augusta, Georgia, is a study from 1946 through 1986 that involved Georgia, correct?

A Yes.

Q And in your report you mentioned the end of preclearance as we know it where you recounted facts involving Georgia legislative redistricting in 2001. Do you recall that paper?

A Yes.

Q Okay. Are there any other publications you looked at on your CV that involve Georgia elections that I've missed out of those three?

A Yes, a Law Review article that is listed immediately following, The End of Preclearance to which you referred, Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960 to '90, which was published in the University of Pennsylvania Journal of Constitutional Law in 2003.

Q Got it.

Okay, so we've added that one, so we're at four. Are there any other publications you have published that involve Georgia?

MS. FINK: Dr. McCrary, if you need time to read through the list of publications to think about whether they involve Georgia, you should take the time to do that.

THE WITNESS: That's what I was doing.

MS. FINK: Good.

BY MR. TYSON:
Q Please take your time.
A There is a book chapter called the Law of Preclearance which was published in collection of essays entitled, The Future of the Voting Rights Act published by Russell Sage in 2006, which is -- which is essentially an excerpt from the Law Review article in which we were asked to present the empirical evidence regarding objection decisions that we had -- we had previously discussed in the Law Review article, and that also necessarily deals with some of the Georgia facts.
Q Any others you can identify? Please take your time. Don't rush.
A I'm trying to recall. I'm pretty sure there were also some Georgia cases discussed in an article entitled -- Law Review article again called Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases.
Actually, now that I think about it, there's also Georgia material in the Law Review article listed immediately below that, Discriminatory Intent: The Continuing Relevance of Purpose Evidence in Vote-Dilution Lawsuits published in the Howard Law Journal in 1985.

I think there's also some discussion of Georgia expert witness reports in a journal article entitled, Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom, published in Social Science History in 1990 and listed on page 3 of the CV.

And there's also, now that I think about it, in a review in -- review essay that I published that's listed on page 3 entitled, Race and Misrepresentation: Review of Maurice T. Cunningham, Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice, published online in a online journal known as H-Net in 2002. I think that's all.

Q Okay. Excellent. Thank you for taking the time for looking at that. I appreciate that.

So on page 3 there before we get into some of these others, I see you have a review essay, Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act, from 1988. Do you see that entry?

A Yes.

Q And was that referring to Dr. Thernstrom's book, Whose Vote Counts?

A Yes.

Q And I'm guessing from the title of your review that you were critical of the book; that a fair statement?

A That's correct.

Q Do you recall calling Dr. Thernstrom's work careless in that review?

A I don't remember whether I used the word "careless," but I'm sure I made comments that would be synonymous with it.

Q Do you recall saying that Dr. Thernstrom's work was, quote, crafted to serve a conservative political agenda?

A I don't recall those words, but it's consistent with what I think Pam Karlan and I said in the review.

Q Do you personally oppose Dr. Thernstrom's conservative political agenda?

A Do I personally oppose her conservative agenda?

Q Yes.

A Well, actually, Abby and I knew each other pretty well, and we were on good terms even in the last year -- years of her life. And I didn't agree with her about the -- portions of her ideology in her publications, but the primary focus of that

review was the carelessness of her scholarship and the way in which she distorted evidence to fit her ideological views. It wasn't a critique of her views so much as it was a critique of her scholarship.

Q Thank you.

Let's take a look at one of the Georgia-specific publications we had, The End of Preclearance as We Knew It. That is document 3 for you, 03.

A Okay. We need to refer to the CV anymore or should I put it back in the folder?

Q We're going to be coming back to it. The report you probably want to hang on to since we're going to need to come back to that as we go. I'm going to try to minimize bouncing between exhibits as much as I can.

A What did you tell me to refer to, which exhibit?

Q Document 03, which we'll mark as Exhibit 4.

(Defendant's Exhibit 4 was marked for identification.)

A Yes.

BY MR. TYSON:

Q It's the article, The End of Preclearance as We Knew It.
A Yes, I have it.
Q Is this the article that you authored that's referenced on your CV in 2001? I'm sorry.
A It appears to be the article. It's a different format from the original, but it appears to be a copy of the article or the article.
Q Okay. So obviously I know it's relatively lengthy. Do you recall where in the article you discussed Georgia's legislative districting?
A So I can look through and find all the references to Georgia if that's --
Q That might be -- sorry, I might be able to assist you. If you go to page 36.
A I'm looking at page 36.
Q So that first paragraph, maybe about fifth line down that begins: Thus, the majority in Georgia versus Ashcroft, can you see that?
A Yes.
Q And do you personally agree or disagree with the court's opinion in Georgia versus Ashcroft?
A Agree or disagree is not the way I would couch it. What we said in the article and what I think is that it was an opinion that would create a

standard for enforcing Section 5 of the Voting Rights Act that would be administratively difficult and confused and called for things that had previously not been regarded as suitable evidence in a Section 5 review, including the political party controlling the legislature and the role of the party control of the legislature in putting African-American legislators in committee chairmanships, which is not the kind of thing we had ever been authorized to look at under Section 5.

It also instructed the Department of Justice or the federal courts to consider the creation of influence districts, which had never been a part of a Section 5 review, and, in fact, it's a concept that political scientists regard as a -- a very sloppy category of districting to examine with little empirical -- little empirical definition, and so it seemed a particularly bad idea.

So I was -- I was critical of -- we were -- my co-authors and I were critical of the decision because it seemed to create a lot of confusion in the standards for administering the preclearance review of voting changes.

There were some aspects of it that seemed

to have some appeal. You know, it suggested attention to things that are of interest, but it was difficult for me or for anyone in the voting section to figure out how the heck to administer Section 5.

And, of course, the case was remanded and we were struggling with that, and it appeared to call, among other things, for legislative roll-call analysis of voting behavior in the legislature in the case of a redistricting decision which meant that we had have to use a totally different kind of expert. So there were a lot of administrative problems with the standard that the court had announced in Georgia versus Ashcroft.

Q Thank you. And that actually kind of leads to what I was going to ask you about. On the next page on page 37, footnote 229 makes reference to what you just described as the issue of looking at the legislative influence of African-American legislators. Are you with me on that footnote? And it says: In Georgia, as in most states, the party which provided the most leadership opportunities for representatives elected by minority voters was the Democratic Party, and references Dr. Karlan. Thus under this new view of retrogression, evidence that a plan maintained or enhanced the chances that

Democrats would control the state senate would presumably enhance the likelihood of preclearance.

Do you see that language?

A Yes.

Q And so based on what you've described earlier, your main concern with this new review that the Supreme Court was requiring in Ashcroft was the administerability of it from the voting section's view; is that a fair statement?

A And the federal courts.

Q Did you have concerns about the constitutionality of engaging in this kind of exercise that would involve partisan line -- partisan engagements in preclearance analyses?

A Yes, but I'm not sure exactly what you mean by the question. I mean, it seemed to me that this was -- this was something that had never been a part of Section 5 review, and it seems to invite a kind of partisan decision-making which we had always tried to avoid.

Q Do you have a personal opinion on whether or not the leadership opportunities for representatives elected by minority voters should have been part of a preclearance review?

A Yes, I don't think it should be part of

the preclearance review.
Q Okay. And those Georgia plans on the next page of footnote 235 you note were later found unconstitutional on the one-person, one-vote principle, correct?
A Where are you referring me to?
Q Page 38, footnote 235.
A Yes.
Q And so ultimately the department didn't have to answer those questions as to those Georgia plans; is that fair?
A That's correct.
Q And then is it your understanding that Georgia versus Ashcroft was overturned by statutory changes in the 2006 renewal of the Voting Rights Act?
A I wouldn't use the term "overturned." Congress doesn't overturn courts' decisions.
Q So is it -- let me ask a better question then. Is it your understanding that Georgia versus Ashcroft is not applicable to preclearance in light of the changes made by Congress in 2006?
A That's correct.
Q Thank you.
We can put that article away for now.

Actually, I shouldn't need to go back to that one.
Let's talk next about document 04, and that is the document, Yes, but what have they done to black people lately? from 1995.
A Yes.
Q I'm going to introduce -- mark that as Exhibit 5.
(Off-the-record discussion.)
(Defendant's Exhibit 5 was marked for identification.)
BY MR. TYSON:
Q Do you have that in front of you now, Dr. McCrary?
A Yes.
Q Okay, great. Is this the article that was referenced on your CV, Yes, But What Have They Done to Black People Lately? The Role of Historical Evidence in the Virginia School Board Case?
A Yes.
Q I guess I'd like for you to turn to the third physical page, page 1276, in the Chicago-Kent Law Review.
A In this copy there is no 1276. I go from 1275 to 1277.
Q Well, that's a problem. Let me do this,

is it correct to say that this article is an analysis of what would be referred to as the Shaw line of cases before the US Supreme Court?

A No.

Q And how would you explain what this article was about then?

A This article was about the evidence in a particular case which was initially styled Irby versus Fitzhugh, I think, which challenged the constitutionality of and I suppose the legality under Section 2 of the Voting Rights Act of the method of appointing elected school -- appointing school boards, local school boards in the state of Virginia.

Q If you could turn to page 1277, since I know you have that one. First full paragraph on that page begins: This article will examine the historical evidence of discriminatory intent presented by the plaintiffs in the Virginia school board case and the basis on which courts minimized the ultimate significance of this evidence.

Do you see that?

A Yes.

Q And you indicate that no court has followed this precedent in deciding subsequent

lawsuits. Were you urging the adoption of the precedent used in the Virginia school board case or the rejection of that precedence?

A I'm sorry, could you rephrase that question?

Q Certainly. So you're examining the historical evidence of discriminatory intent presented by the plaintiffs and the basis on which the court minimized the evidence. I'm assuming in general this article you're advocating against the court's position in how it treated discriminatory intent evidence; is that correct?

A Yes.

Q Okay. And you indicate that no courts have followed this precedent in deciding subsequent lawsuits. Are you aware of courts that have adopted the precedents minimizing the ultimate significance of intent evidence in other cases?

A I have to think about that for a moment. I was, of course, writing this in the middle of the 1990s. I can think of cases since that time in which courts have minimized the significance of historical evidence, but it would take me a while to go through and recall precisely which cases.

Q I don't want you to engage in that kind of

exercise.

Obviously you are a historian, have worked in the Voting Rights Act area for a while. Is it your personal belief that historical evidence is critically important to intent analyses by courts in voting cases?

A Well, historical evidence is a term that I don't refer to with any chronological limits. In other words, when I am analyzing recent history, that's still historical analysis, and that's still historical evidence. It seems to me that it depends on the circumstances.

For example, in the Supreme Court decision in Hunter versus Underwood and the earlier 11th Circuit decision in that same case challenging the petty crimes provision of the 1901 Alabama constitution, the court was focused entirely on things that happened in the period around the third of the 20th century, and that was decision in which then Associate Justice William Rehnquist voted with his -- with the fellow members of the court in a unanimous opinion based entirely on very old historical evidence because it was relevant to the facts at issue with the court on that case.

So there are occasions when going back a

very long time might be highly relevant, and I have been involved in some of those cases myself, but I also have the view that more recent historical evidence can be much more probative than what happened 50 or a hundred years ago. So, you know, I interpret history very broadly.

Q Got it. Thank you.

So we can go ahead and put that one away. Let's go next to another publication document 07 called, Keeping the Courts Honest.

A Sorry, it's 7?

Q Yes, sir.

A Okay.

Q So we'll mark this as Exhibit Number 6.

(Defendant's Exhibit 6 was marked for identification.)

BY MR. TYSON:

Q And is this an article you published in 1989 involving the role of historians as expert witnesses?

A Yes.

Q Okay. And so hopefully we have all the pages here. If you could go to page 105, which is the sixth physical page.

A Yes.

Q So about the middle of that page in the paragraph that starts, "This sort of direct expression." You with me on that?

A Yes.

Q You note about halfway through that paragraph: Evidence of discriminatory intent is most commonly found in newspapers. Opposing counsel normally objects to newspapers, particularly if less than 20 years old, as hearsay evidence.

Do you see that statement?

A Yes.

Q You obviously use newspaper accounts in your analysis here and in other cases; is that correct to say?

A Yes.

Q And this is one of the tools of a historian is to be able to look at newspaper accounts; is that a correct statement?

A Yes. It's not restricted to historians, but yes.

Q Okay. And when you're doing research involving newspapers, how do you locate the newspapers that you are going to consult? Is it print only? We have so many ways of delivery now. Is there a particular method that you use in your

research process?

A Well, the access to newspapers has evolved over time, as I'm sure you know. Back in the 1980s when this article was written and when I was testifying in a variety of cases I had to read newspapers on microfilm, and sometimes I had to travel to the field to analyze them. In fact, usually that was necessary.

Nowadays I have access through my GW University connection to an online database of newspapers and newspaper articles known as NewsBank, which I also was able to use during my time in the Department of Justice, and so sitting at my desk I can access newspapers rather than traveling to Mississippi or Georgia or Montana or wherever to read newspapers.

There is also the possibility of identifying newspapers through an Internet browser sometimes, and so some of the time I can locate newspaper articles that way, so it just depends.

You also asked about a current trend in journalism for online newspapers, and that is also a source of access. For example, I think it's -- I may -- it may be a coalition of the newspapers in Alabama which has an online publication called

AL.com. It's an online version. I think it's probably the Montgomery Advertiser and Birmingham News, but I'm speculating there.

So there are online journalism sources all over the place nowadays in addition to the searchable database, which includes things that were originally in print.

Q Thank you. That's very helpful.

So what methodology do you use as a historian to determine what newspaper accounts are relevant when you're doing an analysis and which ones are irrelevant?

A Well, of course, it depends on the questions you're asking. If, for example, I'm analyzing the adoption of a statute, I focus on stories, reports, news reports covering the operations of a state legislature at the time the statute was under consideration.

If I'm talking about the administration of elections, for example, I would often be looking at newspaper coverage of things that a state agency did, as in this case Secretary of State's office. So it depends very much on what subject matter you're investigating, but newspaper articles are also useful as a what I usually refer to as a

pattern-searching device to find out things to explore through other documents.

So the reason why newspapers were so important in cases in the 1980s is that there's virtually no legislative history record of state legislatures other than the bare-bones account in the journals of the legislature. So if you really want to find out what's happening in the legislature, you can't go to an official document, and the best available evidence was usually newspaper coverage of what the legislature is doing.

Of course, as with any documents, a social scientist, such as an historian, has to analyze each piece of evidence in context and compare what you're finding in one document with other documents that deal with the same subject matter.

So it's the kind of thing where an expert social scientist -- social scientist who was exercising his expertise or her expertise has to be careful in using newspapers just like any other document.

Q And so on -- later on that same page when you say -- or the same paragraph when you say that historians -- experts trained in the scrutiny of such sources, and surely historians would rank first

among equals here, typically relies on such sources in reaching a professional opinion, is that essentially the process you're referring to you just described, you have to review it and determine what the relevance might be?

A Yes.

Q Turning to page 109, four or five pages later.

A Yes.

Q Second full paragraph that begins: The US Department of Justice has also made extensive use of historians as expert witnesses in voting rights lawsuits, do you see that language?

A Yes.

Q Besides you, were there other historians working at the Department of Justice as expert witnesses in voting cases?

A Well, at that time I was not working at the Department of Justice. What I'm referring to there is expert witnesses retained by the department. And, for example, Morgan Kousser, an historian at Caltech, was often an expert in voting rights cases; Vernon Burton, who was then at the University of Illinois, was another historian used as an expert witness in a number of cases. There

were others, some of whom might have served only one or two cases, but it was rather common.

Q When an historian was used in a Voting Rights Act case, was -- had the determination already been made that the department was going to engage in litigation and the historian was brought in to assist in building that case, or were historians used in the analytical process prior to the decision on whether to bring a case?

A Historians were not involved in the prior decision-making. The department -- the court brings out a lawsuit, carries out an extensive investigation, and does not use consultants in that period ordinarily, and certainly didn't in that period, so all the historians would have been retained after a case was filed.

Q And so was the historian essentially helping paint the context, or were the historians focused on discriminatory intent, or did it vary too much case by case to say there was a consistent practice?

A In the 1980s most of the cases where historians were used were dealing with cases in the South where there were judicial findings of the history of discrimination effect on voting, and so

it was hardly necessary to have an expert historian to document what the courts had already found.

So the ordinary practice was where the department thought that there was an intent question to be investigated, the department would retain an historian to focus on the intent question, and that was the primary role.

Though when cases involved states outside the South where there was no body of judicial findings regarding the history of discrimination, such as in cases in the 1990s in Montana and in South Dakota, historians were -- were retained to document the history of discrimination affecting the American Indians.

And there were probably other categories of question where historians were used that I'm just not recalling off the top of my head.

Q Thank you.

Let's keep moving through the article to page 115, which is page 15 of the PDF.

A Yes.

Q At the bottom of that page you begin to discuss a case from Edgefield County, South Carolina. Do you see that section?

A Yes.

Q And you served as the plaintiff's expert in that case on intentional discrimination; is that correct?
A Yes.
Q And do you recall that the court ultimately did not rule on the intentional discrimination element of the Section 2 claim?
A That's my recollection.
Q And ultimately the court didn't decide whether the testimony you gave or the testimony of the defendant's expert, Dr. Belz, was credible, correct?
A Sorry, defendant's expert who?
Q Dr. Belz, B-E-L-Z?
A Oh, Herman Belz.
The court made no credibility finding about either expert, as I recall.
Q So on page 116, the next page over, you relate the story of the defendant's expert testimony. If you want to take a minute to review that, I have a couple questions about that.
MS. FINK: What paragraph are you referring to on page 116?
MR. TYSON: Page 116, the first two paragraphs there are what I want to ask about.

THE WITNESS: I've read it.
BY MR. TYSON:
Q Okay. Thank you.
So when you say at the beginning of the first full paragraph that had the defendants' expert stopped there, his testimony would have been credible, that's just referring to your assessment of his testimony because the court never made a credibility determination, correct?
A That's correct.
Q If you can turn to page 117, the last paragraph on that page is what I'm interested in here. And it lists -- and why don't you take a minute to read it, and then I'll ask you about it.
A I've reviewed it, and I remember the testimony, so go ahead and ask your question.
Q Excellent.
So you talk about a number of things that you looked at, chain gangs, the athletic teams' names, playing Dixie at a football game. In preparing that kind of testimony, how did you determine which community practices were relevant to a question of racial intent in a voting case?
A Well, recall that you elicited the information earlier in this deposition that I grew

1 up in Danville, Virginia. I was intimately familiar
2 with the southern racial etiquette of the time
3 period we're talking about, and any historian who's
4 written about the South would also be familiar with
5 that, even if that historian didn't grow up in the
6 South. So this is -- this is what would be
7 understood by almost anyone writing about the
8 history of the South in the 1960s and 1970s.
9 Q And in the process of looking for the
10 record of discriminatory continuing behavior by
11 county officials that you reference here, do you
12 also in your analysis search for nondiscriminatory
13 behavior, or do you limit your focus to locating
14 discriminatory behavior?
15 A Of course you look at all the purposes.
16 For example, there might be circumstances in which
17 there is a legitimate governmental interest in
18 taking some particular action that would justify it.
19 So you have to weigh racial considerations along
20 with other nonracial considerations in anything
21 you're analyzing.
22 Q What methodology are you using to make
23 that analysis? Obviously you're bringing your
24 background in the southern way of life as you
25 described in Danville. What methodology are you

using to determine whether there may be a legitimate government purpose versus a racially discriminatory purpose?

A Well, it has nothing to do with growing up in the South. You were asking me specifically about the racial etiquette facts that are referred to in that paragraph when I made the comment about growing up in Danville.

An historian is trained to analyze the total context in which decisions are made, and that includes all of the considerations that went into a decision. That's what we normally -- that's what we're trained to do in our education and taught to do when we're conducting research. So even someone that grew up in the North can analyze the South in the 1960s and 1970s.

Q Have you ever heard the name of David Barton from evangelical circles in the context of history?

A David Barton?

Q Just for context, he's someone who is not a trained historian who has been accused of cherry picking quotes from the Founders to reach a particular conclusion about the founding of the country. I can see from your face you don't know

what I'm talking about. That's totally fine.

A I've never heard of David Barton that I recall.

Q Let me ask this question: Apart from that, what processes does a historian use to avoid the mistake of just going through and cherry picking out stories to support a narrative when you're evaluating a historical practice or the adoption of a policy?

A That's a very broad and really vague question, it seems to me. You bring everything you know about the way a political process operates or the way in which social behavior operates in the society you're examining, and you start by trying to assemble all of the evidence you can about the subject matter you're investigating.

There's no -- it's not something like a statistical analysis where you can point to a particular procedure that you're using to analyze whether voting patterns are racially polarized or whether there is a realignment or whether you have social mobility in the society. It's not -- it's a much broader gauge kind of analysis.

But I'm always struck by the language that the courts have used in beginning with White versus

Regester, I think, and extending down to the present day when the courts talk about analyzing the totality of circumstances. That's what historians do. That's what historians do when they're writing history, not when they're involved in voting rights cases.

And it's -- the same thing is true of political scientists or sociologists when they're analyzing questions such as those that we're talking about here. It's not something only historians do.

I made a quote in -- a silly comment that I made in that article or one of the articles that historians are first among equals. That was a little disciplinary chest beating, I suppose, but historians do it a lot more than political scientists or sociologists do, but some political scientists and sociologists are very good historians.

Q Very good.

If you can turn to page 118 for me.

A Yes.

Q At the top of that page you say: The defendants' expert, on the other hand, had testified that he was not an expert on voting rights, and at the end of that paragraph you say that his opinion

was not entitled to the weight of a professional opinion within the meaning of Rule 702 of the Federal Rules of Evidence. That was your opinion, not a finding the court made, correct?

A That's correct, although I should add it probably started with my attorney co-author and not with me, but I'm familiar with Rule 702.

Q Great. And later on that same page you mention a county representative who was not a credible witness. Again, this is the opinion of you and your author, not something the court found, correct?

A That's correct.

Q Let's move away from this case to page -- sorry, in the document away from the Edgefield case to page 126?

A Yes.

Q All right. So on this page you're talking about the legal standard in vote-dilution cases -- sorry. There we go. Sorry. Middle of the page there: By trying to shift the court's attention to the causes, rather than the degree, of racially polarized voting, the defendants' expert sought to reintroduce an intent standard.

Do you see that?

A Yes.
Q And so I'm assuming you're familiar with the terms "vote dilution" and "vote denial."
A Yes.
Q And so how would you define vote dilution in the context of a Section 2 case, just your -- I'm not asking for your legal definition, just your personal definition.
A Could you repeat the question?
Q Certainly. How would you personally define the term "vote dilution" when used in a Section 2 case?
A Well, the question -- first of all, a vote dilution case is challenging a method of election, such as an at-large election system or a districting system that is being challenged as discriminatory in effect because voting patterns are racially polarized, and that means that the voting strength of minority voters is diluted by the voting strength of the majority group in a particular jurisdiction. So that's really what the term means.
Q And those vote dilution cases would be primarily redistricting or at-large election systems; is that fair to say?
A Yes.

Q And then how would you personally define a vote denial case under Section 2?

A Well, I usually refer to denial in abridgment cases where the -- I mean, in cases before 1965 there were instances in which vote denial took place where it was simply impossible for African-Americans in some jurisdictions to register to vote because of the practices of a local registrar, that's almost never the case nowadays. But where the administration of elections makes it more difficult for persons to vote and then the burden of meeting the administrative requirements to vote falls disproportionately on minority voters, that would abridge their voting strength even though their voting strength is not denied.

Q Thank you.

Let's move ahead to page 128. I'm almost finished with this document here. On page 128 we're reaching the conclusion of the paper, and the first full paragraph begins: Critics charge that the adversary system tempts witnesses to become partisans of the cause for which they identify. Some see liberals as especially guilty of serving causes. Our experience is that witnesses are less likely to fall prey to partisanship than to more

pedestrian vices, such as sloppiness, muddled thinking or lack of attention to detail, and that experts serving the defendants' side in these cases are more likely to fall from professional grace than are plaintiffs' experts.

Do you see that language?

MS. FINK: Just like to correct one of the words. I think you read critics charge that the adversary system tempts witnesses to become partisans of the causes for which they identify, but it should read, the cause for which they "testify."

MR. TYSON: Thank you. I'm sorry, I meant to say "testify."

BY MR. TYSON:

Q So what do you mean by the statement that those on the defendants' side of voting cases are more likely to fall from professional grace than plaintiffs' experts?

A Remember we're referring here in this paragraph to allied experience, and what I mean to say is that I have a lot of experience watching experts for both parties in a lawsuit, and it is still true that social scientists testifying for defendants are more likely to engage in sloppy scholarship than -- than are plaintiffs' experts,

1 though that's by no means always true. But that's
2 what we were saying there.
3 Q Have you ever seen a plaintiff expert
4 engage in what you would consider partisan behavior
5 in a voting case given that background?
6 A No, and I'm not sure I would say that I've
7 seen defendants' experts engaging in partisan
8 behavior, as we said in that paragraph. That's
9 not -- that's not the problem. The problem is the
10 quality of the evidence they bring to bear on the
11 issues they were asked to investigate.
12 Q So in the next sentence there you say: In
13 any event, the virtues that lawyers seek in expert
14 witnesses are the same as those valued by academics:
15 Knowledge of all the scholarship in their field of
16 research, hard work in the primary sources, and
17 honest, thoughtful analysis of all the evidence. If
18 after that the testimony is not likely to help the
19 lawyer's case, the expert will not appear on the
20 stand. The standards of the courtroom are as high
21 as those of academe.
22 Do you see that?
23 A Yes.
24 Q Is that statement your understanding today
25 of the standard for expert witness testimony in

federal court?
A Which part of that long quote?
Q The part at the end, standards of the courtroom are as high as those of academe, is that your understanding of the standard for expert witness testimony in federal court?
MS. FINK: Objection, calls for a legal conclusion.
A Yes.
BY MR. TYSON:
Q Okay. Is that your personal opinion of what the standard for expert witness testimony would be in this case?
A In this particular litigation or in the paragraph you just asked me about?
Q Let's start with this litigation.
A Well, I haven't read the expert witness reports of everyone in this case, and I certainly haven't given them much attention in terms of -- in all -- I haven't given all of them the kind of attention I would need to have given if I were going to make such a judgment. So you're asking me a question about investigations I haven't made in this case.
Q Let me ask about you specifically. I'm

sorry, yes. Let me ask about you specifically. Is it your testimony that you believe your expert report in this case is as -- the same as the standard for a peer-reviewed journal article?

A Yes.

Q Okay. And you're aware, I'm assuming, of the distinction between testifying and nontestifying experts?

A Yes.

Q And so when you say in this quote that if after that the testimony is not likely to help the lawyer's case, the expert will not appear on the stand, are you aware of disclosed testifying experts who did not appear on the stand because their testimony wasn't likely to help the lawyer's case?

A No, that's actually probably the jaundiced view of my co-author, who is an attorney. But it's also a common sense proposition. If the expert reaches a conclusion that's contrary to the claims made by the lawyer's client in the lawsuit, the lawyer would not be inclined to put on testimony that is adversarial to the interest of his client, as I understand the practice.

Q Let me ask you about one more quote from this. That last full paragraph: A vote dilution

lawsuit is an interdisciplinary enterprise in which lawyers and academics learn from each other. These cases also make available to scholars financial resources rarely given for academic research. The investigation often deals with issues ignored by historians in the past, and the findings presented in courtroom testimony serve to enrich our understanding of the complex relationship between race and politics in the South. In so doing, historical research may exercise a direct influence over events in the real world of the present.

You with me on that?

A Yes.

Q And so you're being paid for your work in this case obviously, correct?

A Yes.

Q And is that payment giving you resources to deal with issues ignored by historians in the past?

A Let me try to answer your question in this way: To travel and do research and to have time to do research takes money. Historians and political scientists and sociologists and so on can get grant money to finance research.

The first time I ever testified in a case

I apparently felt embarrassed to discuss my expert witness fee, and Judge Virgil Pittman in the Southern District of Alabama said, you shouldn't be embarrassed to admit that you're being paid for your services. If you were working for free, I would have to conclude that you were an advocate of a cause, and so I stopped being embarrassed about the fact that I'm paid a fee as an expert witness. I'm also paid to teach. That doesn't mean that I am teaching in a way that's corruptible by the fact that I receive a salary for it.

And so the point is that these are not issues which would normally be the subject of a grant application. It would be difficult in some cases to find foundations that would investigate a particular locality, you know, and so the only way these things could be done is by involvement as an expert witness in a court case.

But the other part of what I'm talking about in that paragraph is that -- is what I've also referred to in this report, and that is that the fact-finding in court cases is often providing new empirical evidence about subject matter of great interest to other social scientists, and that means that the court decision itself and the documents

that were referenced in the court's decision from expert witness reports to specific documents or courtroom testimony is valuable evidence for historians to use, and in writing about many subjects, historians, political scientists, and sociologists use evidence for court cases. That's really the opinion we were addressing in that paragraph.

Q Okay. What do you mean by the complex relationship between race and politics in the South in that sentence?

A Well, race -- racial concerns have been a central part of the southern experience, and I wouldn't restrict it to the South. That happens to be the subject we were talking about there. But it's certainly not always true that political decisions are motivated by racial concerns, and it's not always true that social behavior is motivated by race.

It's a complex relationship, and you have to investigate the complexities if you want to understand whether there is or isn't a racial dimension to political behavior.

Q Do you still believe the relationship between race and politics in the South is complex?

A Yes.
Q And this article was written at a time when there were white Democrats and black Democrats and white Republicans, is it fair to say there was a decent breakdown there like that?
A Are you talking about the 1980s now?
Q Yes, the time of this article I believe was the 1980s.
A Yes.
Q At that time there was still a sizable number of white voters who identified as Democrats; is that right?
A Yes. I was actually thinking about the question of whether African-Americans were divided between Republican and Democratic Parties as they used to be in 1940s, '50s, and early '60s, and by the 1980s, most African-Americans had become -- had become identified with the Democratic Party and voted accordingly.
Q All right. We're finished with this document. We have also been going for a little bit over an hour and a half. Dr. McCrary, do you want to take a break or keep going? I'm going to be switching over to expert testimony and other things now.

MS. FINK: Let's take a break.
THE WITNESS: I definitely would. I've been drinking a lot of water.
(Recess 11:10-11:21 a.m.)
BY MR. TYSON:
Q Dr. McCrary, we're going to turn next to your expert testimony, and so if you could go back to your CV there for me.
A Okay.
Q And in reviewing the list of cases, it appears to me that when you were not testifying for the United States, you have always testified as an expert for plaintiffs against jurisdictions, either county or state; is that correct?
A Yes.
Q In cases where you served as a testifying expert, have you ever concluded that a jurisdiction was not engaged in discriminatory actions of some sort?
A In cases in which I've testified, is that your question?
Q Yes. Yes, sir, just the testifying expert questions.
A No, as I observed earlier, if I reached the opposite conclusion the lawyer would not have

wanted to use me in the case, and that has happened.
Q Have you ever been hired as an expert witness by any conservative-leaning organization?
A Conservative-leaning organizations. Can you be more specific?
Q Certainly. You're familiar with the term "politically conservative," correct?
A Yes, although it has varied in its definition over time.
Q Certainly. What is your definition of politically conservative?
A You're asking about right now or 15 years ago or 25 years ago?
Q Right now.
A That's very hard to pin down because conservatives have changed their views so dramatically in recent years, and it depends on which particular conservatives you're talking about. There are a lot of people who call themselves political conservatives who are sharply critical of the position taken by the Republican Party in recent years, both in the Congress or state legislatures, in the current President, and so forth. So a lot of people who call themselves conservative disagree with other people who call themselves conservative.

Q So is your answer then that you can't give a definition what politically conservative means despite recognizing that term?
A Yes.
Q Let's try it this way: Have you ever been hired by a Republican Party or -- either state or local or nationally?
A No, but I haven't been hired by a political party.
Q Okay. Have you ever been hired by -- I'm sorry, didn't mean to cut you off.
A No, you didn't cut me off.
Q Have you ever been hired by a Republican Secretary of State in an election case?
A I've never been hired by a Secretary of State.
Q You're familiar with the term "civil rights organization," correct?
A Yes.
Q And how would you define a civil rights organization?
A An organization that is created in order to advance the interests of minority citizens to protect their civil rights.
Q And you have been hired by civil rights

organizations, using your definition, as an expert witness, correct?

A Yes.

Q In the list of cases where you provided expert testimony, you mentioned Shelby County versus Holder. Can you describe for me in your own words what Shelby County was about?

A It was a challenge to the constitutionality of the preclearance requirements of the Voting Rights Act focusing specifically on the coverage formula found in Section 4 of the Civil Rights Act -- of the Voting Rights Act.

Q And you were retained as an expert witness for the Department of Justice, correct?

A No. I was --

Q You were an expert witness --

(Simultaneous speaking.)

THE REPORTER: I didn't hear the answer.

THE WITNESS: I was employed by --

MR. TYSON: Sorry.

THE WITNESS: -- the Department of Justice.

BY MR. TYSON:

Q And you testified as an expert witness on behalf of the United States in that case, correct?

A In the sense that I filed a written declaration in the case, yes.

Q And you were assisting in the defense of the constitutionality of the coverage formula under Section 4; is that correct?

A Yes.

Q Let's next go to document 10.

A Okay. Give me a moment.

Q Certainly. We'll mark this as Exhibit Number 7.

(Defendant's Exhibit 7 was marked for identification.)

A Yes, I have document 10.

BY MR. TYSON:

Q And is this testimony you provided to Congress, specifically House Judiciary Subcommittee, during its review of the Voting Rights Act after Shelby County?

A Yes.

Q So I want to ask you a few questions about that. About the middle of the page there you indicate: In the view of the five conservative justices in the majority, the coverage formula no longer identified the parts of the country where present-day racial discrimination affecting voters

are concentrated.

Is it your testimony that Shelby County was a conservative decision?

A You mean the position of the majority opinion in the -- yes.

Q And the bottom of page 1 right there in the next sentence you note that Chief Justice Roberts said much had changed about the South. Do you see that language?

A Yes.

Q As a historian, do you disagree with the chief justice's statement that much has changed in the South between 1965 and Shelby County?

A No.

Q Turning to page 2 of your testimony, the first full paragraph on that page you're discussing vote denial cases and vote dilution cases. If you want to take a minute to read that paragraph, I want to ask about that.

A I'm sorry, which paragraph?

Q The paragraph that begins: The formula --

A Yes.

Q The first full paragraph: The formula adopted in 1965.

A Thank you.

Yes, I've read the paragraph.
Q What I want to ask you about is the statement in the middle of the paragraph that says: Because the coverage formula was not altered by using new data to identify jurisdictions where both vote denial or abridgment and vote dilution were sufficiently harmful to justify a preclearance requirement, it appears, the majority in Shelby County chose to ignore the extensive record of discriminatory voting changes.
Can you explain to me what you were arguing in that paragraph or that sentence about the record that the court reviewed and how it ignored it?
A The best way to answer that question will take a few moments.
Q Okay.
A Because I go on in the testimony to distinguish between the view of the majority and the view of the dissenters, and to make the point that the majority and the dissenters look at -- looked at a -- took account of different parts of the record, the dissenters focused on the evidence of continuing discriminatory behavior in the jurisdictions that were covered by the existing formula, and the

majority looked primarily at evidence that related to the justification for the formula itself, and the majority opinion ignores much of the record assembled by the congress in 2005 and 2006 focusing on evidence of voter participation, and the reason for that was the fact that the formula itself is based on evidence regarding political participation, and so the majority opinion ignored a lot of evidence that the dissenters thought was more probative to the issues that were before the court.

Q Thank you.

On page 3 after the dissenters there, you say: The decision in Shelby County removed a uniquely powerful tool.

Is it fair to say that you believe personally that preclearance should be reimposed?

A Yes.

Q And you personally believe that Georgia should still be covered by the preclearance requirements of the Voting Rights Act, correct?

A Yes.

Q Now, we can go far ahead in that document to page 32. Okay. In the further full paragraph that begins, "In the aftermath of Shelby County," you discuss the change to focus on barriers in the

path of in-person voting. Do you see that section there?

A Yes. I apologize for the coughing. It's a chronic cough. I'm not coming down with COVID-19.

Q That's good. I'm glad you're okay on that front at least. That's totally fine. And we can take a break at any point if you need to.

So you say in that paragraph that few Section 2 cases have dealt with these types of issues, and then you make the statement: Courts lack a body of relevant precedents to guide them.

Do you still agree with that today?

A It is -- it is less true today because the courts have resolved a way of reconciling the fact-finding necessary in denial of abridgment cases with the standards set down in the Supreme Court in Thornburg versus Gingles, which was designed to deal with voter dilution cases.

Q All right. We can put that away. Thank you.

Are you familiar with the term "voter suppression"?

A Yes.

Q And how would you define the term "voter suppression"?

A Well, I generally don't use the term, but what it refers to is barriers that make it more difficult for citizens to vote, placing various kinds of administrative burdens on their ability to register and to vote.

Q And do you consider voter suppression to be a partisan activity?

A Well, not necessarily.

Q When would voter suppression not be a partisan activity?

A Well, either party could choose to suppress voting strength. In general, that is -- in general, there is a partisan pattern to the use of laws that present burdens to the registration and casting of ballots. That tends to be the work of Republican Parties and state legislatures.

Q Let's move next to your work history at the Department of Justice.

A Okay.

Q And so in your CV --

A Are you calling my attention to an exhibit?

Q I am not. No. No. I was just -- I just want to discuss generally.

A Okay.

Q I believe, from your CV, that you were hired at DOJ in 1990; is that correct?
A Yes.
Q And do you recall who hired you in 1990?
A Who hired me? There's a complex personnel operation that means that the decision is not made by any one individual, and that's the best answer I can give you.
Q And you were hired as part of the career staff in the department, correct?
A Yes.
Q So you indicate in your CV you conducted research for voting rights litigation. Did you have any role in any of the Shaw line of cases?
A I had a role in those cases. They were, of course, filed by private plaintiffs, and the United States was a defendant.
And so I wasn't doing an investigation before the case was filed, I was only doing research in connection with the issues posed in that particular litigation after it was filed.
I'm sorry, maybe I made too much of the word "investigation." In the department we distinguished between an investigation that takes place before the filing of a case and work that is

done in a case after the case is filed.
Q And I appreciate you making that distinction. One of my questions was -- you talked about your expert witness role already. I'm assuming you had a nonexpert witness role within the department from a research standpoint. Is that -- is that a correct assumption on my part?
A When you say in nonexpert role, often my job was characterized as an in-house expert, but if you mean by that I was not retained as an expert by the department, that's correct.
Q Well, and I guess maybe I need to understand a little bit more of the inner workings of the department. You referred to the investigations before case is filed and the investigation after a case is filed. Did you participate in investigations before cases were filed, or was your work with the department exclusively investigations after a case was filed?
A Are you asking now about Shaw cases in particular or cases in general?
Q I'm moving to all cases now just to understand your role before we go back to Shaw.
A I routinely was involved in investigations before a case was filed to help determine whether

the case should be filed.
Q Were you also involved in preclearance review of state and local voting practices?
A Sometimes.
Q So were you involved in the preclearance review that was part of the Georgia versus Ashcroft 2001 legislative district in Georgia?
A No.
Q Were you involved in the preclearance review of the 19 -- early 1990s Georgia congressional and legislative plans?
A Not that I recall.
Q I believe in your report you said you did not participate in anything related to Georgia's database matching preclearance process; is that correct?
A I don't know whether I testified to that effect, but that's true.
Q Were you involved in the preclearance review --
A I'm sorry, could I -- I'm not sure I -- my answer was directly related to the question you asked. Can you rephrase -- can you tell me what you asked so I make sure I'm consistent?
Q Certainly. I'll remove the reference to

your report that -- I was just explaining where I got the information.

I'll ask it this way: Were you involved in any review of Georgia's database matching processes in the 2007 to 2009 range for preclearance review?

A I'm glad I asked you for clarification. I thought you were asking me about the photo identification requirement that Georgia first adopted. No, I was not.

Q And you anticipated my next question, which was: Were you involved in the administrative preclearance review of Georgia's photo identification law?

A No.

Q Were you involved in the preclearance review of Georgia's 2011 redistricting plans?

A As I recall a Georgia suit in a Section 5 declaratory judgment action before the -- of a three-judge court in the District of Columbia, and I -- therefore, my work would have been in the context of that litigation.

Q So is that a yes, you did work on some sort of preclearance review, or that you only -- is your testimony that you worked on the lawsuit that

was filed concurrent with -- well, I won't testify -- put words in your mouth on that.

Did you work on Georgia's -- preclearance review of Georgia's redistricting plan either in litigation or through an administrative process?

A Yes.

Q Did you participate in making a recommendation about whether to preclear Georgia's 2011 redistricting plans?

A No, that wasn't -- making recommendations of that sort wasn't my role in lawsuits, it was only my role in administrative review where I was an analyst, and I would actually make recommendation, which was reviewed up the chain.

Q In your role as an analyst in an administrative preclearance review -- so I'm limiting to that subset of cases that you worked on -- did you ever recommend that a Georgia voting change be precleared?

A I'm trying to recall everything over 26 years. I did not often work on administrative reviews. They usually only asked me to do -- to take a hand in an administrative review when they had a serious question about the purpose of the change, so they tended to ask me about cases where a

decision to object would be more likely than the ordinary run-of-the-mill administrative review.

Q Sitting here today, you can't -- I'm sorry, go ahead.

A Go ahead with your question.

Q So sitting here today, you can't recall a situation where you were part of an administrative review for preclearance of a Georgia voting practice, you were an analyst on that review, and you recommended that the practice be precleared, correct?

A That's correct.

Q For the same group when you were part of an administrative preclearance review for a Georgia voting practice, did you ever recommend that preclearance be denied?

A Yes. I'm obligated not to discuss particular internal decision-making in any one instance, but I can answer that the answer is, yes, I did sometimes participate in recommending an objection.

Q Were there other historians who were employed by the Department of Justice when you were there?

A No.

Q Was there a historian who was employed -- sorry.

A Let me correct. Were you asking specifically about the voting section, which is what I understood you to be asking about? You actually said the department, and it's a different answer.

Q Thank you for that clarification. Yes, when I'm referring to the Department of Justice in this, I am limiting it to the voting section, so I will be precise about that.

A Because there are historians who work in other parts of the Department of Justice.

Q Certainly. Certainly.

Did the Department of Justice's voting section employ a historian before you were hired?

A No.

Q Do you know if the voting section hired an -- a new historian after you retired?

A I do not know.

Q Is it correct that the Section 2 cases you worked on in the voting section were all what we would call vote dilution cases?

A No.

Q So you did work on some vote denial and abridgment cases as you categorized them earlier?

A Yes.
Q And do you recall which cases -- well, I guess -- let me reask that. Is the fact that you worked on a particular case if you were not a disclosed expert also something that you are bound to a confidentiality agreement regarding with the voting section?
A No, I just can't discuss the internal decision-making process.
Q Okay. So do you recall what vote denial or abridgment cases you worked on during your time at the voting section?
A And your question specifically is about Section 2 cases, right?
Q Correct.
A The challenge to a 2013 statute adopted by North Carolina, which was challenged in United States versus McCrory and challenge to -- Section 2 challenge to the photo identification requirement in Texas.
In other cases which were Section 5 cases brought by jurisdictions, I also worked on denial or abridgment matters.
Q Is it correct to say that the cases -- Section 2 vote denial or abridgment cases that you

worked on was after Shelby County was decided?

This isn't a memory test. I didn't know if there was a specific delineator for you or not, and if there's not, that's fine.

A Well, the complication is that I worked on the Texas photo ID case when it was before the DC court before Shelby County, and in the South Carolina Section 5 case before Shelby County was decided, and I worked on a Florida case before Shelby County was decided, again a Section 5 context. And because we were -- because the United States was involved in the Texas photo ID case in DC, we were not involved in the Section 2 case down in Texas until after Shelby County was decided.

Q Thank you for that clarification.

You mentioned that one of your roles was identifying consultants and expert witnesses to be used in cases; is that correct?

A Yes. I just remembered another context that I had forgotten to mention in connection with denial or abridgment cases, and that is a case involving a claim in Noxubee County, Mississippi, US versus Ike Brown, which was also a denial or abridgment case well before Shelby County was decided.

Q Thank you.
A And I'm trying to remember whether I was involved in any others, but that's enough. That's as much as I can recall.
Q Thank you.
So you mentioned that one of your roles was assisting in identifying consultants and expert witnesses for the voting section to use in cases; is that correct?
A Yes.
Q And so you hired political science experts, I'm assuming?
A Oh, yes. More political scientists than anyone else. More political scientists than anyone else. Than any other discipline.
Q And did you -- I'm sorry, yes.
And did you ever look at hiring Dr. Tom Brunell during your time at the Department of Justice?
A I met Tom Brunell at, I think, an American Political Science Association meeting where he was with his dissertation advisor, Bernie Grofman, who was an old friend of mine and an expert I had worked with in cases. I don't remember whether we ever considered using Tom Brunell in a case or not.

Q So while you were employed at the voting section, were you ever placed on a remedial plan as a result of any workplace discipline?

A I beg your pardon?

Q While you were employed at the department, were you ever placed on a remedial plan as a result of a workplace disciplinary process?

A I don't even know what a remedial plan is in the Department of Justice, but I was never -- my objectivity or behavior was never questioned in any regard.

Q While you were employed at DOJ, were you ever disciplined for refusing to work on a case because of the racial makeup of the alleged victims?

A No.

Q While you were employed at DOJ, were you ever formally reprimanded by your supervisors for refusing to work on a case because of the racial makeup of the alleged victims?

A No.

Q Were you ever informally reprimanded by your supervisors for refusing to work on a case because of the racial makeup of the alleged victims?

A No.

Q I'd like to talk about two particular

cases that you worked on while you were at the Department of Justice. First, you mentioned a few minutes ago the Noxubee County case, the Ike Brown case.

A Yes.

Q You're familiar with that case?

A Yes.

Q Could you briefly describe what that case involves?

A Yes, it involved claims that the Democratic Party leadership in that county, which was, as I recall, an African-American majority county and the party leadership, the executive committee and so on was controlled by African-Americans, and there were claims that they interfered with the opportunity of the white minority in the county to -- I forget whether it involved registration. It mostly involved voting as I recall. And so that was the basic factual situation in the case.

Q Now, did you initially refuse to work on that case because of your personal opposition to the department bringing it?

A No.

Q Were you personally opposed to that case

because it was being brought to protect white voters from African-Americans who were being accused of violating the Voting Rights Act?

A No. At that time I did have questions in my mind as to whether that was consistent with the mission of the civil rights division, but I -- I saw a memo by a former colleague, David Marblestone, which he had been tasked with years earlier where he established through his research into the congressional -- the record before Congress and the courts that such claims were legitimate, but that's the only sense in which I had questions about it.

I had questions also about the legal argument that was being used in the case initially as to whether it was appropriate to characterize the behavior described as vote dilution, which it seemed to me was clearly a denial or abridgment kind of claim, but I did not refuse to work on the case.

In fact, I helped identify the appropriate expert witness to use in the case, Theodore Arrington, whom we had used in the past. I worked with the attorneys and with Professor Arrington in the course of his investigation, I went to -- and helped prepare him for his deposition as I recall, and I certainly went to Jackson to help prepare him

at trial.

Q Were your questions about the mission of the voting section related to the racial makeup of the alleged victims in the Noxubee County case?

A Yes, I couldn't think of any other case of that sort that had been brought in the -- in the history of the civil rights division's implementation of the Voting Rights Act since 1965, and it did seem to me an unusual case, but once I saw the facts in the case, I became convinced that it was a meritorious case.

Q And were your questions about the mission because you believed the mission of the voting section was to protect people of color as opposed to white voters?

A It was because the mission was to protect the interests of minority voters, and I didn't at first realize that African-Americans were in the majority in that county and that whites were necessarily in the minority. That changed the complexion of the case, no pun intended.

Q Now, who was Christopher Coates at the time of the Ike Brown case?

A He was an attorney in the voting section. He had -- he had not -- I think at that point he had

not become the deputy chief, but I may be misremembering the chronology of his promotion, and it was before he was section chief.

Chris is a person I had known since 1980. I had worked on several cases for him in the 1980s as an expert witness, a testifying expert. I had, in fact, recruited him to come to the voting section in the 1990s when his daughter graduated from high school, and he was -- he was interested in leaving private practice in Milledgeville.

So I had worked with him regularly on cases after he came to the voting section, including cases in Montana, which we investigated together initially. So I've known Chris for many years.

Q Are you aware that Mr. Coates testified to the US Commission on Civil Rights in 2010 about the Ike Brown case?

A Yes.

Q If you could turn to document 11 with me here.

A There's nothing in the folder. I think this must have been the document that was not in a folder which I accidentally saw when I removed the -- you want me to get that document?

Q Yes, please. It's a transcript of

testimony to the US Commission on Civil Rights.
A Yes, I've got it.
Q We will mark that as Exhibit 8.
(Defendant's Exhibit 8 was marked for identification.)
BY MR. TYSON:
Q If you could turn to page 16 of that testimony?
A Okay.
Q On page 16 -- hold on. Let me get there too, sorry. Do you see the first full paragraph says: One of the social scientists who worked in the voting section and whose responsibility it was to do past and present research into a local jurisdiction's history flatly refused to participate in the investigation.
Do you see that statement?
A Yes.
Q And are you familiar with this statement by Mr. Coates to the US Commission on Civil Rights?
A Yes.
Q And do you know the social scientist to whom Mr. Coates is referring?
A Yes, he was referring to me.
Q And though you ultimately testified at the

trial, I believe you -- what you've explained here is you did initially not participate in the case; is that correct?

A No, that's not correct. I will preface my answer by saying that the testimony you just read is false, and I addressed this in the investigation by the Inspector General's office in the Department of Justice, and the inaccuracy of that is addressed in the Inspector General's report.

My recollection, which could be wrong, is that there is a footnote 28 in the Inspector General's report that refers to this and points out, which I had quite forgotten, that Chris Coates -- and I hadn't seen the document, the evaluation document to which the Inspector General investigator was referring, but that he had rated my performance on that case outstanding.

Q Going back a page to page 15 at line 18.

A Okay.

Q The statement: Once the full investigation into Brown's practices commenced, opposition to it by career personnel in the voting section was widespread.

Were you aware of any opposition to the Brown case within the voting section?

A I was aware of some individuals who didn't -- in the white case, including, actually, the paralegal who went to Mississippi when I was unavailable to go and do the newspaper research.

Q So it's your testimony that you were not -- I'm sorry?

A I also remember a number of attorneys who said this was a meritorious case, so there were a lot of different views.

Q And it's your testimony that you were not part of resistance or opposition to the case within the voting section; is that correct?

A That's correct, and I so offered sworn testimony twice.

Q Are you familiar with the book Injustice: Exposing the Racial Agenda of the Obama Justice Department by J. Adams?

A No.

Q Let's go to document 12. Hang on to the civil rights testimony because we will come back to that. Document 12 we'll mark as Exhibit 9.

(Defendant's Exhibit 9 was marked for identification.)

A I actually do remember now seeing this online when it was published. I had forgotten about

it.
BY MR. TYSON:
Q Okay. Have you ever read this book before?
A No.
Q I want to ask you about two sections, two excerpts from it. The first excerpt is the second physical page, pages 50 and 51. And I believe you actually answered my first question. At the bottom of page 50 and top of page 51, if you can read the paragraph that kind of overlaps those two.
A I've read the paragraph.
Q The first statement I wanted to ask you about, Mr. Adams's book says: Coates could not find anyone in the section to work with him.
Is that your recollection of what happened with this case or is Mr. Adams incorrect?
A I think Mr. Adams is incorrect.
Q Mr. Adams at the end of that page says that Joann Sazama went to do the newspaper reviews in Noxubee County. Do you recall that?
A I do.
Q And Ms. Sazama was a paralegal, not a historian, correct?
A That's correct.

Q Is the local newspaper review a role you undertook in every other Section 2 case in which you participated directly?

A In most, yes, but we also used paralegals in doing research, and from time to time we would engage graduate students at some university nearby when we had retained an expert to do research for the -- for the expert as well.

Q Okay.

A In other words, you don't have to have a PhD in history to do newspaper research.

Q So on page 51 at the top of that first full paragraph when Mr. Adams says that Ms. Sazama ended up having to do the job of the DOJ's in-house historian, it's your testimony that that is not a correct statement because other people would do that job as well of local newspaper review?

A I'm not sure I understand your question in the context of this paragraph.

Q Okay.

A It is true that Joann went to Mississippi to do research on the case, and I was busy at the time doing -- working on other matters, as I told the Inspector General's investigator, and, in particular, I was using my nights and weekends to

work on the Law Review article that ended up being published at the end of preclearance, and I was reluctant -- and it was also not long after I had emergency quadruple bypass surgery, so I was trying to take it a little easy at that point.

But in that sense the way that Christian puts it, it's like I wasn't doing my duty, but -- and I see that in the same paragraph, Christian goes on to quote Chris Coates's false testimony before the Civil Rights Commission that I flatly refused to work on the Ike Brown investigation. That's just not true.

In fact, I remember a conversation with Chris Coates in which he came asking me about working on the case, and I told him I have never flatly refused to work on a case. And I said, I'm tied up with other matters right now, but I directly -- actually, he's probably quoting me when he says that in his testimony before the Civil Rights Commission, but it's just not true.

Actually, Christian says later on in that paragraph that I did travel to Noxubee County later in the case.

Q So you're referring to the author as Christian. I'm assuming you know Mr. Adams

personally.

A Yes, we worked on one case together probably -- actually, two cases together, and so I knew him well. And, in fact, at that time he attended the Catholic church next door to the Presbyterian church that my wife and I attend, so I sometimes saw him on Sunday morning. But, yes, I know him well.

He's also false in saying that -- well, I take that back. He says: Coates viewed McCrary's lack of cooperation was a kind of insubordination. Chris never said that to me nor to anyone else, to my knowledge, who may have said it to Christian, but I -- I reject that charge.

Q Let's turn to the next page, which is page 52 there, and let's look at the first full paragraph. Mr. Adams says: But with his involvement in the Ike Brown case, suddenly none of that mattered anymore. Many voting section attorneys stopped talking to Coates. He had met Peyton McCrary for lunch at least once for many years, but that tradition quickly ended.

Is that a correct statement, first that you met for lunch once a week for many years?

A That's true.

Q Did that end after -- I'm sorry.
A Half of that claim is false.
Q So the statement that the -- that opportunities or the tradition of you having lunch with Mr. Coates ended after the Noxubee County case is false?
A That's true. I don't know how Christian would have known what the pattern was since he wasn't involved in going to lunch.
Q Have you spoken to Mr. Coates following his testimony to the US Commission on Civil Rights?
A I'm sure I have because -- well, actually, I should look at the date. Yes, that was in 2010, and subsequent to that I had occasion to talk with Chris on several -- several times when he was representing South Carolina after he retired from the department in the case involving the preclearance of South Carolina's photo identification requirement.
In fact, he had borrowed a copy of my book and returned it to me during the proceedings in that case, and, of course, we had conversations in connection with a deposition that we both attended.
Q Did you ever talk to Mr. Coates about what you said are his lies to the US Commission on Civil

Rights?

A No, I didn't see any point in rubbing his nose in it. I try not to pick fights.

Q So let's -- we'll come back to that Exhibit 9 in just a minute. Let's go back to Exhibit 8, the testimony to the US Commission on Civil Rights.

A I have that as document 11.

Q I'm sorry. It's document 11 for you, and Exhibit 8 to the deposition. I'll refer to it by document number. If you can flip with me to pages 83 and 84.

A Okay.

Q I want to ask you about the last paragraph on 83 going into 84. Mr. Coates says: And I had trial attorneys that I had worked with in cases that were successful and we had good relationships with. And they told me, one -- the person that testified told me point blank that he didn't come to the voting section to sue black people, to sue African-American people.

Do you see that statement?

A I do.

Q Did you ever hear comments like that from the attorneys in the voting section when you were

there?
A No.
Q Do you share that view of you didn't come to the voting section to sue African-American individuals?
A No.
Q Let's go next to page 18 of the testimony.
A Okay.
Q In the middle paragraph of that page there's a reference to Mark Kappelhoff, the chief of the division's criminal section. Do you see that?
A Yes.
Q And do you know Mr. Kappelhoff?
A I do not.
Q And at the bottom of page 18 over into page 19 there's a statement that: The primary role of the civil rights division is to enforce the civil rights laws enacted by Congress -- I'm sorry, I'm reading the wrong section. My apologies.
Are you aware of any civil rights groups that complained to members of the voting section about the Ike Brown case?
A No.
Q And on page 19 there's a statement about civil rights groups where Mr. Coates says beginning

with "Instead" at line 6: Instead, many of these groups act, as they did in response to the Brown case, not as civil rights groups but as special interest lobbies for racial and ethnic minorities and demand not equal treatment but enforcement of the Voting Rights Act for only racial and language minorities.

Do you see that language?

A Yes.

Q Do you agree with that description of civil rights groups that Mr. Coates is giving?

A No.

Q And the Ike Brown case was ultimately a successful outcome for the division, correct?

A That's correct.

Q Okay. Let's move next to the New Black Panthers Party case. Are you familiar with that case?

A Yes.

Q And what were the issues in that case?

A As best I recall it involved a lawsuit about two individuals who were members of an obscure group called the New Black Panther Party, who were apparently trying to intimidate voters at a polling place in Philadelphia. And my recollection is that

this was a polling place or in a precinct with a substantial African-American population, whether majority or just a large minority I don't recall, but one of the two had a policeman's nightstick and was beating -- hitting the palm of his hand with it as presumably a method of intimidating people who were going in to vote.

And as I say it involved two people in one polling place, not the kind of thing that you ordinarily bring a lawsuit about. When you're on election coverage, we try to deal with that situation informally with people that are involved in the administration of election in the jurisdiction, but it's -- it's hardly the kind of thing that I had ever seen a case brought, but I'm generally familiar with it.

Q And the victims or the alleged victims in that case that the individuals were attempting to intimidate -- well, say it this way: Were the individuals in that case attempting to intimidate white voters?

A Well, I think that was the claim that the department had in the case. I don't know that to be true.

Q Okay. Now, you worked on the New Black

Panther case with Mr. Adams, correct?
A Well, I worked on it in a limited capacity. The only thing they asked me to do was to identify possible expert witnesses, and it was -- they were looking for someone who was basically experienced in law enforcement as I recall. And I looked, but I don't think we came upon any logical choices, and they more or less dropped the idea, and eventually the case went away.
Q If you could go back to document 12, which is Exhibit 9, the last page of Mr. Adams's book.
A Page 180? I'm sorry. Yes, 180.
Q The page number in the book is 130. It's the last physical page of document 12, Exhibit 9.
A Okay. The number is hard for me to read. 130, okay.
Q And so Mr. Adams begins at the top of that page: Similar to the Ike Brown case, DOJ lawyers working on the Panther case ran into institutional resistance within the DOJ from the very beginning, including from the historian who had hobbled the Brown case, Peyton McCrary.
Did you launch institutional resistance to the Black Panther case?
A No. I also didn't hobble --

Q Mr. Adams is --
A I also didn't hobble --
Q I'm sorry?
A -- the Brown case. That sentence has two false statements with it.
Q And the next sentence indicates that you were tasked with looking for an expert to explain the history of voter intimidation tactics and the intimidating nature of the Panther organization. That's a slightly different description of expert in law enforcement that you gave. Is this description of what you were tasked to do correct?
A No.
Q Another two sentences later, Mr. Adams says: Mr. McCrary tried to scuttle our recommendation, claiming the expert wasn't competent to testify about the organization.
Is that a correct statement?
A No, I had no -- I have no recollection I had any such involvement, and I simply don't know who the heck he was talking about there. I don't know what potential expert he was talking about, but I didn't evaluate anybody. I looked unsuccessfully for somebody to work on the case, but it was a much more limited role.

I don't remember Christian or Chris asking me to identify someone who -- what was his -- to explain the history of voter intimidation tactics and the intimidating nature of the Panther organization.

If he means the Black Panthers in the 1960s by reference to the Panther organization, I'm absolutely confident that that issue never came up. If he's talking about the New Black Panther Party, I don't know anyone who would know anything about the history of the New Black Panther organization, so it just sounds increasingly farfetched. Bears no relationship to the memory I have of anything having to do with that case that involved me.

Q And at the end of that paragraph, Mr. Adams says: McCrary's obstructionism damaged the case.

I'm assuming you disagree with that as well.

A Of course.

Q Then at the bottom of the page, Mr. Adams talks about the advent of -- last full paragraph, the advent of the Obama administration. Do you see that?

A You said the last full paragraph?

Q Last full paragraph on that page starts with, "The problem extended far beyond McCrary."
A Yes.
Q If you want to read that paragraph, I just have one question about that.
A Okay.
Q So was it your experience that the election of President Obama made resistance to the New Black Panther Party case go to the top of the civil rights division, as Mr. Adams says in that paragraph?
A No, not to my knowledge.
Q We can put that exhibit away, and I have couple more questions about Mr. Coates's testimony.
A Okay.
Q So if you could turn first to page 21 of Mr. Coates's testimony.
A Okay.
Q And the first full paragraph on that page starting at line 5: The election of President Obama brought to positions of influence and power within the civil rights division many of the very people who had demonstrated hostility to the concept of equal enforcement of the Voting Rights Act.
Do you agree with that statement?

A No.
Q Did the election of President Obama change the focus of the voting section's work?
A Yes, in the sense that the relative indifference to bringing affirmative Section 2 cases in the George W. Bush administration was replaced by a return to a wish to enforce actively the Voting Rights Act.
Q If you can go next to page 34.
A Okay.
Q Line 14 of page 34 Mr. Coates testified: During the Bush administration, the voting section began filing cases under the list maintenance provision of Section 8 to compel state and local registration officials to remove ineligibles from the list.
Were you involved in any Section 8 NVRA list maintenance cases in the voting section?
A I had a very limited involvement as I recall. I'm trying to remember what it would have been, but it was probably more than a casual involvement. It may have been -- may have involved asking about potential experts, but I wasn't actively involved in any of them. And, actually, they were largely not expert-related cases, as I

recall.

Q And beginning on line 21 of page 34, Mr. Coates said: When Ms. Fernandes told the voting section that the Obama administration was not interested in the Section 8 list maintenance enforcement activity, everyone in the room understood exactly what she meant.

Were you ever present at a meeting with Ms. Fernandes where this Section 8 list maintenance was discussed?

A Yes. Excuse me, I've got spam coming in. I'll have to cut it off.

Now, can you -- you were asking about the meeting in which Julie Fernandes is quoted by Chris Coates as saying that the Obama administration was not interested in Section 8 list maintenance enforcement activity. I do remember it, though I don't remember those exact words. But I also think that I know what Julie meant, which was --

Q And what do you -- I'm sorry.

A -- which was --

Q You anticipated my question.

A -- which was that this -- this was a matter that, A, was not a problem, and, B, that it was something that didn't -- it wasn't -- it wasn't

consistent with what the civil rights division had always done in regard to -- in regard to enforcing the Voting Rights Act.

And furthermore, the problem of list maintenance as -- as the -- as the lawyers who were bringing -- advocated bringing such cases was that they looked at the census data on the voting age population, and they looked at the voter registration lists, and they saw that sometimes there were more persons listed as registered voters than there were in the voting age population of the jurisdiction.

And that's actually an artifact of the fact that there was widespread failure to purge voter registration lists, particularly in the Mississippi counties that Christian Adams's organization and Chris Coates were involved in after leaving the voting section.

But they were simply not meritorious cases. And, in fact, the department was unsuccessful in getting the federal courts to take its view of those list maintenance cases.

Q Based on your experience within the department, did partisan politics drive the enforcement divisions of the voting section at any

time when you were there?
A Yes, during the George W. Bush administration.
Q And so you don't believe that politics were driving the enforcement decisions during the Obama administration at all, only during the Bush administration?
A That's correct. And to underscore my emphasis on the George W. Bush administration, that had also been true -- not been true in any administration before that. Even in the years when W. Bradford Reynolds was head of the division and was perceived as hostile to voting rights, he actually was engaging in a lot of active enforcement of Voting Rights Act in ways that were responsible, and under George H.W. Bush, that continued to be true.
So it's -- the only time I've ever seen partisan decision-making in the voting section of the civil rights division was during a portion of the George W. Bush administration when they were literally hiring from the Republican Trial Lawyers Association. And there's ample discussion of this in an Inspector General's report which faults the persons who were actively running the civil rights

division during a portion of that time, Brad Schlozman and Hans von Spakovsky.

Q And do you know Mr. von Spakovsky?

A Yes.

Q And did you ever have any interactions with Mr. von Spakovsky?

A Yes.

Q Did you ever refer to Mr. von Spakovsky as a Nazi?

A No. He claims that I did based on something he was doing, but I did not.

Q While you were employed in the voting section, was some information that you handled confidential?

A I'm sorry, what was the question?

Q While you were employed with the voting section, was some of the information that you had in, for example, preclearance review files, considered to be confidential by the department?

A Oh, yes.

Q And how did you determine what was confidential information and what was not in the department?

A There were guidelines explaining exactly what categories fit into confidential and not. I

mean, internal deliberations of any kind and the work of analysts and attorney -- well, work of analysts working on a Section 5 review, the work of attorneys in an investigation, all of that was confidential in the sense that it was an internal deliberation or an internal practice.

Q While you were employed at the voting section, did you ever provide confidential information to a nongovernment entity that was not entitled to have it?

A No.

Q Did you ever -- while you were at the voting section, did you ever provide confidential information that your superiors did not authorize you to provide to an outside person or organization?

A No.

Q Did you ever provide information your superiors didn't authorize you to provide to Gerry Hebert?

A No.

Q Joe Rich?

A No.

Q Or Bill Yeomans?

A No.

Q Now, aside from your work at the

Department of Justice and your work as a professor, have you had any other employment in the last 20 years or so?

A You want to repeat your question because I was mulling over, and I'm not sure I followed exactly what you're asking.

Q I just was asking a more general question. In the last 20 years, looking at your CV, aside from your work as a professor and at the Department of Justice, did you have any other employment during that time?

A No.

Q Did you work anywhere else is all I'm asking.

A Not during the last 20 years. In 1999, I did take leave from the government to teach at Swarthmore College as the Eugene Lang Professor, but that wasn't within the last 20 years.

Q Thank you.

Let's go off the record real quick.

A Okay.

(Recess 12:34-1:23 p.m.)

BY MR. TYSON:

Q Hope everybody had a good lunch. Dr. McCrary, we're now going to move to our -- to

your report itself. So if you could get that in front of you. I believe we marked it as Exhibit 3, but it's document 2 for you.

First of all, did you write this report all yourself, or did you -- I know you had assistance on the research side, but did you have assistance on the writing side?

A Nobody writes my reports for me, period.

Q And did you send plaintiff's counsel drafts of your report before it was finished?

A Yes, I sent two or three partial drafts, as I recall.

Q And did plaintiff's counsel provide you with any suggested edits that led to change -- led you to change your opinions at all?

A No.

Q So one issue that I know we kind of talked a little bit about already, but I know your report as a historian is a little different than maybe a statistical report or something else in terms of what you relied on to formulate your opinions. I know you've talked about kind of the research process that you went through and all of that. Is it correct that any document that you relied on to form your opinion is cited in the footnotes of your

report?
A It depends on what you mean by relied on. I looked at a lot of things that affected my selection of what I thought was relevant to discuss. I've got well over a file cabinet full of documents from this case, so I didn't -- even though I have over 300 footnotes, I didn't cite everything that I looked at that had a remote relationship to my conclusions in this case.
Q And I understand that and appreciate that. Given that, can you describe maybe general categories of documents that you reviewed in the preparation of your report?
A You mean that I did not cite?
Q Correct, yeah, documents, I'm sorry -- let me ask that again. So given that there are some documents you reviewed and relied on in preparation of your report that are not cited, could you give me the categories of documents that you reviewed that are not referenced in the footnotes?
A Sure. I examined all of the Section 5 submissions that were supplied through discovery. I didn't cite very many of them, but they help me in identifying the work of the Secretary of State's Office, and, of course, many of them turned out not

to be very revealing, but it was useful to read through those documents even though I didn't cite them. That would be one category.

I did a lot of newspaper research, and I cited very few newspaper articles in the report on that, so that was another category -- big category of documents that I reviewed that I did not end up citing.

There are other categories if I think about it for a moment if you want me to pursue that line of meditation.

Q That's helpful. Maybe what I can do is narrow that a little bit. Did you review the legislation as to House Bill 316 in the 2019 session of the General Assembly?

A I did not. I mean, I looked at the statute in general, I looked at news coverage of its adoption, but I did not make an analysis of it, and, therefore, I didn't discuss it in the report.

Q Are there any expert reports from other cases that you reviewed that are not cited in the footnotes?

A I'm sure there are because I looked at a lot of expert reports. I don't remember. If they were particularly relevant, I certainly cited them.

Q Okay. So this gets me back a little bit to something we talked a little bit more earlier, but is there a particular method that you use, based on your training and experience, to determine what is relevant to review and include in your report?

A Well, there's no method to determine what's relevant. It depends on the questions that are under investigation. So that's -- that's a hard question to answer.

Remember that, as my report reveals, I have a much broader gauged approach than many historians in that I consider statistical evidence at some length in a variety of ways, and I also consider legal documents in ways that not every historian does. So having worked on voting rights litigation for 40 years, I have a lot of experience in evaluating what is relevant and what's not due to the claims in this lawsuit.

Q Ultimately you're relying on your experience in this -- in this space to be able to determine what is relevant and what is not; is that fair?

A Could you repeat that question? I'm not sure I caught every word.

Q Sure. So ultimately the kind of

methodology that you're using to determine what's relevant for your review and preparing your report is the experience that you've had in voting rights cases over decades to know what is relevant and what is not; is that a fair statement?

A Well, that's not all. You know, the work that I did as a historian before 1980 is also relevant, and -- excuse me -- it's the case that I draw on my traditional historical training as well as my unusual use of regression analysis and other forms of statistical analysis that helps to inform the work that I do, and my scholarly writing draws on my experience both in a -- in my academic training and my experience working on voting rights matters.

Q Thank you.

And you mentioned that your method is broader than a lot of historians. Are there other historians who use the methodology that you're describing to reach opinions and do historical research?

A Oh, yes. One way of imparting this trend is to emphasize journals, and also in my educational background when I was in graduate school at Princeton all graduate students took a course

entitled Interdisciplinary Approaches to History, and we were all encouraged to learn from other disciplines, and among those that I learned the most from was political science. I had a course in quantitative methods, which was unusual in graduate school and history departments, especially in the 1960s.

The professor that taught me quantitative methods, Theodore Rabb, was one of the co-founding editors of the Journal of Interdisciplinary History in which historians who do social science research like me regularly publish.

The journal -- the organization Social Science History publishes a journal called Social Science History in which actually in one of my publications appeared. So there's a major school of historical research that is considered nontraditional that engages in social science analysis of a variety of different types.

And some of the historians who were -- some of the persons who developed the technique known as ecological regression analysis as a method of analyzing voting behavior were historians, Allan Lichtman at American University, and J. Morgan Kousser of Caltech.

Q Thank you.

Let's go ahead and start with your report. I want to start with the first paragraph -- unnumbered paragraph there on page 1. You say that you've been asked by attorneys for the plaintiff in this litigation to assist the court in assessing the impact of the Voting Rights Act on Georgia's historical policies and practices and the impact of the removal of preclearance requirements based on the Supreme Court's opinion in Shelby County versus Holder.

So is that what you understood your mission to be in preparing your report?

A That's only one aspect of it. I was basically asked to focus on the racial effects of Georgia's registration and voting practices. I'm not sure how I came to put this as the first thing I said in the report, but I was also asked to look at the question of the impact of Voting Rights Act on the policies and practices of election administration in Georgia that are at issue in the plaintiff's claim.

And, of course, two of my book chapters were chapters in a co-authored book called The Impact of the Voting Rights Act, so that's something

I regularly look at in my scholarly research.
Q So if we can head to paragraph 8, which is on page 6 entitled Summary of Findings.
A Yes.
Q All right. So you -- I believe you just said that your -- you were looking at the voter registration practices in the state of Georgia; is that right?
A Yes.
Q Okay. And the way I read your findings, and you can tell me if I'm misreading this, the first opinion you reach in paragraph 9 is about Georgia's implementation of its voter verification process under HAVA since 2006, and your opinion is it has exercised a persistent discriminatory effect on minority voters' opportunity to register and vote.
Do you think that's a correct first opinion that you offer in this report?
A Yes.
Q And then paragraph 10 on page 7 seems to me to be the second opinion, which is the current pattern of voter registration and voting in Georgia bears a striking resemblance to the system of voter registration in the Jim Crow era before 1965.

Would you agree that that's the second opinion that you're offering in this report?

A That's certainly a second opinion. I'm not sure that I have a list of opinions that I offer, but I would agree that that's one of the opinions I express.

Q Okay. And then in paragraph 11 you express an opinion that the political context within which the current registration system operates also resembles the politics of Georgia before the adoption of the 1965 Voting Rights Act. That kind of is the third opinion you're offering in your report; would you agree?

A Yes, it's a third opinion I offer.

Q Okay. Are there other expert opinions -- I'm not trying to pin you down with this, I'm trying to frame where we're going to be discussing your report. Are there other expert opinions you are offering that are not covered by those three categories?

A There are a lot of sort of subsidiary opinions that I offer about these categories, but those are -- that's a good way of characterizing the categories of my opinions.

Q Okay. Now, one thing that I was looking

for in your opinion and wasn't -- your report and wasn't able to locate is an opinion that Georgia -- any part of Georgia's voter registration system was enacted with discriminatory intent.

Are you opining that any portion of Georgia's voter registration practices and systems were adopted with a discriminatory intent?

A No.

Q Okay. So given that, on the bottom of paragraph 11 on page 8 you make a statement that there is a powerful incentive for Republican officials at the state and local levels to place hurdles in the path of minority citizens seeking to register and vote. That is what has happened, you say.

It's your testimony that is not a statement that any practice currently in effect is intentional -- or, I'm sorry, was enacted with discriminatory intent?

A That's correct.

Q Now, in your report it looks like you focus primarily on the voter verification process's so-called exact match process. Is that correct or was it broad to the entirety of the registration system in the state?

A It is focused on the voter verification process utilizing an exact match. I do discuss other aspects of election administration, but that is the principal focus.

Q And as we kind of categorize them categories 2 and 3, the way I read them, relate to the entirety of the voter registration system in the state. Am I reading that wrong, or are those limited to the exact match process?

A Well, your question assumes limits that I wouldn't impose on the impact of the exact match requirement because everything in the administration of elections in the years after the creation of the methods of implementing HAVA in Georgia essentially depended on the application of an exact match and voter verification process.

It's also true that I mentioned the discretion exercised by local registrars, for example, but their understanding of how to operate was conditioned in part on the -- the results of the exact match aspect of the voter verification process. And the core to understand about how -- how the voter verification process limited minority opportunities to register is dependent on how the exact match system operated.

Q So in your review did you review -- let me ask this: To reach your opinion about the discriminatory effects of the voter verification exact match system, you're relying in part on the work of Dr. McDonald and Dr. Mayer and some other political scientists, correct?

A In addition, I'm relying on the analysis of the Department of Justice underlying the adoption of its 2009 objection to the voter verification process, I'm relying in part on the assessment of the HAVV system by the Social Security Administration reflected in the Inspector General's report in -- the Inspector General of the Social Security Administration, and I'm including also the analysis of the voter registration process by Gary Bartlett, the election director for almost 20 years in the state of North Carolina, who is a highly respected election administrator.

Q And as to your opinions, the first category of opinions we discussed, Georgia's voter verification process exercised a persistent discriminatory effect, that is the only opinion about a discriminatory effect in your report; is that correct?

A First of all, are you asking only about

the period of HAVA implementation?

Q What I'm trying to get to -- maybe I can give you some background what I'm trying to understand about your opinions.

So categories 2 and 3 about the resemblance to the Jim Crow era of the voter registration system and the political context resembling the politics before the Voting Rights Act, I don't read those as opinions that there's a discriminatory effect of a particular practice; it's more like a global view.

My question is: As to the specific practices that Georgia utilizes for its voter registration system, the only opinion you're reaching about a racially discriminatory effect is as to Georgia's implementation of its voter verification process under HAVA since 2006, correct?

A No, not correct. My historical account of the period before 1965 clearly establishes that there was a discriminatory effect, not surprising since the effects of the system were determined by the formula -- coverage formula for the Voting Rights Act in 1965 as justifying Georgia being placed under the special provisions, including the elimination of the literacy test and the

establishment of the preclearance process. That was all because of the discriminatory effects revealed in the -- in the racial disparities in voter registration in Georgia.

Q So is it your testimony then that opinion -- the second category of opinions that the current pattern of voter registration in voting in Georgia has a discriminatory effect in total?

A I'm sorry?

Q I didn't see that in your report.

A I'm not understanding your question. What I said in the report is that there was a racially discriminatory effect in the operation of Georgia's registration system before 1965, and that there is, in the period of HAVA implementation, also a racially discriminatory effect.

Q Got it. Okay. That helps clarify what I was looking for.

So in terms of the opinions, then, the only racially discriminatory effects that you are opining about as far as specific practices are the entirety of the registration system prior to 1965 and the implementation of voter verification under HAVA since 2006. Is that correctly framing that now?

A I think that's correct.
Q Okay. You don't disagree with it?
A I don't disagree with it. It's possible I expressed an opinion that I'm not calling to mind about the HAVA implementation period, but -- but I was certainly focused on the voter verification process.
Q And so then in light of that, then it's correct that you are not opining that the entirety of Georgia's voter registration system as it stands today has a racially discriminatory effect on minority voters?
A Well, you weren't listening to my earlier answer, I think. What I said --
Q I know you want to clarify -- I don't want to interrupt you, but I know you'll clarify. I understand you believe the voter verification process touches every part of the registration process.
A Yes.
Q But then you also seem to be saying that you are not opining as to the entire registration process today; you're limiting your opinion to the voter verification implementation since HAVA. I want to understand what your opinion actually is.

A Well, if you understand what you said at the beginning of your statement, you understand that if it necessarily affected every part of the registration process, it's hard for me to cabin that to saying it has no effect on the registration process because I think it had much broader implications for the whole registration process, and so I'm puzzled by your questions.

Q So maybe I can ask it this way: If Georgia completely eliminated its current voter verification system, would it still be your opinion that Georgia's voter registration system has a racially discriminatory effect on minority voters?

A Sorry, I didn't mean to interrupt. Probably, probably not, but it's a hypothetical, and I'm uncomfortable with hypotheticals even though I teach in a law school.

Q This is my chance to finally ask a professor some good hypotheticals. Here we go.

Let's do this, Dr. McCrary. Let's go to document number 13. We're going to mark this --

A Document 13.

Q -- Brennan Center report.

A Okay.

Q Are you familiar with the Brennan Center

for Law and Justice?
A Yes.
Q Are you familiar with the --
MS. FINK: Are you marking it as an exhibit?
MR. TYSON: Yes. I'm sorry, I was trying -- Exhibit 10. We'll mark that Exhibit 10.
(Defendant's Exhibit 10 was marked for identification.)
BY MR. TYSON:
Q Dr. McCrary, are you familiar with the Brennan Center's opinions related to elections?
A In general, but I don't remember seeing this document.
Q Okay. I want to ask you about a couple of things on page 3 of the report. That's using the numbers at the bottom of the page.
A I'm there.
Q So you see the title that says Protect and Expand Voting?
A Yes.
Q The first item on that list says Enact Automatic Voter Registration. You see that?
A Yes.
Q Do you know if Georgia has automatic voter

registration?
A It does not.
Q You'd agree that automatic voter registration makes it easier for individuals to vote, correct?
A Yes.
Q Did you look at the question of Georgia's use or nonuse of automatic voter registration in forming the opinions in this report?
A No.
Q Second item on the document there says Expand Early Voting. Does Georgia have early voting?
A It has -- I'm forgetting exactly how they treat absentee voting, so it's not something I analyzed in this report.
Q So you didn't look at how Georgia implements early voting at any point in preparing your report, correct?
A Not that I recall.
Q The third section there, Modernize the Voting Process, Protect Voting Rights, and Secure Elections Against Foreign Interference, talks about, number one, Upgrade and Secure Voting Infrastructure. Do you see that section?

A Yes.
Q Did you at all review whether Georgia has taken any steps to upgrade the security of its voter registration database?
A Yes.
Q You did review that question?
A Yes. I don't address it in the report, but I did review it.
Q Okay.
A Example, I read the opinions in Curling versus Kemp.
Q But you didn't rely on those opinions in reaching the opinions in your report, correct?
A I did not.
Could I interrupt you for just a moment?
Q Yes.
A Getting awfully warm. I was wondering if anyone would be offended if I took off my sport coat?
Q Not at all.
A Be back in a moment.
(Brief recess.)
BY MR. TYSON:
Q We can put the Brennan Center document away and return back to your report, Dr. McCrary.

A Okay.
Q In working towards your opinions in the report, did you speak to any county voter registrars in Georgia?
A No.
Q Did you conduct any review of the methods by which Georgians are able to register to vote?
A Yes.
Q And what did that review involve?
A Well, I looked at aspects of -- I'm sorry, are you asking about how people are able to register to vote?
Q Correct. If that was part of your review.
A Yes. And the fact that I may not have total recall of every aspect of how absentee voting is treated doesn't mean that I didn't look at it at one point, and I did not see that as central to the issues I was investigating, but I tried to familiarize myself by looking at all the training materials, the official election bulletins, I came upon PowerPoint presentations, and -- what's the other term -- webinars by which registrars were trained, but I can't say that I have total recall of everything in the training materials.
Q Certainly. Did you review Georgia's

online registration process?
A I looked at it, yes. I reviewed it in that sense, but I didn't carefully analyze it as a part of my investigation.
Q Did you review Georgia's app-based registration processes?
A No.
Q And you reached a conclusion about the discriminatory effect of Georgia's voter registration system, but you didn't look at automatic voter registration -- the methods by which Georgians can register to vote; is that correct?
A No, I didn't recall every aspect of how they register to vote, but I did look at it, and I focused on that part that was related to the voter verification process.
Q Did you review materials related to how many voters go through the voter verification process, or did you assume that every voter goes through the verification process?
A The way I read the Secretary of State's website and training and the laws that were adopted, everyone has to go through voter verification process.
Q And if only a subset of voters had to go

through the voter verification process, would that change your analysis?

A If that were true it would change my opinion as to that percentage for which it's not true.

Q Okay. And so if only paper applications, for example, went through the verification process, you would then conclude that there was no discriminatory effect as to nonpaper applications; is that correct?

A I'm not sure -- you're going to have to rephrase that question. Sounded to me like you contradicted yourself.

Q Certainly. Let me do this, I will posit it as a hypothetical to you. Assume for purposes of this question that not all voter registration applications go through the voter verification process. Further assume that the only registration applications that go through the verification process are paper applications, not applications received through the Department of Driver Services, online voter registration, or the app. Are you with me so far?

A By the DDS part of your question, are you talking about the process of DDS giving voter

registration opportunities to individuals when they apply for a driver's license, is that what you're asking about?

Q Yes, so I am excluding for purposes of this hypothetical Department of Driver Services-initiated verification process records through whatever method. If the application comes from a driver services office, I want you to assume for purposes of this question that those are not included in the verification process. Are we clear on that?

A Yes.

Q Okay. So if we assume those things in this hypothetical, would your opinion then be that because the voter verification process does not apply to any voter registration applications except those coming from paper in the hypothetical that there is not a discriminatory effect except for those voter registrations that come via paper application?

A I have trouble with hypotheticals because, first of all, you're not putting any numbers on the categories. My understanding is that not very many -- not a very large number of persons and not a very large percentage of persons who succeed in

getting registered come through the motor voter procedure at DDS or its equivalent in other states. So if, in fact, the facts in your hypothetical are true, it would -- it would be true that anything that doesn't go through the voter verification process I have not addressed in this report. I just don't know what the numbers are.

Q I believe a minute ago you said that if Georgia were to hypothetically completely eliminate its voter verification process, your opinion that Georgia's voter registration system has a racially discriminatory effect would change. Am I characterizing your testimony correctly?

A Yes, depending on what the numbers show.

Q And in that scenario, I guess that's why I thought my hypothetical would be easier, because if there is a subset of voters to whom the verification process does not apply, then it would seem logical that then there could not be a racially discriminatory effect as to that subgroup no matter what size it is. Do you disagree with that?

A Well, this is the first time I've ever thought about that hypothetical. And so, for example, I don't know enough about how the motor voter process operates in Georgia in terms of how

successful the DDS agency is in processing voter registration applications. That's often a problem in other states. I don't know what the facts are with regard to Georgia.

So, I mean, if, for example, it turns out to be 1 percent of the registered voters in Georgia, then it wouldn't be a very significant exception to the voter verification process, but I just don't know the facts about it.

Q And in preparing your report, you didn't attempt to uncover those facts. You strictly looked at the verification process, correct?

A It's -- well, I didn't just look at the voter verification process, but I did not examine the operation of the DDS system of offering registration opportunities to people.

Q Okay. Thank you.

Let's turn next to paragraph 17 of your report on page 12. You indicate in that statement you're talking specifically about the method of assessing whether persons are legally registered voters from 2008 to the present, and I wondered why not back earlier than 2008? Was there a particular reason why you chose 2008?

A Yeah, that's the period after which

Georgia was -- beginning with which Georgia was implementing HAVA.

Q Okay. Let's turn next to paragraph 24 of your report on page 19.

A Yes, I'm there.

Q And first of all, you reference that Secretary of State Max Cleland was encouraging local boards to appoint more black deputy registrars, and there was a dismissal of a case involved there. Do you know what party was -- Secretary Cleland was a member of?

A Yes, he was a Democrat.

Q In footnote 32 also on that page you indicate that when Georgia tried to cut back on the availability of satellite registration in 1991, the Department of Justice objected. Was Georgia also still controlled by Democrats in 1991?

A Yes.

Q So then in paragraph 25 you start talking about an objection from 1994 to some of the aspects of Georgia's changes to comply with the National Voter Registration Act. Do you see that?

A Yes.

Q What I'd like to do is refer you to document number 14, and we'll mark this as Exhibit

11.

(Defendant's Exhibit 11 was marked for identification.)

A Okay.

BY MR. TYSON:

Q And this is a printout from the Georgia Laws regarding legislation, as you see here at the beginning, to amend Title 21 to conform to National Voter Registration Act of 1993. Do you see that?

A Yes.

Q If you could turn to page 24.

A Okay.

Q And there you see kind of two thirds of the way down the page 21-2-234, you see: As used in this code section, the term "no contact" shall mean that the elector has not voted.

Do you see that language?

A Yes.

Q And did you at any part of your opinion in your report review the list maintenance process related to no contact?

A Yes, in the period of HAVA implementation.

Q Okay. And do you know what party was in the majority in Georgia in 1994 when this legislation was adopted?

A I believe that's the Democratic Party.
Q Next if you could turn with me to document 15, which we'll mark as Exhibit 12.
(Defendant's Exhibit 12 was marked for identification.)
A Yes, I'm there.
BY MR. TYSON:
Q And I am assuming this is one of the preclearance objection letters you've reviewed as part of preparing your report?
A Yes.
Q And at the beginning there you see that the Attorney General objected about the provisions of no contacts during the three-year period at the bottom last paragraph on page 1?
A Yes.
Q And so this objection was to the no contact procedures adopted by the Democratic majority in 1994; is that a fair statement?
A Yes.
Q In your report you next say: In response to this objection the state amended its objection laws to comply with the NVRA.
Did you review those amended laws?
A I did, but I can't recall the specific --

the specific law in question.
Q I can help with that if you can look at document number 16 before you.
A Document 16 is the 1997 law.
Q Correct. And did you review on page 1 -- page 2, section 2, there's an amendment to the no contact process. Do you see that?
MS. FINK: Can we mark this one as Exhibit 13?
MR. TYSON: This is 13, yes. I'm sorry, Sarah. This is 13.
(Defendant's Exhibit 13 was marked for identification.)
A Yes, I see it.
BY MR. TYSON:
Q Okay. So is this the law that you're referring to the state amended its election laws to comply with the NVRA?
A Yes.
Q Then let me give you one more on this point, document 17, which we'll mark as Exhibit 14.
(Defendant's Exhibit 14 was marked for identification.)
A Okay.
BY MR. TYSON:

Q This is an entry from the House Journal in 1997?
A Yes.
Q And page 5, the last page there, is the vote on the 1997 legislation. You with me on that?
A This is under section 3. Yes.
Q You see that that vote was unanimous, correct?
A That's correct.
Q Okay. So going back to your report -- you can set those '94 and '97 documents to the side.
A Okay.
Q Going back to your report in paragraph 26 on page 21 you mentioned that the Department of Justice blocked 177 proposed changes to election laws in Georgia. You'd agree with me, wouldn't you, that most of those objections came prior to the year 2000?
A Yes.
Q And when you say on paragraph -- the bottom of 26: The department found that each had a retrogressive impact on voters of color in Georgia, could the department also have found that the state didn't submit sufficient evidence to determine there was not a retrogressive impact on voters of color?

A That's a better way of phrasing the legal burden under a Section 5 review, and I like that wording better.

Also, I would correct that sentence in that there were some objections that were purpose-based and not based on retrogressive effect. Small number.

Q I'm assuming you have not reviewed, or have you reviewed every single objection from 1965 to Shelby County for Georgia?

A I have reviewed and analyzed and written about every objection from 1965 through mid 2004 for a Law Review article on the end of preclearance, but I have not examined -- I actually looked at all the objection letters on -- in periods since -- since 2004 for Georgia in connection with this report.

Q But I think you agreed with me earlier, though, there's not an affirmative finding of retrogressive impact in every one of those, there could also be a determination of the state or the county had not submitted sufficient evidence of a lack of retrogressive impact, correct?

A Usually the objection letter phrases it as you just did, and that is because that's the way -- that's the language of Section 5 of the Voting

Rights Act.

The burden is on the jurisdiction in a Section 5 review, whereas it's on the plaintiffs in a Section 2 lawsuit or some other kind of legal claim, and the objection letter reflects the burden that the Act imposes on jurisdictions. So I was careless in saying that each objection had a retrogressive impact. I should have phrased it more carefully as you did. The jurisdictions had not met their burden.

Q Thank you.

The next section of your report looks at the adoption of DREs in Georgia. Initially I was curious in terms of if you're looking at voter registration why you looked at voting machines as part of that analysis. Can you give me a little bit of understanding of that, please?

A Yes, I looked at that because it was associated with the whole process of HAVA implementation, and I thought it was useful to include that discussion because it included a consideration of that part of the voting system to which the voter registration process led. I suppose one could argue that it was not relevant, but it seemed to me part of the story.

Q Let's turn next to -- actually, let me ask you this question first: In footnote 37 you cite to the report of the 21st Century Voting Commission from December 2001. Did you review that report as part of preparing your expert report here?

A Yes.

Q If you could turn with me to document 18, which we'll mark as Exhibit 15.

(Defendant's Exhibit 15 was marked for identification.)

A Okay.

BY MR. TYSON:

Q Does this appear to be -- is it a copy of the 21st Century Voting Commission report?

A Yes.

Q And if you could turn to page -- physical page 20, page number 19.

A Okay, I'm on page 19 of the report.

Q Okay. And there's a bullet at the top of that paragraph -- I'm interested in the paragraph that begins, "The data indicates that, across the board."

A Uh-huh.

Q And the report found that the percentage of undervotes on paper ballots was higher than

the -- in predominantly black precincts than in predominantly white precincts. Do you see that conclusion?

A I'm actually -- I need to review this because I'm not seeing that. First of all, it begins by discussing overvotes, not undervotes. Let me read the paragraph.

Q Certainly. Please take your time.

A Okay, I've read the paragraph. You want to repeat your question?

Q Yes. So you see the commission found that there was an undervote gap that was greater in counties that used paper ballots, and the highest undervote percentages were in African-American precincts using those paper ballots. Do you see that portion?

A You're talking about in a separate paragraph?

Q Third paragraph, "The data indicates that, across the board."

A I was looking for reference to that in the paragraph you called my attention to first. I'm sorry, I'll have to look at the --

Q I apologize.

A Okay, I see that now. What was your

question?

Q Well, first I was going to ask you if you saw it. I'm glad we're on the same page now. Would you agree, based on your analysis of the adoption of the DREs in Georgia in your report, that at least one basis for Secretary Cox moving toward electronic voting was to rectify a disparity on the impact of African-American voters when paper ballots were used?

A Yes, and I thought that's what I said in my report relying in part on the analysis of political scientist Charles Stewart, who did a very careful analysis in an unpublished paper of the subject matter that the commission was addressing.

Q Thank you.

I'm assuming you would support a voting system that allows -- that corrects undervotes for African-American voters, and you believe that was a good policy decision for Georgia to move to that system; is that correct?

A I would -- without even referencing the race of the voters, I think it's -- a system should cut if not eliminate undervotes and overvotes.

Q Uh-huh. If you could put the commission report away. If you could turn to paragraph 35 of

your report.
A Okay.
Q In this paragraph you talk about the efforts that staff and Diebold and Center for Election Systems went through. Did you look at all, as part of your report, at Georgia's new voting system of ballot-marking devices or how those were implemented?
A No.
Q And in paragraph 36 you indicate about halfway through that paragraph, initial success would not, as it turned out, be replicated in coming years, as the new DREs aged and the impressive training of election administrators and the staff they supervised is replaced with less intensive training efforts.
How did you determine that the training in 2002 was impressive?
A That was the analysis of Professor Stewart and also Professors Alvarez and Hall in the article they co-authored that I cited.
Q And are you also relying on those professors for your conclusion that the impressive training was replaced with less intensive training effort?

A There I am -- there I am going on my reading of the training materials in the last 10 years and the analysis of those materials by Gary Bartlett in his expert report in the 2016 case.

Q And did you analyze all the training efforts in the training materials related to DREs?

A I think I read almost all of them. I can't -- I don't have any recollection of any that I did not include, but I didn't cite them all.

Q The next section of your report addresses realignment in the Georgia party system.

A Yes.

Q I want to go to paragraph 39.

A Okay.

Q You talk about the secular realignment of white voters leaving the Democratic Party and switching to the Republican Party, and you mention the 2002 gubernatorial election as accelerating that process. And my -- at the end of paragraph 39 what I want to ask about that is as a result you say: Decisions about voter registration, election administration, and the machinery by which ballots were cast in 2002 reflected the policy preferences of the Republican Party, and you're citing to an article by Dr. Bullock for that statement.

Is it your -- are you making that statement simply because Republicans were the majority party, or are you saying that Republicans have particular policy preferences about voter registration, election administration, and the machinery by which ballots are cast?

A In that sentence I'm simply referring to the fact that they controlled the majority in the legislature and the governorship, and after 2004, 2006, I forget which, Secretary of State's Office.

Q And in paragraph 40 you say: In white-majority Georgia, Republicans benefited from a pattern of voting that was polarized along racial lines.

And you'd agree with me that from 1965 to 2002, racially polarized voting was not beneficial to Republicans in Georgia; is that correct?

A That's correct, it benefited whatever party was the dominant party in the state, and before 2002 -- for much of the time before 2002 it was Democratic Party or it was becoming more evenly balanced.

Q In paragraph 41 on the next page you're talking about a study by Dr. Bullock and Dr. Gaddie indicating -- about -- towards the end of that

paragraph you indicate that between 30 and 40 percent of white voters in the state supported Democratic candidates in the 1990s, but only about a quarter of whites voted Democratic beginning in 2002.

Have you looked at any racial polarization analysis on a statewide level in Georgia after this, after the Bullock and Gaddie study?

A Yes. For one thing I cite -- you're asking about statewide patterns as opposed to patterns for a portion of the state?

Q Correct. I know you cite the Gwinnett County cases and some of those other specific ones in parts of the state.

A I looked at a number of studies that cite exit poll data or -- exit poll data during a period up through at least 2014, and I cite them in the report.

Q You did not review any studies that conducted an ecological imprint analysis of racial polarization, you only used exit poll data up to that 2014 date for the state statewide?

A Actually, I also looked at a second book by Chuck Bullock and Keith Gaddie called, I think, The Rise and Fall of the Voting Rights Act, and my

recollection is they also have data on racial polarization after this initial book, The Triumph of Voting Rights in the South in 2009. I don't --

Q The end of paragraph -- I'm sorry?

A I don't think I cited the second Bullock and Gaddie book, though, in the report.

Q At the end of paragraph 41 you say: Such polarized voting is evidence of vote dilution, of course, only in contests where minority candidates -- minority-preferred candidates usually lose.

And you'd agree with me that in the 2018 governor's race in Georgia, Ms. Abrams came within a little bit more than 50,000 votes of winning an outright majority, correct?

A Yes.

Q And have you conducted any racial polarized voting analyses of that race in 2018 to determine her level of support among white voters?

A I have not.

Did you have a question about the sentence that you called my attention to or not?

Q That was the setup for my question about --

A Okay.

Q -- 2018. Yeah.
So let's turn to paragraph 45. We're talking there about the 2008 election.
A Yes.
Q And the second paragraph -- second sentence there indicates that the same percentage of white voters voted for Obama in 2008 as voted for Democratic nominee John Kerry in 2004. How do you determine when there's same level of support for an African-American candidate and the same level of support for a white candidate among white voters that the polarization you see is racial and not political?
A Well, it's obviously political, and what I'm talking about there is, as I go on in that paragraph to discuss, is other aspects of the voting patterns in 2008. That sentence is not the principal subject matter of the paragraph.
Q I'm sorry to step back a couple, but in paragraph 43 I see you discussing the level of white turnout versus black turnout in various elections. You see that?
A Yes.
Q I didn't find -- maybe I was missing it, but I didn't find turnout rates by race for any

election after 2004 in your report with the exception of -- I see you cover 2008 as far as the racial breakdown, but in terms of turnout by white and black voters, I didn't find any election after that. Did you leave those out on purpose?

A No, I didn't -- I don't think I had any -- I don't think I encountered any studies that discussed that subject matter, and I did not try to conduct an analysis myself in the years after 2008.

Q You're familiar, I'm assuming, with the current --

A I'm sorry, I paused. In terms of statewide patterns as opposed to local patterns.

Q Certainly, yes. And for these I'm definitely focusing statewide. I know that there's specific cases later.

You're familiar, I'm assuming, with the Current Population Survey from the Census Bureau?

A Yes.

Q And that's what Dr. Bullock and Dr. Gaddie used in footnote 79 that you reference on the estimates of registration and turnout by race published by the census when they gave the turnout numbers you cited; is that correct?

A Yes.

Q I want you to turn to document 19, which we'll mark as Exhibit 16.

(Defendant's Exhibit 16 was marked for identification.)

BY MR. TYSON:

Q This is Table 4b from the CPS report for November 2008 you can see there at the top. I have hidden the rows for states other than nationwide and Georgia. So do you see -- I'm sure you're familiar with generally how these reports look.

A Yes.

Q Is that right?

A Yes.

Q And looking at the column percentage voted, you'd agree with me that in terms of total voted percentage for the 2008 election, black alone or in combination is six points higher than whites alone or in combination in Georgia.

A I'm sorry, I have to line up the rows. Okay, ask your question.

Q You'd agree with me that the total voter percentage for black alone or in combination is higher in November 2008 than white alone or in combination, correct?

A That's correct. You're asking me -- I

thought you were asking me white alone and black alone.

Q So I was asking you first about white alone or in combination and black alone or in combination.

A I'm sorry, but I have to use a straight line to read the table correctly here.

Yes, I would agree black turnout in Census Bureau estimates is slightly higher than the white or Hispanic alone. Did you ask me in combination?

Q Yes. Then if you can look at those in combination, and the question is the same: Would you agree that black alone or in combination is higher turnout than white alone or in combination for the November 2008 election?

A Yes.

Q Okay. Now I'm going to ask you the same questions for 2012 and 2018. So those are document 20, which we'll mark as Exhibit 17.

(Defendant's Exhibit 17 was marked for identification.)

A See the same pattern in the 2012 election.

BY MR. TYSON:

Q And so the black voter turnout is higher than white voter turnout for the 2012 election in

Georgia, correct?
A Yes, according to the Census Bureau estimates.
Q And then document 21, which we'll mark as Exhibit 18, same question for the 2018 election.
(Defendant's Exhibit 18 was marked for identification.)
A Same pattern.
BY MR. TYSON:
Q So in the November 2018 election African-American turnout is higher than white turnout as well, according to the census Current Population Survey?
A Yes. Yes.
Could I review this portion of the report to see whether I left out a major point that I've addressed in other reports?
Q Certainly.
A I see I left out the discussion that I have always tried to include in discussing participation rates when referring to the Census Bureau estimates. And so since it's not in the report, the only way I can explain what I was about to say is if you'll indulge me to explain what's not in the report.

Q And I'm certain you will be explaining to me that it's an estimate and is self-reported, and it is not actual turnout numbers.

A That's right.

Q Instead of doing that, let me just go to two questions. Number one, you relied on the Bureau of the Census numbers in paragraph -- footnote 79; is that correct?

A 79?

Q On page 32.

A No, there's no discussion of the Census Bureau estimates there.

Q Footnote 79: Bullock and Gaddie cite the estimates of registration and turnout by race published by the Bureau of --

A Footnote 79. I thought you said paragraph. I'm sorry.

Q I'm sorry. We are getting late in the afternoon.

A Well, I often cite the Census Bureau reports that are estimates I should say, but point out that there is a problem of overreporting that is -- political scientists have found to be greater among African-Americans than among whites.

But with that caveat, they're useful, and

they're useful for comparisons where you're trying to compare one state that does not have racial data on registration with voting with a state like Georgia that does have those data. So the only way you can compare the states is to use the Census Bureau estimates.

All I'm saying is there's a qualification to it, but the estimates tend to -- tend to suggest a slightly higher turnout rate among African-Americans than among non-Hispanic whites.

Q You didn't attempt to -- I'm sorry.

A They're still useful data, but they are not as good as the official data that a state like Georgia supplies.

Q And you didn't attempt to go and locate the official data from Georgia about turnout rates for any elections after 2004; is that correct?

A Actually, I think I did, but I may be mixing up -- I may be mixing up reports. I may be thinking about another case.

Q Okay. Moving to paragraph 46 -- sorry?

MS. FINK: Will you be getting to a breaking point any time soon? Like to take a five-minute break.

THE WITNESS: That would be useful.

MR. TYSON: This is actually a great time to. Let's go off the record, and we can do a five-minute break definitely.

(Recess 2:42-2:52 p.m.)

BY MR. TYSON:

Q Dr. McCrary, good news, I don't have any more detailed spreadsheets for you to look at, so we can move next to paragraph 46 of your report.

And in this survey about white voters favoring and reporting that they're Democrats or Republicans, I believe the citation is to survey data from the Pew Research Center at footnote 86 and not to any sort of regression analysis. This is self-reported survey data, correct?

A That's correct. That's what Professor Hutchings was relying on. I was actually --

Q Did you attempt --

A I was not actually looking at the Pew data. I was looking at his analysis of the Pew data.

Q Got it. And did you attempt to locate any similar survey from the 2018 election?

A I attempted to find expert reports after -- that would address that, but I never located any.

Q In paragraph 47 you begin to discuss a local election lawsuit in Gwinnett County. I believe that was about county commission districts; is that right?

A My wife came in and asked me if I wanted the coat back on, and I -- I took it off for a reason.

What was your question about the -- about what the governing bodies at issue were?

Q The county commission I believe you said involved local elections. I believe it was county commission and school board. I realize it's not in your report.

A I think it was both county commission and school board, but that's my recollection. I didn't say anything in the paragraph about it.

Q And are you aware that the lawsuit was dismissed after the Democratic candidates were successful in the 2018 election?

A Not with regard to the Gwinnett County case. I am familiar with that in connection with the challenge to two state house districts in Gwinnett and Henry Counties.

Q So your testimony is you don't know if the Gwinnett local election case you referenced in

paragraph 47 is still ongoing or not?
A I simply don't recall, as I sit here, what the outcome of the case was.
Q So let's move to paragraph 48. You reference two state house districts, and this is -- this is a case that you know was dismissed after the Democratic candidates were successful in the 2018 election, correct?
A Was it the 2018 election? Yeah, I guess it was.
Q Now, I want to ask you about footnotes 89 and 90. You're talking about some various expert reports in both those Gwinnett local election case and the state house district case. Where did you obtain those declarations?
A In the case of the legislative case, I was an expert in that case, and I suspect I got the -- frankly, I don't remember where I got the Engstrom report in the Gwinnett County case, whether I found it -- I often search Election Law at Moritz to find documents filed in election law cases, and that could be where I found it.
Q Did you review the report of Dr. Alford that you reference in footnote 89 on page 36?
A Yes.

Q Let's go to document number 22, which we'll mark as 19.

(Defendant's Exhibit 19 was marked for identification.)

A Okay.

BY MR. TYSON:

Q Is this the report of Dr. Alford that you reviewed in that Gwinnett County local election case?

A It appears to be. Let me just check something.

Actually, as I look in my footnote, I don't think I cited to Professor Alford's report. I was quoting from the Engstrom rebuttal to that report.

Q Do you know then if you reviewed Dr. Alford's report, or did you only rely on Dr. Engstrom's report?

A I have reviewed a good many expert reports by Professor Alford. I'm not sure I remember reading this one.

Q Okay. There's only one -- couple different sections, one particular -- two particular places I want us to look together. Page 9 in the blue numbers at the top at Exhibit 19.

A Okay.
Q Do you see the last paragraph that begins, "In the one remaining election for the 2012 District 5 seat"?
A Yes.
Q Could you just review that paragraph, and then it goes over on to the next page.
A Okay. Okay.
Q So you see Dr. Alford is discussing a race where there was an African-American Republican candidate who was overwhelmingly favored by the white voters and overwhelmingly opposed by the African-American and Hispanic and Asian voters; you agree that's a fair characterization?
A Yes.
Q And on this basis Dr. Alford focused on the issue of partisan polarization because the race of the candidate didn't matter. In your review in terms of relevance of information, do you believe the race of the candidate assists the court or has any role in determining whether something is partisan polarization or racial polarization?
A It depends on the overall pattern. First of all, notice that this is one election contest, and I'm reluctant to draw a conclusion from one

election contest.

Secondly, it is often the case that African-American voters vote against a candidate who is also African-American because they perceive him or her as being unsympathetic to the policy preferences they have.

I would cite, for example, Tim Scott. When I worked on a case in Charleston County, South Carolina, in the justice department roughly almost 20 years ago, now Senator Scott was a member of the county council. He was the only African-American member on the county council. We found that -- Professor Arrington's expert analysis found that Mr. Scott received about 5 to 10 percent of the African-American vote the first time he ran for the county council, and his black support went down in every other election. So he fits the pattern of H.K. Dido in this particular -- in this particular example.

The issue in a voting rights case is the rights of minority voters, not minority candidates. So the question of who the minority voters prefer as opposed to who the white voters prefer is what experts and the justice department and the courts look at. That's the standard for analyzing voting

behavior.

So if in this case Mr. Dido was not perceived as sympathetic to the policy positions of African-American voters, and actually in Gwinnett also Hispanic and Asian voters, then he was not the preferred candidate of minority voters.

And that doesn't suggest that it's -- that there is a causal relationship, the fact that he is a partisan is the reason for that voter choice. It's the -- it's the positions that the voters prefer.

And in the case of Mr. Dido, about whom I know exactly nothing, if he were like Mr. Scott -- Tim Scott in Charleston County, there were reasons why the African-American voters, and in this case Hispanic and Asian voters, voted against him.

So that's an example of the complications and complexities in trying to analyze causality, which the -- which the courts have generally avoided doing except in judicial election cases in my experience. And the reason is that statistically you can't separate the effects of party and race in places like Gwinnett County or the state of Georgia or Alabama or other southern states because of the very high correlation between race and party,

1 particularly when it comes to African-American
2 voters, and the problem of multi-collinearity is a
3 problem that troubles any analysis of the causality
4 issue in connection with racially polarized voting.
5 Q So turning to page 13 at the top in the
6 blue numbers, the bottom of that page says --
7 A Are we still --
8 Q We're still in Dr. Alford's -- still in
9 Dr. Alford's report.
10 A Okay, his paragraph -- what are you
11 telling me to look for?
12 Q On the very top there's a row of blue
13 numbers, case number document filed.
14 A Yes.
15 Q Go to page number 13 on that.
16 A Okay.
17 Q There's a section titled Summary
18 Conclusions.
19 A Okay. I have read Professor Alford's
20 paragraph.
21 Q And so Professor Alford's conclusions are
22 that African-American voters vote cohesively for
23 Democrats, white voters vote cohesively for
24 Republicans. What led you to reject Dr. Alford's
25 criticisms of Dr. Engstrom and rely on Dr. Engstrom

for your statement in paragraph 47 of your report?
A Well, I think you've asked a compound question that's confusing. If I may separate the issues out, let me start the first point.
I don't find John Alford's conclusion in that paragraph to be a sound analysis for the reason I previously indicated. It's simply not correct to say that he has demonstrated that the cause is partisan rather than racial polarization.
Then you were asking some other things, and I can't recall exactly what other aspects of the question you want to ask about.
Q Well, I think you've answered the second part, which was on what basis did you reject Dr. Alford's conclusion that -- and endorse Dr. Engstrom's. I think what I've heard you say is you don't believe Dr. Alford's conclusions are supportable. Is that fair to say?
A That's correct, but your -- your question involves footnote 89 as I recall in my report, and there you'll see that the point that Engstrom was addressing didn't have anything to do with the causality argument, it was his -- his criticism was related to a few district elections where the small number of precincts created problems for statistical

analysis, and it didn't resolve -- it didn't involve the causality issue at all. So I wasn't actually addressing this part of Alford's report in that footnote.

Q Earlier on paragraph 47 you make the statement: Non-Hispanic whites consistently defeated minority-preferred candidates in interracial contests, at the top of page 36 of your report.

A Yeah, let me see what the beginning of the paragraph deals with. We talking about the Gwinnett County case?

Q Correct.

A Okay. What's your question?

Q So that's your statement. Wouldn't it also be just as true to say Republicans consistently defeated African-American-preferred candidates or Democratic candidates -- sorry, let me start over again.

Wouldn't it be consistent with the statistical analysis to say Republicans consistently defeated Democratic candidates in interracial or interparty contests because we can't tease out party and race?

A The answer is yes, but that's not the

standard that the courts are considering in a case such as this. And, in fact, this isn't the case involving political gerrymandering, which the courts also don't want to go to.

But where the question is related to the racial effect of -- of an election practice, whatever it is, in here we're talking about a dilution case, then the Supreme Court in Thornburg versus Gingles rejected the causality defense. I'm embarrassed to say they actually relied on discussion of the causality defense in a Law Review article I published which they cited and quoted in the text of Gingles.

But there are courts in cases involving the election -- the method of electing judges who have taken a different view of that question of the causality question, which I think is -- is setting up a standard of proof in a voting rights case that's impossible for plaintiffs to meet because of the multi-collinearity problem.

Q Thank you. We can put away Dr. Alford's report now.

So let's move to your report, paragraph 49, top of page -- bottom of page 37, top of page 38.

A Okay.
Q You make the statement there: Because minority voters routinely support Democratic candidates, Republicans stood to benefit from making registration and voting by minority citizens more difficult.
You're not saying that Republicans intentionally made it more difficult, correct?
A That's correct.
Q And in footnote 95 on page 38 you're discussing Dr. Hood and Dr. McKee's report. You'd agree with me that Dr. Hood's report is a survey of voter perception, not necessarily a survey of particular election practices and their use; that correct?
A Let me -- let me work back to the Hood and McKee. Ask your question again.
Q The Hood and McKee report you cite was a survey of what voters perceived as issues, not what were or were not actual issues of election administration; is that correct?
A I think that's correct now that I understand your question.
Q So you'd agree that it's a survey of voter perception, not a study of particular election

practice?
A That particular article which they published is -- is not about the particular election practice, yes.
Q And you'd agree it's a survey of voter perception?
A I actually don't remember that aspect of their article very well.
Q Let's go to document 26. We'll mark it as Exhibit 20.
(Defendant's Exhibit 20 was marked for identification.)
A Yes, you were right.
BY MR. TYSON:
Q The Hood and McKee article, you agree now, having reviewed Exhibit 20, was a survey of voter perception?
A Yes.
Q Okay, great.
A I'm trying to see the context in which I cited that. That was actually a conclusory statement they made in their article.
Q Uh-huh.
And the conclusory statement that you're referencing is the statement at the end of paragraph

49 of your report?
A That's correct.
Q Okay. Let's skip ahead to paragraph 53 of your report. Now we're into the part of your report about immigration and citizenship issues. In paragraph 53 you're discussing the state's adoption of Senate Bill 529 in 2006.
A Yes.
Q You mentioned that two key provisions required verification of citizenship for either applications for employment or applications for public benefits.
Is it unusual among states or have you looked at other states to determine the rate at which those states require citizenship verification for either of those applications for public benefits?
A It's not uncommon for states to do that. I was discussing the particular adoption in Georgia and the things said in connection with justifying it.
Q In paragraph 54 you discuss that federal funding -- there was a provision for state law enforcement assisting in the enforcement of federal immigration laws, and you mentioned federal funding.

It's correct, isn't it, that it was federal law that allowed local law enforcement to assist in enforcing immigration laws, correct?

A Yes, that's why there's a memorandum of understanding between the federal agency and the state. In that particular sentence that's what I was referring to.

Q Okay. On the top of page 43, the end of paragraph 54 you say: These new functions would likely have a significant effect on the state's Hispanic or perhaps Asian residents.

What are you using to determine what -- that there would likely have a significant effect on Hispanic and Asian Georgians?

A Well, I have to read the context in the paragraph.

Well, I meant simply that most of the persons who were noncitizens in Georgia were either Hispanic or Asian, although one study suggested there were also African noncitizens in significant degree in certain Georgia counties along with perhaps noncitizens from the Caribbean.

Q In paragraph 55 you state that Governor Perdue's statements when signing Senate Bill 529 used inflammatory language that rose to the level of

demagoguery.
A Yes.
Q How did you determine it was inflammatory and rose to a level of demagoguery?
A I read the sentence quoted in the next sentence of that paragraph.
Q Okay. And on footnote 111 you indicate that Lieutenant Governor Cagle or then State Senator Cagle said the issue of dealing with the impact of illegal aliens on the healthcare system is a significant one for Georgia, and you're saying that that was also incorrect, that there was not an issue with undocumented individuals affecting healthcare coverage in Georgia?
A That's the conclusion I drew from the study that I cite in subsequent paragraphs that, in fact, the citizens don't -- noncitizens don't have access to healthcare in Georgia.
Q In paragraph -- sorry, in footnote 112 you make a reference to the fact that individual D.A. King was consulted by Senator Chip Rogers in drafting Senate Bill 529, and you mentioned that Senator Rogers was also a sponsor of the photo identification requirements for voting. What is the connection between those two things?

A The photo ID requirement for voting that I was referring to is the one struck down as unconstitutional by Judge Harold Murphy.

Q And my question was, how is Senator Rogers's work in drafting Senate Bill 529 connected to the fact that he was a sponsor for the photo identification requirement? Why are you making a connection there?

A Because it's an indication of his support for placing difficulties in the path of voters as consistent with -- actually, I guess it's not relevant in the sense that SB 529 didn't relate to voting, so I should have -- I should not have mentioned that -- should not have included that sentence because it's not an election bill.

Q In paragraph 55 after Governor Perdue's quote you make the statement: The state's voting process at the time, including a restrictive photo identification requirement for in-person voting, made the governor's claim of undocumented immigrants voting extremely unlikely, unless local election officials were routinely failing to enforce the law.

Do you agree that photo identification for in-person voting helps avoid undocumented immigrants from voting or illegal votes being cast?

A I agree it would do that. I also would add that there are other provisions protecting against illegal aliens from voting in state law and in federal law.

Q Going to paragraph 56 you make a statement at the end: Hispanic groups warned that Georgia's immigration crackdown would turn conservative Hispanic voters away from the Republican Party.

If that was correct, wouldn't the Republican Party be undermining its own ability to win elections?

A I'm not offering that as my own opinion as much as I'm saying that's what the newspaper was reporting -- the Associated Press story was reporting, and I don't in fact -- I mean, I don't know that there's evidence that there were a lot of conservative Hispanic voters who voted for the Republican Party. That's just a part of the discussion of the issue that newspaper coverage revealed. I'm not sure -- I'm not sure that it's correct.

Q Moving to paragraph 57 on page 45, you're discussing a study from the Georgia Budget & Policy Institute.

A Yes.

Q And are you aware if the Georgia Budget & Policy Institute is considered to be a liberal organization?

A I have seen that somewhere, but this is a detailed, documented report that I was quoting.

Q So you're not concerned about any particular political leanings of GBPI because the report was very detailed?

A Prior you were previously calling my attention to a Brennan Center report. The Brennan Center is also regarded as a liberal organization in general, but it often does very good work in a variety of different ways. And where there is documentation for a point that is substantial, I pay attention to -- whatever the political leanings of the organization, I -- I'm focused on the evidence, not on the political -- political leanings that are attributed to an organization.

Q Let's move forward to paragraph 60 which addresses House Bill 87 from 2011.

A Yes.

Q So you state that House Bill 87 was among the most controversial pieces of legislation in the 2011 session. Was that based on the note from the Georgia State Law Review?

A No, that particular statement is based on all the newspaper coverage of the process by which HB 87 was adopted and the demonstrations against it, which were covered in the newspaper articles.

Q Okay. Was your conclusion based on the newspaper coverage of House Bill 87?

A Yes. The Law Review note that I cited is a detailed presentation of the legislative history of HB 87 and a -- and an analysis of the content of the bill.

Q Moving to paragraph 61.

A Okay.

Q You indicate that there was a provision that appeared to forbid racial profiling in HB 87, correct?

A Yes.

Q Wouldn't that be a good thing in the bill, or was it your conclusion that it was basically useless based on your later statements in that paragraph?

A No, it would be a good thing. And, in fact, the court relied on that statement as a way of addressing the question of racial profiling as I recall.

Q And --

A My point was simply it's a very general reference to constitutional protection. It doesn't specify any particular method of dealing with racial profiling.

Q Okay. Would a prohibition on racial profiling like in House Bill 87, would that be something you would review if you were conducting a review for discriminatory intent in the adoption of House Bill 87, would that be relevant to that component?

A Yes, that would be one piece of evidence.

In this case I hope you're not suggesting that I am arguing that a provision that appears to forbid racial profiling would be evidence of discriminatory intent because that is not the case.

Q Oh, definitely not. No, I was asking more generally, I'm sorry.

Let's move to paragraph 62, and you indicate that the crackdown against undocumented immigrants would threaten to cause problems with traditional Republican constituencies. I guess one of the things I struggled with was the immigration discussion here is, is your report essentially saying that the Republican majority is acting irrationally when it passes immigration restrictions

because its key supporters oppose them, but it's acting rationally when it's passing voting restrictions because it serves a partisan interest?

A I'm not arguing they're acting irrationally. I'm simply observing that the issue of dealing with illegal immigration was more important than their traditional -- than the traditional Republican policies of assisting business and the interest of agriculture.

In other words, it's a way of stressing how salient the issue of illegal immigration was for the Republican Party majority, and that observers were pointing out the fact that business and agricultural interests that benefited from illegal immigration apparently were -- were often opposed to the restrictions that the legislature was adopting because of the economic difficulties it posed, particularly to agriculture, but also for some business interests where immigrant -- an immigrant labor force was key.

Q So let's move forward to paragraph 66, Problems with Election Administration and Database Matching.

A Yes, I'm there.

Q So first you say the subsequent compliance

with HAVA, the Help America Vote Act, was spotty and reflected an uncertain grasp of what HAVA requires. I believe we talked about things earlier. Although you teach some cases that involve election administration, you don't have specialized training or expertise in the administration of elections, particularly as to compliance with HAVA, do you?

A I don't have that as a specialty, but I did research on HAVA compliance in preparing this report.

Q So have you ever prepared a report previously involving a state's efforts at HAVA compliance?

A No. What I'm relying on, of course, is research on HAVA compliance in large part.

Q The last sentence of paragraph 66 says: This was especially true of the state's flawed implementation of HAVA's requirements when states use electronic database matching to create a voter verification program.

So you agree that a voter verification program is required under the Help America Vote Act, correct?

A Yes.

Q You just disagree with how Georgia had

gone about implementing its voter verification requirement?

A If you mean I disagree -- that I'm critical of how it operated and the effects of that operation, yes.

Q So at the top of page 55 in paragraph 67, the first full sentence says: The purpose of this database matching was to identify the applicant as a resident of the state and county and to confirm that the person was a citizen of the United States.

So it's your testimony that the HAVA requirements were designed to identify -- to confirm citizenship as one component of the match, correct?

A Of course.

Q And then at the bottom of that paragraph, the bottom of 67, you state that whether the applicant was qualified under state law for registration as a legal voter, in other words, was left to the judgment of the states.

So you'd also agree that eligibility to vote is also a question of state law, correct?

A Yes, and as the sentence concludes, that's why it was subject to the preclearance requirements of Section 5.

Q In paragraph 68 you discuss the Morales

case.
A Yes.
Q That case was a Section 5 enforcement action, correct?
A I think that's right.
Q So a Section 5 enforcement action only asks the question of whether a state had a change in voting practices precleared, correct?
A That's the legal issue the court's allowed to address, yes.
Q So a court would not be making a finding related to the specific administration; the only question is did you get it precleared or not, right?
A As I said, that's what they had the authority to address, but the court made factual findings about the specific plaintiff and his experiences.
Q Do you know what the court ultimately ordered in Morales as a remedy?
A I read the case. I don't recall, as I sit here, how the case was finally resolved.
Q Okay. In paragraph 70 you state at the end of that paragraph that "when DDS checks SAVE." So is it your understanding the Department of Driver Services is currently using the SAVE system to

verify citizenship of applicants for driver's licenses?

A I didn't investigate what DDS is currently doing. I was talking about what it was doing at that time and how that relates to the state's -- the Secretary of State's later claim that they had to have SAVE in order to identify who was and wasn't a noncitizen. DDS was using SAVE all along, as I understand the facts from the sources I cited.

Q If DDS was not using SAVE all along to verify citizenship, did that change your analysis or your opinion in this case?

A Well, it certainly would be a different fact from what I reported, and my recollection is I was actually looking at the law, and I'm -- I'm quoting from the DDS website which cited a Georgia code provision. Are you saying that DDS was making it up?

Q I'm just asking if it would change your analysis if DDS was not using SAVE.

A It would change my analysis of that particular point, yes.

Q And is it your understanding that Georgia currently uses SAVE at any point for verifying citizenship either through SSA or through DDS?

A I don't recall looking at that question as to how the current -- how DDS currently operates.
Q If you could turn to page 59. You indicate that SSA had signed user agreements with 46 states to use the HAVV system.
A I'm sorry, where are you referring me to?
Q Top of page 59.
A 59. Okay, I'm there.
Q And the Social Security Administration's matching process is the same for all 46 states and territories that use the HAVV process; is that right?
A Yes.
Q Do you know how many or did you look at -- actually, let me ask it this way: Did you conduct any analysis of what percentage of voters in the voter verification process go through the HAVV system from SSA?
A I remember that is addressed in Michael McDonald's report in the 2016 case; I just don't remember what percentage that was.
Q Okay.
A It's a smaller percentage. Most people go through DDS verification, as I understand the facts.
Q In paragraph 74 on page 60, your last

sentence says: To be reliable, Georgia would have to devise ways of checking and cleaning up its database matching results to address these routine human errors.

In your analysis of Georgia's voter verification processes, did you look at the role of registrars in reviewing the results of failures to match?

A Yes, in general. That is to say, I looked at the training materials that the registrars were exposed to. I took account of the declaration of a recently retired voter registrar from a rural county in Georgia, who said that that was -- that while she did that kind of checking, she was never -- she was never exposed to training that mandated that or required that, and she just thought it was a good practice to do.

But my recollection of what Gary Bartlett's expert report said, and he did analyze the whole process, is that there was no requirement that registrars do that that the states enforce. It was obviously something that should have been done, but the state -- Secretary of State's training didn't really specifically require that as a part of what registrars should do.

Q Going forward to paragraph 77, you reference that: Georgia sought preclearance of its newly revised voter verification process from a three-judge court in the District of Columbia as well as through administrative review by the Department of Justice.

That's allowed by the Voting Rights Act to pursue both tracks, correct?

A Sure.

Q You indicate at the end of that paragraph that then Attorney General Thurbert Baker refused to file the lawsuit. Are you aware of the prior litigation between Governor Perdue and Attorney General Baker regarding the scope of authority to represent the state?

A I am not, and I'm simply reporting that as what a newspaper article reported.

Q Paragraph 78 on the next page, you quote the letter from the Department of Justice -- or actually, I'm sorry, the federal court: The department informed the plaintiff that it did not intend to object to the implementation of the revised verification process. And that's typical language from the department, don't you agree, that it's a failure to object, it's not an approval?

A That's correct.
Q And then you say in the next sentence: The department agreed to preclear the process to settle Georgia's lawsuit.
You're not saying the department was forced to preclear in order to settle, correct?
A No. The point is if they didn't see a basis for objection, they would settle the lawsuit.
Q Paragraph 79 you reference the training materials from a 2015 presentation: For the applicant who is registering to vote using their driver's license number nothing changes.
Is it your understanding that those individuals would not go through a matching process?
A No, that's not --
Q I'm sorry, I'm in the wrong section. I'm sorry. We've already covered the piece I was going to ask you about there.
So let me go to paragraph 80. Sorry, Dr. McCrary. Are you doing good? You need a break or you doing okay?
A Actually, if we can have a two-minute break, that would be very helpful.
Q Certainly. Why don't we pause here and take two minutes --

A Thank you.
Q -- and go off the record. Thank you.
(Recess 3:42-3:49 p.m.)
BY MR. TYSON:
Q Dr. McCrary, if you could move with me to paragraph 80 of your report on page 65.
A Yes.
Q And in this paragraph you're describing what is supposed to happen under the training materials from the state if an individual fails a verification process; is that fair to say?
A Yes.
Q There's a human check to determine if there's transposition of numbers, problems with the name, all those kinds of things, and the registrar was able to correct that process, correct?
A That's correct.
Q Okay. You say at the end of paragraph 80: In my opinion, if preclearance had still been in effect, the department would have objected to these overly technical identification requirements and the Secretary of State's use of a pending list.
What are you basing that opinion on?
A Let me first review the paragraph in light of that question.

That is reference to the notification letter which Gary Bartlett described as extremely difficult to follow for most people and to the complicated steps that had to be followed if you fail -- if a -- if an applicant failed a voter verification system.

Q Yeah. So this is a reference to the entirety of the voter verification process?

A No.

Q This is your opinion the department would have objected to the pending list and to this particular letter that went after 40 days?

A Had there been a voting change, and the complication is that I'm not sure they -- the information I had didn't make clear whether there was a change that would have been subject to preclearance before Shelby County was decided.

Q You talk at the beginning of paragraph 81: The central focus of the state voter verification process was its use of an inflexible and unsystematic exact match procedure for database matching.

Why are you describing the process that way when there was a human check as you described in paragraph 80 for individuals who failed the matching

process?
A Well, because it's not clear from the evidence I have seen that that was actually done systemically by the registrars.
Q So it's your opinion that although the state was instructing and had a process for it, the registrars weren't doing their job to follow that process; is that fair?
A I haven't investigated whether they were doing their job. I have just observed that, based on the training materials, it doesn't appear as if that was particularly stressed or certainly mandated by -- by the state. But it's also -- the point I'm making here is also that they were very much guided by the failure of an applicant to match the voter verification process through DDS or in some instances through SSA, but the whole eNet system was built around the failure to match.
Q In paragraph 82 you discuss expert database matching that used several different algorithms to provide a more accurate result.
A Yes.
Q I'm assuming you have not done any sort of technical verification of DDS's computers to determine if they're able to run those different

algorithms, correct?
A I have not. My understanding from descriptions is that they did not do it. Whether they had the capability of doing it, I'm not aware.
Q Skipping ahead to paragraph 86, you indicate that the DDS exact matching procedure is a primitive method that is no longer an accepted practice in the field, I believe quoting from Dr. McDonald's report. Do you see that statement?
A That's correct.
Q And you'd agree that the exact matching process is still what's used by the Social Security Administration, correct?
A Yes, and as I pointed out the Inspector General in his report said that it was a very -- very faulty method because of the results it produced.
Q Now, in these paragraphs kind of running through your explanation of Dr. McDonald's report, you are aware that the system Dr. McDonald analyzed is no longer the law in Georgia, correct?
A That's correct, he was analyzing an earlier period.
Q In paragraph 90, if you can skip ahead there with me.

A Okay.
Q Last sentence you report Dr. McDonald's conclusion that the practice of requiring an exact match has a clear discriminatory effect, and is that based solely on the overrepresentation of particular racial groups versus their total population from the prior paragraph?
A Yes. You mean Professor McDonald's conclusion, yes.
Q Yes, that you're reporting.
A Yes.
Q In paragraph 91 you quote Dr. McDonald again saying that a voter registration application is effectively a literacy and writing test. Do you agree with that statement?
A Well, the one caveat I would place here is the term "application," as I understand it, refers -- in that sentence refers to the whole process, including the application form, but, more particularly, the notification letter if the person fails the voter verification first step, and the process of using the state's website to deal with how to satisfy the voter verification process. In other words, the whole application process, not just the application form itself.

Q Paragraph 93 on page 75 --
A Yes.
Q -- you make a note that the process was especially difficult for individuals with lower educational achievement. Are you relying solely on Mr. Bartlett for that conclusion -- or that statement, sorry?
A Sorry, where are you?
Q Paragraph 93.
A You mean --
Q 93, the first sentence.
A I am quoting him, but I also agree with that.
Q But you're relying on him for that statement. You haven't conducted an independent analysis of the difficulty for individuals with lower educational achievement?
A That's correct, but recall in the next sentence I'm citing the literature of political scientists writing about the relationship between socioeconomic characteristics, such as educational achievement, and participation in the political process.
Q So, in other words, any government policy that was difficult for individuals with lower

educational achievement would, by necessity, be -- also have a racially discriminatory effect?

A No, only if there was an observed racial effect. I mean, not all persons with lower educational achievement are members of a minority group after all. Political scientists aren't just referring to racial minorities when they talk about the relationship between socioeconomic characteristics and political participation.

Q Going to page 77, the last part of paragraph 94 there at the top of page 77.

A Okay.

Q And you're concluding in short there were consistent racial disparities in the socioeconomic characteristics usually affecting participation rates, and the same disparities are likely to have a significant impact on the ability to remedy exact match failures in the state's flawed voter verification program.

The way I read this you're saying it's likely, but you can't say for certain that it would have a significant impact; is that right?

A That's correct, it's an inference I've drawn.

Q On the next page you're discussing the

allegations of a lawsuit brought in 2016, and you talk about the allegation of the cancellation rate for African-American applicants was higher than that rate for white applicants. What I want to ask about is the next sentence you say: According to the plaintiffs, the same discriminatory effect was clear as well in non-matches on the question of citizenship.

Is the use of "discriminatory effect" here based solely on the fact that a cancellation rate for African-Americans was higher than for white voters?

A We're talking now about the complaint in the case, right?

Q Correct.

A And I'm quoting from the complaint before I started talking about the experts. Can you repeat the question again now that I've clarified where we are?

Q Certainly, and I'll put a finer point on it here too. I understand that you're reporting what the plaintiffs had claimed in this lawsuit. My question is: The use of the word "discriminatory effect" there, would you use the term "discriminatory effects" to describe a process where

the cancellation rate for African-Americans was higher than for white applicants alone, or would you have to have more information to conclude there was a discriminatory effect?

A So you're not asking about the next sentence, which you did earlier, right? Citizenship sentence.

Q What I'm zeroing in on is the "same discriminatory effects," that phrase in the "According to the plaintiffs" sentence on page 78.

A Uh-huh.

Q And your opinion in this case is that there was a racially discriminatory effect of the voter verification process.

A Yes.

Q Here we seem to be talking about a discriminatory effect based solely on the differential between the cancellation rate for African-American applicants and white applicants. So my question to you is: Is that all you need to determine there's a racially discriminatory effect is a differential rate, or do you need something more than that?

A Well, differential rate of cancellation is a very strong piece of evidence. Of course, there

is a lot more evidence deduced in the expert reports I'm citing, and -- but if you're asking whether the rates of rejection are sufficient to show a discriminatory effect, the answer is yes.

Q Okay. Going to page 80, paragraph 98.

A Okay.

Q We're now to another piece of legislation where you say undermines the equitable implementation of the settlements about the voter verification process. Do you know if anyone moved to enforce the settlement agreement in that case as a result of that legislation passing?

A You mean other than the fact that the plaintiffs filed a subsequent lawsuit in the aftermath of HB 268?

Q That's your understanding of the further action after the settlement was the new lawsuit filed in 2018?

A Yes.

Q Paragraph 99 on page 81 you again make a statement of a law that would likely have been objected to by the department. And you, as I understood it, never reviewed the files on the old voter verification process, you weren't involved in that administrative preclearance process, right?

A That's correct.
Q And so what is the basis for your statement that the administrative implementation of House Bill -- HB 268 in 2017 would likely have been objectable? Objectionable, sorry?
A My knowledge of the standards applied by the government in -- in enforcing the preclearance requirement when it existed is the principal basis for that along with the facts regarding HB 268 and the context in which it was adopted, that is, immediately following the settlement agreement of the 2016 lawsuit.
Q Later in paragraph 99, you state: Because the state now implemented voting changes -- sorry, top of page 82: Because the state now implemented voting changes with a racially discriminatory effect knowing that it would have that effect, this voting change would have been adopted with a racially discriminatory purpose.
So I read this as you're saying that there was discriminatory intent in the adoption of House Bill 268; is that right?
A That's inartfully worded. What I meant was that it would have been objectionable under the intent or purpose prong of Section 5 review, that is

to say that the state could not have met its burden of proving that it didn't have a discriminatory purpose because of the strong evidence presented in the 2016 lawsuit that had caused the state to settle that voting case in a way that satisfied the plaintiffs.

Q So this isn't saying this was discriminatory intent for purposes of the 15th Amendment --

A No.

Q -- this is lack of being able to meet Section 5 standard for preclearance, correct?

A That's correct. That's why I said it was inartfully worded on my part. I apologize.

Q We can go forward to paragraph 104 on page 85.

A Okay.

Q You relate the story of Mr. Oren and his experience sending in his application with his naturalization certificate. Do you recall what county Mr. Oren -- what county registrar Mr. Oren was dealing with?

A I don't recall with any precision. I have a general sense -- I mean, I have -- I have a recollection that I'm not comfortable relying on

that it was Fulton County.
Q I thought it was Fulton as well. I hadn't gone back and checked. We're both thinking the same thing.
A Don't take that to the bank. I don't recall with sufficient clarity.
Q Certainly. So let's go forward to paragraph 108 on page 88.
A Okay.
Q And this is reporting the racial makeup of individuals flagged as potential noncitizens from Dr. McDonald's declaration. Do you know if Dr. McDonald looked at the pool of -- sorry. Do you know what basically the denominator was for Dr. McDonald's conclusions here what group was he looking at? Was he looking at all applicants, all voters, or was he looking at only voters who submitted a paper application, do you know? I think it was to all voters.
A My recollection is it was to all applicants, but I would naturally prefer reviewing the report to check my recollection.
Q Certainly. So let's go forward to page 91 and paragraph 112.
A Okay.

Q And so you now were reporting the adoption of House Bill 316, which I believe we mentioned earlier.
A Yes.
Q And so you'd agree that the law on Georgia's voter verification process has changed, correct?
A Yes.
Q And you say at the end -- on the next page at the end of paragraph 112 that whether House Bill 316 fully resolves the issues in the exact match case remains to be seen. And so we're -- we're at a point of we're not sure if that's going to be enough to satisfy the judge in that case, or what do you mean in terms of resolve the issues in the exact match case?
A Well, as I recall HB 316 hasn't been implemented in an election, has it?
Q We have one coming up in a couple weeks.
A You used the future test there, right?
Q We had to delay -- it should have already happened by now, but we had to push it out because of COVID.
A Yes.
Q So when you say resolve the issues in the

exact match case, you're saying you need to see an election run using the provisions of House Bill 316 to make that determination?

A At a minimum, yeah.

Q Let's forward to page 95, paragraph 117.

A Okay.

Q And you referenced that voters who failed the verification process were to be classified as active with an MIDR requirement. You report that Dr. Mayer says those individuals face additional identification requirements. Your understanding, is it consistent with Dr. Mayer's that MIDR means additional identification requirements or fewer identification requirements under Georgia law?

A Would you repeat your question?

Q Sure. It was a terribly worded question.

Is it your understanding that a voter who is flagged active with an MIDR flag faces additional identification requirements or fewer identification requirements than an active status voter?

A I'm still not sure I understand your question.

Q Okay. Let me try -- take another run at it. You're reporting in paragraph 117 that individuals who are in MIDR status because they

failed verification face additional identification requirements, and you're relying on Dr. Mayer for that statement. You see where that is in the middle of 117?

A Yes, that's what he's saying, but I'm still not sure I understand your question.

Q My question is: Did you do any analysis of what MIDR status means?

A Yes. I don't recall with any particularity, as I sit here, exactly what I found, but I did look -- I did read documents that explained exactly what it meant.

Q And so it's your understanding that MIDR status means additional identification requirements for a voter, correct?

A Well, it means that they have to supply -- they have to supply identification because it was not -- it was not evident in the -- in the voter verification process. It may already have been in their files, for example, or they may have -- they may possess documentation showing, for example, that they were naturalized, so that -- that's what I believe Professor Mayer meant when he referred to additional identification requirements.

You know, part of the problem seems to be,

according to, I think, Gary Bartlett's analysis and some of the other documents I saw, is that registrars don't always check their files to see what's actually in their files because there are examples of persons who were naturalized citizens and showed the documentation when they first applied, and the registrar hadn't -- hadn't picked up on what was actually in their file, their application file.

So, you know, the point is they have to supply identification which -- even if it's in the file, I think it's providing additional identification.

Q And when you -- Mr. Bartlett has not reviewed the new process that exists under House Bill 316 and the official election bulletin issued pursuant to that statute, right?

A That's correct. His report was in 2016.

Q Let's go to page 97.

A Okay.

Q Paragraph 120 -- paragraph 120 you reference individuals who were in pending status for reasons other than citizenship verification. Do you see that?

A Yes.

Q Last sentence says: Again these data reveal an impact of these missing data "falls most heavily on minority registrants." See that statement?

A I'm not seeing it. Where is it?

Q The last sentence of paragraph 120.

A Yes.

Q It's not your testimony if a voter doesn't sign his or her voter application that that application should be put into active status, right?

A I'm sorry? Would you repeat the question?

Q You say -- yes. It's not your testimony that a voter who does not sign a voter registration application should have that application put into active status, correct?

A I don't know why that's inferred from anything in paragraph 120.

Q First sentence of paragraph 120 says individuals that you're identifying with continuing racial disparity are in that status because of missing information or lack of a signature.

A That's what Professor Mayer was saying, yes.

Q Right. And so my question is: You're not saying that voter registration applications that

lack a signature should be processed with no further action by the registrar, are you?

A The registrar should call attention of the applicant to the fact that he didn't sign -- he or she didn't sign the document.

Q And do you know if that's the process that's used in Georgia if there's missing information like that?

A I don't -- I don't know that it is or isn't because I haven't investigated all the actions of the registrars, but I -- I think that if you recall the declaration of the former registrar whose name I'm blanking on at the moment that I cited earlier, she said she would have checked, and she would have presumably contacted the citizen who applied to say you didn't sign your application form. That's just routine, good practice.

Q Let's move to the conclusion section of your report on page 98.

A Okay.

Q First of all we have, kind of again coming back to our structure, paragraph 122 summarizes your opinion about the persistent discriminatory effects on minority voters' opportunity to register and vote by Georgia's implementation of its voter

verification process under HAVA; that correct?
A Yes.
Q In that paragraph you refer to a cumbersome and decentralized system of decision-making of individual voter verification. Did you discuss that somewhere in the report because I don't remember addressing the cumbersome and decentralized system of decision-making directly in the report.
A You were asking me questions about part of what I was discussing in that sentence already in this deposition. The decentralized system is a system in which the Secretary of State's office has some role in the process in carrying out the voter verification process of the databases, and then the state relies on each local registrar or board of registrars to make the final decision. That's what I meant by decentralized system.
The cumbersome reference is to the -- the character of the exact match system, which is cumbersome and inaccurate and flawed and achieves more disenfranchising effect than would be justified.
So I think we've covered that a good bit in this deposition because it's covered a good bit

in the report.

Q Okay. Then paragraph 123 seems to go to your second major area, the current pattern has its analogue in the system of voter registration in the Jim Crow era before 1965. Then you make a comparison to the complexity of the literacy test used by Georgia between 1945 and 1965 with the difficulties that minority voters face in dealing with Georgia's voter verification system since 2008. You're a historian. You study history. Do you really think it is -- it's comparable to the disenfranchisement of the Jim Crow law? That's what you're saying in this report, and that's a pretty bold statement to me.

A First of all, you're talking about problems of vote denial or abridgment in both instances. It's not a question of dilution.

Secondly, there is an observed discriminatory effect against minority citizens in both periods. The discrimination was more dramatic in its -- in its numerical effects in the period before 1965, but there's -- there is a discriminatory effect in both patterns.

It's also true that there is evidence of intentional discrimination in the application of the

literacy tests and other aspects of the registration process in Georgia before 1965, and I'm not -- I'm not actually concluding that there is a discriminatory intent underlying the use of voter verification system by Georgia in the current -- in the current system, but I do see similarities. But obviously they are somewhat different as well as somewhat similar.

Q Then paragraph 124 covers the third area, the resembling of the politics of Georgia before the 1965 Voting Rights Act. I know we covered this, but, again, at the very last sentence you referenced a powerful incentive for Republican officials to place hurdles in the path of minority citizens seeking to register and vote, but there is no testimony here that that is intentional in this -- in this report, correct?

A That's correct.

Q Dr. McCrary, do you have any other opinions related to the issues in this case that are not addressed in your report or that we have not covered today in this deposition?

A Not that I -- not that I can think of.

Q Okay. Sitting here today you can't think of any others?

A No. I suppose I could be asked questions in trial testimony that would raise another issue that I didn't address in the report, and to answer the question I might have to address the subject matter of the question, but it's not -- it's not my intention to offer an additional -- an additional opinion unless there were a rebuttal report criticizing my analysis, in which case I would expect to be able to reply.

Q Certainly. Thank you. And for your reference, we are not planning to offer a rebuttal report to your report, so we'll be in good shape there.

A Okay.

Q Dr. McCrary, that's all the questions I have. Ms. Fink may have some questions for you, or we'll see where we go from here.

MS. FINK: If we can take a break. We can go off the record. Let's take just a 10-minute break.

MR. TYSON: Certainly.

(Recess 4:26-4:30 p.m.)

MS. FINK: I don't have any questions for Dr. McCrary.

MR. TYSON: Well, thank you for your time,

Dr. McCrary. Hope you have a good weekend.

THE WITNESS: Do my best.

(Deposition concluded at 4:30 p.m.)

(Signature reserved.)

The following reporter and firm disclosures were presented by me at this proceeding for review by counsel:

REPORTER DISCLOSURES

The following representations and disclosures are made in compliance with Georgia Law, more specifically:

Article 10 (B) of the Rules and Regulations of the Board of Court Reporting (disclosure forms)

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- I am a certified court reporter in the State of Georgia.
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- I have no direct contract with any party in this action, and my compensation is determined solely by the terms of my subcontractor agreement.

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- Veritext was contacted to provide reporting services by the noticing or taking attorney in this matter.
- There is no agreement in place that is prohibited by OCGA 15-14-37 (a) and (b). Any case-specific discounts are automatically applied to all parties, at such time as any party receives a discount.
- Transcripts: The transcript of this proceeding as produced will be a true, correct, and complete record of the colloquies, questions, and answers as submitted by the certified court reporter.
- Exhibits: No changes will be made to the exhibits as submitted by the reporter, attorneys, or witnesses.

- Password-Protected Access: Transcripts and exhibits relating to this proceeding will be uploaded to a password-protected repository, to which all ordering parties will have access.

CERTIFICATE

STATE OF GEORGIA:
COUNTY OF FULTON:

I hereby certify that the foregoing transcript was taken down remotely, as stated in the caption, and the colloquies, questions and answers were reduced to typewriting under my direction; that the transcript is a true and correct record of the evidence given upon said proceeding.

I further certify that I am not a relative or employee or attorney of any party, nor am I financially interested in the outcome of this action.

I have no relationship of interest in this matter which would disqualify me from maintaining my obligation of impartiality in compliance with the Code of Professional Ethics.

I have no direct contract with any party in this action and my compensation is based solely on the terms of my subcontractor agreement.

Nothing in the arrangements made for this proceeding impacts my absolute commitment to serve all parties as an impartial officer of the court.

Th

Robyn Bosworth

_____
ROBYN BOSWORTH, RPR, CRR, CRC, CCR-B-2138

To: Sarah Fink
Re: Signature of Deponent Payton McCrary
Date Errata due back at our offices: 30 Days

Greetings:
This deposition has been requested for read and sign by the deponent. It is the deponent's responsibility to review the transcript, noting any changes or corrections on the attached PDF Errata. The deponent may fill out the Errata electronically or print and fill out manually.

Once the Errata is signed by the deponent and notarized, please mail it to the offices of Veritext (below).

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I, the undersigned, do hereby certify that I have read the transcript of my testimony, and that

___ There are no changes noted.
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DEPONENT'S SIGNATURE

Sworn to and subscribed before me this____day of
_____, 20__.

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My Commission Expires:_____

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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

GEORGIA STATE CONFERENCE NAACP, et. al.,	)	CIVIL ACTION NO. 1:21-cv-05338-ELB-SCJ-SDG THREE-JUDGE COURT
Plaintiffs,	)	
v.	)	Served on behalf of the Georgia State Conference of the NAACP Plaintiffs.
STATE OF GEORGIA et. al.,	)	
Defendants.	)	

Declaration of Dr. Peyton McCrary

Pursuant to 28 U.S.C. § 1746, I, Peyton McCrary, make the following declaration:

Introduction

1. My name is Peyton McCrary, and I reside in Arlington, Virginia. I have been asked by attorneys for the plaintiffs in this litigation to examine the Congressional and State legislative redistricting plans adopted by the State of Georgia following the receipt of the 2020 census redistricting data. Congress set forth specific factors it believed should guide the federal courts in applying Section 2 in its official report,[1] often identified as the "Senate Factors," based in part on the

[1] Report of the Committee on the Judiciary on S. 1992 (Voting Rights Act Extension), U.S. Senate, 97th Cong., 2nd Sess., Report No. 97-417 (hereafter cited as 1982 Senate Report).

Exhibit
0004
Peyton McCrary

totality of circumstances test first articulated by the Supreme Court in *White v. Register* in 1973.[2] The purpose of the following report is to assess evidence relating to specific aspects of the totality of circumstances test. My primary focus is on a) Senate Factor 1, the history of racial discrimination affecting voting in Georgia; b) Senate Factor 5, the degree to which that history continues to have a discriminatory effect on the opportunity of minority citizens to participate equally in Georgia's political process; and c) Senate Factor 7, the degree to which minority citizens have been elected to public office in Georgia in recent decades. My discussion of Senate Factor 1, however, includes evidence of the history of racially polarized voting in Georgia that provides context for the quantitative analysis by another expert for the plaintiffs who is addressing Senate Factor 2.[3] In addition,

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[2] 412 U.S. 755 (1973).

[3] In my article "Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *Social Science History*, 14 (Winter 1990), 507-31, I describe the evolution of the statistical methods used in voting rights litigation in the 1970s and 1980s. I was able to evaluate the expert reports used as evidence in that article because I had previously used ecological regression and multiple regression in analyzing voting behavior in the deep South during the 19th century. See e.g., Peyton McCrary, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978), and "Class and Party in the Secession Crisis: Voting Behavior in the Deep South, 1856-1861," co-authored with Clark Miller and Dale Baum, *Journal of Interdisciplinary History*, VIII (Winter 1978), 429-57. As noted in Paragraph 5 above, my work on voting rights litigation in the Department of Justice entailed working with expert witnesses on many cases; this includes political scientists employing the technique called "ecological inference" developed by Professor Gary King of Harvard University for the purpose of analyzing patterns of voting behavior, including the degree to which voting patterns are racially polarized.

my discussion of Senate Factor 1 includes historical evidence regarding Senate Factors 3 and 6, which I will note at each point where relevant.

2. My understanding of the proper role of an expert witness, based on my 42 years of experience in voting rights litigation, is that an expert is merely to assist the court by applying the methodology generally employed in his or her field of expertise to factual questions before the court. In this declaration, therefore, as in previous expert testimony and scholarly publications, I have employed the standard methodology used by historians and political scientists in investigating the operation of election practices, and the racial effects of these practices.[4]

3. For the convenience of the court in this case I have cross-referenced prior judicial findings to place in context the evidence I provide in this declaration.[5] In my scholarly writing I routinely utilize the factual evidence provided by court decisions. As I observed in a recent journal article: "The factual evidence

[4] When analyzing political decision-making, historians and political scientists examine the political, institutional, and social context within which a decision is made. When examining how the political system operates, we consider quantitative evidence regarding voter behavior, the conduct of registration and voting by state or local officials, and the behavior of legislative bodies. In both types of investigations, we examine relevant scholarly studies, newspaper articles concerning events, reports of state or federal governments, and relevant court decisions as well.

[5] However, I avoid expressing legal opinions in this declaration, as in prior sworn testimony in other cases. Although I write about the history of voting rights law in my scholarly publications and co-teach a course on voting rights law, I am a historian by training, not an attorney.

presented in court proceedings – in voting rights cases key evidence often comes in through expert witness testimony by political scientists or historians – is an invaluable resource for historical and social science research."[6]

4. I also consider relevant coverage by newspapers and other media, correlating the information provided by journalists with documentary evidence whenever available. My analysis in this case – thus far – has been handicapped by the limited nature of the relevant state documents available through discovery. This has made coverage of the redistricting process through newspaper reporting more probative, as the best available evidence on key questions. Should additional documents pertinent to my investigation emerge through discovery in this case, it would provide an opportunity for further exploration of the decision-making process leading to the adoption of these redistricting plans, and – potentially – the degree to which the plans were designed to have a racially discriminatory impact.

Qualifications

5. I am an historian by training and taught history at the university level from 1969 until 1990. During the 1980s, while teaching at the University of South Alabama, I served as an expert witness in numerous voting rights cases in the South. From 1990 until my retirement in 2016, I was employed by the Voting

[6] Peyton McCrary, "The Interaction of Policy and Law: How the Courts Came to Treat Annexations under the Voting Rights Act," *Journal of Policy History*, 26 (No. 4, 2014), 429-58 (quoted sentence at p. 431).

Section, Civil Rights Division, of the Department of Justice. My responsibilities in the Civil Rights Division included the planning, direction, coordination, and performance of historical research and empirical analysis for voting rights litigation, including the identification of appropriate expert witnesses to appear for the government at trial. I worked with experts in analyzing: 1) the adoption and maintenance of election laws; 2) the statistical analysis of racially polarized voting; 3) the use of database matching techniques in the construction of statewide voter registration databases; and 4) other issues relating to the conduct of elections. Since 1981, I have testified in court in 19 voting rights cases. In addition, I have presented sworn written testimony as an expert in 18 cases.

6. I received B.A. and M.A. degrees in History from the University of Virginia in 1965 and 1966, respectively, and obtained my Ph.D. in History from Princeton University in 1972. My primary training was in the history of the United States, with a specialization in the history of the South during the 19th and 20th centuries. Before beginning work at the United States Department of Justice, I taught courses in my specialization at the University of Minnesota, Vanderbilt University, and the University of South Alabama for 20 years. I took a leave from my position at the Department of Justice in 1998-1999 to serve as the Eugene Lang [Visiting] Professor at Swarthmore College; I taught two political science courses: Law and the Political Process in the fall semester and Civil Rights Policy in the

spring semester. For the last 15 years I have co-taught a course on voting rights law as an adjunct professor at the George Washington University Law School.

7. I have published a prize-winning book, *Abraham Lincoln and Reconstruction: The Louisiana Experiment* (Princeton, N.J., Princeton University Press, 1978) (winner of the L. Kemper Williams Prize of the Louisiana Historical Association), six law review articles, seven articles in refereed journals, and seven chapters in refereed books. Over the last 37 years my published work has focused on the history of discriminatory election laws in the South, evidence concerning discriminatory intent or racially polarized voting presented in the context of voting rights litigation, and the impact of the Voting Rights Act in the South.

8. I explain the methods of assessing the discriminatory effects of challenged election procedures in: "Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990," *University of Pennsylvania Journal of Constitutional Law*, 5 (May 2003), 665-708; "Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom," *Social Science History*, 14 (Winter 1990), 507-31; and "Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits," *Howard Law Journal*, 28 (No. 2, 1985), 463-93 (quoted in *Thornburg v. Gingles*, 478 U.S. 30, 73 (1986)). With co-authors I have also addressed the effects of challenged election practices in "Alabama," co-authored

with Jerome A. Gray, Edward Still, and Huey Perry, and "South Carolina," co-authored with Orville Vernon Burton, Terence R. Finnegan, and James W. Loewen, in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, N.J., Princeton University Press, 1994), 38-66, 397-409. This co-authored book was awarded the Richard Fenno Prize of the American Political Science Association.

9. Some of my published work focuses specifically on Georgia. I address the intent underlying the adoption of at-large elections – and the racially discriminatory effects of the at-large system – in a major Georgia city in "The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1946-1986," *Journal of Urban History*, 25 (Jan. 1999), 199-225. In "Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting," co-authored with Steven F. Lawson, *Journal of Policy History*, 12 (No. 3, 2000), 293-320, we examine the intent underlying the use of multi-member districts in the first legislative redistricting following the decision in the malapportionment case *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962. In "The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act," 11 *Mich. J. Race & L.* 275 (2006) (co-authored with Christopher Seaman and Richard Valelly), *reproduced before publication in Voting Rights Act: Section 5 Preclearance and Standards: Hearings Before the*

Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 96-181 (2005), we recount the facts regarding Georgia congressional redistricting in 1981 and Georgia legislative redistricting in 2001.

10. Over the last four decades I have published numerous reviews of books in my areas of specialization and served as a scholarly referee for numerous journals and university presses. I continued to publish scholarly work in my areas of expertise while employed by the Department of Justice and expect to continue my scholarly writing now that I have retired from government service. A detailed record of my professional qualifications, a curriculum vitae, which I prepared and know to be accurate, is attached as Exhibit 1 to this Report. My rate of compensation for work on this case is $350.00 per hour, my standard rate for serving as a consultant or expert witness.

Senate Factor 1: The History of Discrimination Affecting Voting

11. There is a long history of racial discrimination affecting voting in Georgia that applies specifically to Black Georgians. Among recent examples of court decisions noting this history, see: a) *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG, slip op. at 42 (N.D. Ga., August 5, 2022), at 42 ;[7] b) *Fair Fight Action v. Raffensperger*, No. 1:18-CV-5391-SCJ, slip op. at 41, Order (N.D. Ga.

[7] According to the court (citing Paragraph 8 of the Joint Stipulation in this case), "it is undisputed that Georgia has a 'well-documented history of discrimination against its Black citizens."

November 15, 2021);[8] c) *Wright v. Sumter County Board of Elections*, 301 F. Supp.3d 1297, 1310 (M.D. Ga. 2018);[9] and d) *Georgia State Conf. NAACP v. Fayette County Board of Commissioners*, 950 F. Supp.3d 1294, 1314 (N.D. Ga. 2013).[10]

The State of Minority Voting Rights in Georgia, 1945-1965

12. Shortly after the United States Supreme Court struck down the Texas white primary in 1944,[11] Georgia's white primary – in which Democratic party rules restricted voting to white registered voters – was successfully challenged in *King v. Chapman*.[12] Once the Democratic white primary – the only election that mattered in one-party Georgia – was struck down, the state's long-standing voter registration law became more important than ever to Georgia political leaders as a way of minimizing the number of Black Georgians registered to vote.[13]

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[8] Taking "judicial notice of this fact," the court observed: "Defendants do not contest that 'prior to the 1990s, Georgia had a long sad history of racist policies in a number of areas including voting."

[9] "Georgia has a history chocked full of racial discrimination at all levels . . . ratified in state constitutions, enacted into state statutes, and promulgated in state policy."

[10] "It is wholly unnecessary, however, to recount the voluminous details of Georgia's history in this Order," observed the court, which it could "all but take judicial notice therof."

[11] *Smith v. Allwright*, 321 U.S. 649 (1944).

[12] 62 F. Supp. 639 (M.D. Ga. 1945), *aff'd* 154 F.2d 450 (5th Cir. 1946).

[13] Beginning with a statute enacted in 1908, Georgia had restricted the registration of voters to: 1) persons who served in any war on behalf of the United States or the Confederate states, or who was a lawful descendant of a person who fought in those wars (that is, a "grandfather clause"); 2) a person of "good character" who

13. In order to create a more difficult registration hurdle, the state adopted a re-registration law in 1949, requiring *all* voters to register again under a new literacy test. Under this test voters would have to demonstrate their ability to read and write or answer correctly at least 10 of 30 factual questions.[14] In 1958 Georgia adopted a new voter registration act that increased the number of correct answers to factual questions asked of prospective registrants who were illiterate.[15] Instead of 10 out of 30 questions (as in the 1949 law) a person who could not read or write had to answer correctly 20 of 30 questions to the satisfaction of the county registrar. Among the questions asked were what qualifications a candidate had to

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understood the duties and obligations of citizenship (a standard allowing broad discretion for racial discrimination); 3) a person who was able to read and write correctly any paragraph of either the federal or state constitutions (to be assessed by registrars who rarely had education beyond high school and who had no legal training); or 4) a person who owned 40 acres of land or $500.00 worth of taxable property. Dewey W. Grantham, Jr., *Hoke Smith and the Politics of the New South* (Baton Rouge, Louisiana State University Press, 1958), 159; Laughlin McDonald, Michael B. Binford, and Ken Johnson, "Georgia," in Chandler Davidson and Bernard Grofman (eds.), *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (Princeton, NJ, Princeton University Press, 1994), 69-70, 410; Joseph L. Bernd and Lynwood M. Holland, "Recent Restrictions Upon Negro Suffrage: The Case of Georgia," *Journal of Politics*, 21 (1959), 488.

[14] Bernd and Holland, "Recent Restrictions," 492, 496; *Franklin v. Harper*, 55 S.E.2d 221, 227 (Ga. 1949). This re-registration law proved to be as difficult for whites as well as blacks and under heavy pressure the state amended it to allow persons already registered before 1949 to remain eligible to vote. Bernd and Holland, "Recent Restrictions," 496.

[15] *Id.* Bernd and Holland contend that the new law was likely motivated by the fact that the NAACP had inaugurated a voter registration drive in Georgia and "the number of persons of color eligible for the franchise was rising throughout the South."

possess to run for the Georgia General Assembly, how the writ of habeas corpus can be suspended, or what procedures were required to amend the U.S. Constitution. Contemporary political scientists contended that the "principal intent of the literacy test is racial discrimination."[16] The tests were often administered by unsympathetic white persons with little legal education or training – but even if administered fairly, notes one study, the questions "were difficult for even the best educated person to answer."[17]

14. The burden of satisfying even a fairly administered literacy test was especially great for Blacks in Georgia because they were the victims of many years of inferior public education in segregated schools, putting them at a marked disadvantage compared with white Georgians. In 1940 the average per-pupil expenditure for white schools in the state was $46.70, compared with only $14.61 for Blacks. By 1952 the degree of racial disparity had narrowed, with the average per-pupil expenditure for whites at $163.76 and for Blacks at $110.59. This

[16] Bernd and Holland, "Recent Restrictions," 498. In their view the "most pervasive type of discrimination in registration involves the failure to apply the [literacy] test to white persons," which is "just as definitely a denial of equal protection to Negroes as is the most sordid device to keep the latter away from the ballot box."

[17] McDonald, et.al., "Georgia," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 71, 410.

history of Georgia's racially discriminatory educational policies is relevant to the later analysis of Senate Factor 5 in this report.[18]

15. One characteristic of Georgia elections in those days was quite different from the years following 1962. Political leaders always knew how many Black Georgians voted on election day – and for which candidates they voted – because ballot boxes were segregated in each polling place and the returns were reported by race, until the practice was struck down as racially discriminatory by a federal court in 1962.[19] That enabled them to talk about the "Negro bloc" vote, with actual proof as to which candidates Black Georgians supported in each election.[20] In light of these direct measures of voting by race, no statistical inference was required.

16. Wherever Blacks were able to surmount the state's barriers to voter registration, Georgia turned to practices that would dilute minority voting strength. Political leaders in the city of Augusta decided to switch from ward to at-large elections in 1953 to minimize the chances of Black candidates winning a seat on the Augusta city council.[21] The plan retained the old wards as residency districts –

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[18] Harry S. Ashmore, *The Negro and the Schools* (Chapel Hill, University of North Carolina Press, 1954), 153 (Table 8).
[19] Peyton McCrary, "The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1945-1986," *Journal of Urban History*, 25 (January 1999), 220 n. 18. The decision eliminating the segregated ballot boxes was *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962).
[20] McCrary, "The Dynamics of Minority Vote Dilution," 203, 220 n. 18.
[21] *Id.*, 208-11.

meaning that candidates had to reside within a specific ward but were elected citywide, which had the effect of preventing the use of single-shot voting and thus enhanced the discriminatory potential of the at-large system. This is an example of what would later be termed an "enhancing device" under Senate Factor 3 of the totality of circumstances test.[22]

17. For the same purpose the legislature adopted multi-member districts for the state senate in 1962, explicitly announcing the goal of preventing a black candidate from being elected a member of the state senate.[23] In that year the United States Supreme Court decided that constitutional challenges to malapportioned legislative districts were justiciable in a Tennessee case known as *Baker v. Carr*.[24] As a result a federal court in Georgia promptly ruled in *Toombs v. Fortson* that the Georgia state legislature was malapportioned.[25] To comply with the court's legislative redistricting order, the legislature had to reapportion at least one of its two houses. Under Georgia law the state senate could be redistricted by

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[22] *Id.*, 204, 211, 220 n.24, 223 n.70.
[23] See Peyton McCrary and Steven F. Lawson, "Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting," *Journal of Policy History*, 12 (No. 3, 2000), 293-320.
[24] 369 U.S. 136 (1962).
[25] 205 F. Supp. 248 (N.D. Ga. 1962). The same year a federal court found the state's county unit system for electing statewide officeholders – which allocated "county unit" votes to each county based on its seats in the malapportioned state house – unconstitutional. *Gray v. Sanders*, 203 F. Supp. 158 (N.D. Ga. 1962). This decision was ultimately upheld by the Supreme Court in *Gray v. Sanders*, 372 U.S. 368 (1963).

statute but reapportioning the state house would require a constitutional amendment.[26] In Fulton County, Blacks were registered and voting at high enough levels to concern white political leaders in 1962. Led by Carl Sanders, the president pro tem of the state senate who had just won the Democratic gubernatorial primary – when the Democratic primary was still the only election that mattered in Georgia – the legislature voted to require multi-member districts for all counties with population that entitled them to more than one senator.[27] Sanders was a resident of Augusta, which had adopted at-large elections for the city council in 1953 to prevent the election of Blacks.[28]

18. Several senators pointed out that the state constitution required "one Senator from each district," but the majority pressed ahead with a multi-member plan.[29] As the floor leader for the bill, veteran legislator Frank Twitty from south Georgia, put it: "I am not going to vote for anything that would automatically put a member of a minority race in the Senate," and as he saw it "without countywide races a Negro would almost certainly be elected to the Senate from Fulton County."[30] A state court subsequently ruled that the state constitution required the 1962 elections for the reapportioned state senate to be conducted on a single-

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[26] McCrary and Lawson, "Race and Reapportionment, 1962," 316 n.61.
[27] *Id.*, 302-03.
[28] McCrary, "Dynamics of Minority Vote Dilution," 208-11.
[29] McCrary and Lawson, "Race and Redistricting," 303, 316 n. 65.
[30] *Id.*, 304, 317.

member district basis, despite the actions of the legislature establishing multi-member districts.[31] As a result of the court-ordered single-member senate districts, attorney Leroy Johnson became the first Black person elected to the Georgia legislature since Reconstruction.[32]

19. Within a few months the Georgia House adopted a bill providing for a majority vote requirement, which its most vocal sponsor, Representative Denmark Groover of Bibb County, described as a way of reducing the chance that the "Negro bloc vote" could elect a candidate of its choice. The following year the majority vote requirement for all elections was added to the Georgia election code and is still good law today.[33] This evidence is especially relevant to Senate Factor 3 of the totality of circumstances test.

How the Voting Rights Act Worked, 1965-1999

20. The Voting Rights Act of 1965 abolished the literacy test for voter registration employed by Georgia, as by other states, primarily in the South. Georgia was covered under the formula in Section 4 of the Act – and thus covered by the preclearance requirement under Section 5 of the Act, as well as by the

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[31] *Id.*, 305-06, 318 notes 88-91. The trial court judge in question was Judge Durwood Pye, an ardent segregationist who nevertheless believed in enforcing the Georgia constitution, and he was upheld by the state supreme court.
[32] *Id.*, 305-06, 318-19.
[33] J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (Chapel Hill, University of North Carolina Press, 1999), 226-32.

provision suspending its literacy test – because its total voter registration, white as well as Black, was under 50 percent of the total voting age population (because most states did not – and still do not – maintain registration and turnout data by race – unlike Georgia).[34] Reliable data on voter registration by race documents that Blacks in Georgia were 27 percent of the registered voters before the Act and whites were 63 percent.[35] The Act's elimination of tests or devices and the threat of federal examiners taking over voter registration in recalcitrant counties, led to substantial gains in black voter registration in Georgia, as in other covered jurisdictions. As of 1971 Black registration in Georgia had jumped to 68 percent of the Black voting age population, while whites had increased only to 71 percent of the white voting age population.[36]

21. After publication of the 1970 decennial census, Georgia drew new redistricting plans for both state house and state senate to comply with the one person, one vote standard, and submitted both for preclearance under Section 5 of the Voting Rights Act. The Attorney General objected to the house plan because it diluted minority voting strength by increasing the number of multi-member districts and requiring candidates in those multi-member districts to compete for

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[34] U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (Washington, D.C. 1975), 5.
[35] *Id.*, 53.
[36] *Id.*

individually numbered posts and meet a majority vote requirement. Shortly thereafter the use of numbered posts and a majority vote requirement would be classified as "enhancing devices" under Senate Factor 3 of the totality of circumstances test.[37] The state refused to revise the house plan and contended that Section 5 preclearance was not required for redistricting plans. The United States sued to enforce its objection and the courts ruled against Georgia.[38] The state adopted a new house plan in 1974, with fewer multi-member districts and 24 majority-black districts. In the 1974 elections 19 Black candidates won seats in the house and two won senate seats.[39]

22. Black plaintiffs filed numerous lawsuits challenging the use of at-large elections for local governing bodies in the 1970s, winning some and settling others favorably. In the highest profile case, Burke County plaintiffs won at the trial court level, at the Fifth Circuit, and at the Supreme Court.[40] The Court's findings reflect the sort of factual evidence found in many of the other Georgia cases. Burke County was almost as large as Rhode Island, making it difficult to campaign at large. In addition, the difficulties of running countywide were enhanced by

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[37] *Georgia v. United States*, 411 U.S. 526, 528-30; Laughlin McDonald, A *Voting Rights Odyssey*: Black Enfranchisement in Georgia (New York, Cambridge University Press, 2003), 148.
[38] See *Georgia v. United States*, at 530-32.
[39] McDonald, A *Voting Rights Odyssey*, 148.
[40] *Rogers v. Lodge*, 458 U.S. 613 (1982).

numbered posts and a majority vote requirement,[41] as well as the racial segregation that affected every aspect of social contacts between whites and blacks. There was also strong evidence that county commissioners were unresponsive to the policy interests of African Americans. Above all, there was "overwhelming evidence of bloc voting along racial lines."[42] The Court also affirmed the lower courts' finding that Burke County had intentionally maintained its at-large elections because the county's legislative delegation had "retained a system which has minimized the ability of Burke County Blacks to participate in the political system."[43]

23. Following publication of the 1980 decennial census, Georgia's congressional redistricting plan failed to secure preclearance under Section 5.[44] The case turned on the facts surrounding the fifth congressional district, centered in the capital city of Atlanta. Black civil rights leader Andrew Young had represented the district during the mid-1970s when whites made up a majority of its voting-age population, but when he left to head the United Nations delegation in 1977 the district elected a moderate white Democrat, Wyche Fowler. After the 1980 census,

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[41] As noted in the preceding paragraph, numbered place and majority vote requirements were cited in Senate Factor 3 of the totality of circumstances test as "enhancing devices."
[42] *Id.*, at 623.
[43] *Id.*, at 626. See the discussion in McCrary, "Discriminatory Intent: The Continuing Relevance of 'Purpose' Evidence in Vote-Dilution Lawsuits," 28 *Howard L.J.* 463, 477-80 (No. 2, 1985), of the record before the lower courts.
[44] *Busbee v. Smith*, 549 F. Sup. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

the legislature increased the Black population percentage in the fifth district to 57 percent, but whites were still 54 percent of the registered voters.[45] Because voting patterns had become more racially polarized in recent years, most observers believed that the Black concentration in the newly configured district was not great enough to provide Black voters an equal opportunity to elect a candidate of their choice.[46]

24. The trial court found abundant evidence, both direct and circumstantial, that "[t]he Fifth District was drawn to suppress black voting strength."[47] For example, a key player in the legislative decision-making process, Joe Mack Wilson, who chaired the House Reapportionment Committee, complained to fellow legislators that "the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts."[48] The trial court also found that Speaker Tom Murphy "purposefully discriminated on the basis of race in selecting the House members of the conference committee where the final redistricting plan was determined," in that he selected white legislators "he knew would adamantly oppose the creation of a congressional district in which black voters would be able

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[45] *Id.*, at 498.
[46.] *Id.*, at 499.
[47.] *Id.* at 515.
[48.] *Id.*, at 501, 144-45. Wilson was also quoted as saying "I'm not for drawing a nigger district and I'm not for drawing a Republican district." *Id.* at 512. According to the trial court, "Wilson uses the term 'nigger' [routinely] to refer to black persons." *Busbee*, at 500.

to elect a candidate of their choice," and refused to appoint any Black members to the conference committee.[49]

25. Because the redistricting plan had a racially discriminatory purpose, it was not entitled to preclearance, even though it was ameliorative rather than retrogressive in effect. As the three-judge court stated, "[s]imply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose."[50] The court found the plan objectionable "because State officials successfully implemented a scheme designed to minimize black voting strength," and as a result the plan was "not free of racially discriminatory purpose."[51]

26. After Congress amended Section 2 of the Act in 1982 to make it possible for plaintiffs to challenge discriminatory election laws under a results test, without the necessity of proving that the practice was adopted or maintained with a racially discriminatory purpose,[52] the number of successful lawsuits in Georgia

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49. *Id.* at 510. Murphy explained at trial that he was concerned that "we were gerrymandering a district to create a black district where a black would certainly be elected." *Id.* at 509–10.
50. *Id*. at 516.
51. *Id*. at 518.
52. The 1982 amendment of Section 2 was designed to create a statutory route around the decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) which, like other vote dilution cases beginning in 1973, was decided under the 14th Amendment. See McCrary, "History in the Courts: The Significance of *City of*

jumped dramatically.[53] A systematic study of Georgia cities and counties over 10,000 with over 10 percent black populations found that between 1980 and 1990 many of the jurisdictions surveyed switched from at-large to single-member district elections.[54] Litigation under Section 2 – or sometimes the mere threat of litigation – was the primary cause of these changes. The result of the change to single-member districts was a substantial increase in the percentage of elected officials in both cities and counties.[55]

27. Georgia continued to erect barriers to Black registration and voting after 1965. In 1966 the state amended the law permitting assistance to illiterate voters – which in the past allowed one individual to assist up to 10 illiterate voters in casting their ballot at the polls – "to provide that no person might assist more than one such voter."[56] In 1968 the Department of Justice objected to that change under the preclearance requirement set forth in Section 5 of the Act.[57]

Mobile v. Bolden," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

[53] McDonald, *Voting Rights Odyssey*, 182-84.

[54] The elimination of numbered place and majority vote requirements (classified as enhancing devices under Senate Factor 3) was often a target in Section 2 litigation.

[55] McDonald, et.al., "Georgia," 77-81, 91-100 (Tables 3.1-3.8).

[56] *Morris v. Fortson*, 261 F. Supp. 538, 541 (N.D Ga. 1966).

[57] Objection letter from Stephen J. Pollak to Arthur K. Bolton, July 11, 1968. Section 5 required that in all jurisdictions covered under the formula provided in Section 4 of the Act secure federal approval – either administratively through the Civil Rights Division of the Department of Justice or through a declaratory judgment by a three-judge court in the District of Columbia – before *any* voting change could legally be enforced.

28. In 1981 the state adopted a similar change, reducing the number of illiterate or disabled voters a person could assist from ten to five. The Department objected to this change as well, noting that "our analysis reveals that a disproportionately larger number of black than white voters depend on assistance in order to effectively exercise their right to vote."[58] According to the available census data 32 percent of Blacks aged 25 and over have completed less than five years of school, compared to eight percent of whites aged 25 and over, the Department noted.[59] Based on years of examining elections in Georgia, the Department had concluded that "the vast majority of voters who request assistance because of illiteracy are black," and that in Georgia "it is common for more than five black voters to receive assistance from the same person."[60]

29. In 1984 private plaintiffs sued state officials on behalf of minority citizens seeking, among other changes to the state's voter registration procedures, the appointment of more Black deputy registrars and the creation of additional satellite voter registration sites.[61] When the state, under the leadership of Secretary

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[58] Objection letter from William Bradford Reynolds to Michael Bowers, September 18, 1981, 2-3. In the same letter the Department objected to a change in the procedures for voter identification, which gave wide discretion to local registrars to determine which documents were (and were not) sufficient to identify the person seeking to register.

[59] *Id.*, 3. The latest available census data at the time of the objection were from the 1970 census.

[60] *Id.*

[61] *Voter Education Project v. Cleland*, CA84:1181A (N.D. Ga. 1984). See the

of State Max Cleland, agreed to encourage local boards of registrars to appoint more black deputy registrars and provide more satellite registration locations, the court dismissed the case.[62] The State Board of Elections then adopted regulations that "established minimum requirements for the provision of satellite registration opportunities," according to the Department of Justice.[63] The new regulations included "a formula specifying the minimum number of satellite locations in each county and requiring that satellite locations be open a minimum number of weekend and weekday evening hours."[64]

30. The Department objected in 1994 to some aspects of Georgia's changes designed to comply with the National Voter Registration Act of 1993 (NVRA).[65] The NVRA "specifically provides" that procedures for removing registered voters

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summary in Laughlin McDonald and Daniel Levitas, *Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union* (March 2006), 161-63.

[62] McDonald, et.al., "Georgia," in Davidson and Grofman (eds.), *Quiet Revolution in the South*, 76, 411.

[63] Objection letter from John R. Dunne to Mark H. Cohen, February 11, 1992, 1-2.

[64] *Id.* When Georgia tried to cut back on the availability of satellite registration in 1991, the Department of Justice objected to amendments that would "reduce the minimum number of permanent satellite voter registration locations established by certain counties and eliminate the requirement for Saturday registration hours" for satellite registration sites other than for "months when "potentially significant elections regularly occur," the Department pointed out. African Americans of voting age still registered at "a significantly lower rate than voting age whites." At the time of the November 1990 general election "only 52.3 percent of voting age blacks were registered compared to 62.1 percent of eligible whites." *Id.*, 1-2.

[65] The changes were set forth in Georgia Act No. 1207 (1994). See the Objection letter from Deval Patrick to Dennis Dunn, October 24, 1994.

from the registration rolls "shall not" result in the removal of any person from the registration rolls for Federal office "by reason of the person's failure to vote."[66] In response to this objection the state amended its election laws to comply with the NVRA, according to the trial court in a later case.[67] Among these changes in 1995 "Georgia began keeping statewide voter registration data."[68] This change helped the state to develop the statewide voter registration database required by federal legislation following the controversy surrounding the disputed presidential election of 2000.

31. During the period between 1965 and the Supreme Court's decision in *Shelby v. Holder*, the Department of Justice blocked 177 proposed changes to election law by Georgia and its counties and municipalities. Of these Section 5 objections, 48 blocked redistricting plans – 13 of them objections to state house, state senate, or congressional plans.[69] Another 68 blocked adoption of *enhancing devices* such as numbered place or majority vote requirements, staggered terms, or residency districts used in at-large election systems.[70]

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[66] *Id.*, 1, 3.
[67] *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1268 n.3 (N.D. Ga. 2005).
[68] *Id.*, at 1269. The court noted (p. 1272) that the state "admits that there was no centralized system in place prior to 1995."
[69] https://www.justice.gov/crt/voting-determination-letters-georgia.
[70] *Id.*

Realignment in the Georgia Party System

32. The defeat of incumbent Governor Roy Barnes, a Democrat, by Republican challenger Sonny Perdue in the 2002 gubernatorial election was, according to political scientists Danny Hayes and Seth McKee, "more than stunning – it was historic." The outcome "broke a Democratic stronghold on the Georgia governorship that had kept the GOP out since Reconstruction."[71] It signaled, moreover, what proved to be a major realignment in the Georgia party system. Since 2002 Republicans have, as political scientists M.V. Hood and Seth McKee observe, consistently won most statewide contests and controlled majorities in the state senate (beginning in 2002) and the state house (since 2004).[72]

33. Historians and political scientists distinguish between two types of partisan realignment in the United States: secular and critical realignment. Secular

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[71] Danny Hayes and Seth C. McKee, "Booting Barnes: Explaining the Historic Upset in the 2002 Georgia Gubernatorial Election," *Politics and Policy*, 32 (December 2004), 1. The Democrats still commanded majorities in both houses of the General Assembly until 2002

[72] M.V. Hood III and Seth C. McKee, "Why Georgia, Why? Peach State Residents' Perceptions of Voting-Related Proprieties and Their Impact on the 2018 Gubernatorial Election," *Social Science Quarterly*, 100 (No. 5, 2019), 1828, 1830. The legislative redistricting plans in place at the time of the 2002 elections were adopted by the state in 1997, following the Supreme Court decisions in *Miller v. Johnson*, 515 U.S. 900 (1996), and *Abrams v. Johnson*, 521 U.S. 74 (1997). They were precleared by the U.S. Attorney General, and first implemented in the 1998 elections: Pamela S. Karlan, "*Georgia v. Ashcroft* and the Retrogression of Retrogression," *Election Law Journal*, (No. 4, 2004), at 24.

realignment is gradual, incremental realignment, in which groups of voters change their party identification and voter preferences in a consistent trend over a significant amount of time. Critical realignment, on the other hand, refers to a rapid change in the outcome of elections that fundamentally reshapes the balance of power between the parties for perhaps a generation.[73]

34. Georgia has experienced a secular realignment of white voters leaving the Democratic Party and switching to the Republican Party – beginning in the 1960s with white opposition to the 1964 Civil Rights Act and the 1965 Voting Rights Act – but accelerating in the two decades preceding 2002.[74] The 2002 gubernatorial election, on the other hand, looks like part of a critical realignment in the Georgia party system – accelerating the pattern of white movement into the Republican Party and reaching a critical mass that gave the Republicans long-standing control of state government and politics.[75]

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[73] See, e.g., V.O. Key, Jr., "A Theory of Critical Elections," *Journal of Politics*, 17 (February 1955), 3-18; Walter Dean Burnham, "The Changing Shape of the American Political Universe, *American Political Science Review*, 59 (March 1965), 7-28; Burnham, *Critical Elections and the Mainsprings of American Politics* (New York, W.W. Norton, 1970); James L. Sundquist, *Dynamics of the Party System* (Washington, D.C. The Brookings Institution, 1970).

[74] Hayes and McKee, "Booting Barnes," 709. See also *id.*, Figure 2, p. 710, Table 1, pp. 712-13; Charles S. Bullock III, "The History of Redistricting in Georgia," 52 *Ga. L. Rev*. 1057, 1092 (2018).

[75] See, e.g., Charles S. Bullock III, "Georgia: Republicans at the High-Water Mark?" in Bullock and Mark J. Rozell (eds.), *The New Politics of the Old South* 5th edition (New York, Rowman & Littlefield, 2014), 49, 51 (Table 2.1).

A Long History of Racially Polarized Voting

35. In white-majority Georgia during the 21st century Republicans – like Democrats earlier – have benefitted from a pattern of voting that was polarized along racial lines.[76] The pattern was evident in the 2002 election. As political scientist Charles Bullock points out, "the relationship between race and voting in 2002 was striking."[77] Despite the long decades of racially polarized voting – both in the years when a Democratic majority controlled state politics and long after Republicans became the majority party in Georgia – Black candidates have seldom been elected to office in more than token numbers, except from black-majority districts created as a result of successful voting rights lawsuits brought under Section 2 of the Voting Rights Act after Congress amended the statute in 1982.[78] Fairly drawn single-member districts provided a means for increasing minority representation *in spite of* white refusal to vote for minority-preferred candidates.[79]

36. A recent study by Bullock and fellow political scientist Ronald Keith Gaddie provides evidence that statewide voting patterns in Georgia continued to be polarized along racial lines into the 21st century. Increasingly, however, white voters were switching from the Democratic to the Republican Party. In the 1990s

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[76] Hood and McKee, "Booting Barnes," 709.
[77] Bullock, "Georgia," 58.
[78] McDonald, et.al., "Georgia," 77-81, 91-100 (Tables 3.1-3.8).
[79] *Id.*, 84-85, 412-13 (citing judicial findings of racially polarized voting in Notes 118-125 (p. 84).

African American congressional candidates running as Democrats enjoyed between 77 and 100 percent of black votes, but only 18-54 percent of white votes. Between 30 and 45 percent of white voters in the state supported Democratic candidates in the 1990s, but only about a quarter of whites voted Democratic beginning in 2002. Black voters favored Democratic candidates by 85 to 92 percent.[80] Such polarized voting is evidence of vote dilution, of course, only in contests where minority-preferred candidates usually lose.[81]

37. Exit poll data have consistently demonstrated that Black voters are the most reliably Democratic voters in Georgia, whereas most whites consistently vote Republican.[82] In their 2009 study Bullock and Gaddie report, based on exit poll results, that "since 1992, Democrats have always taken at least 80 percent of the black vote while most whites invariably preferred Republicans."[83] Exit polls in statewide elections for federal office from 1992 through 2006 show that Blacks

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[80] Charles S. Bullock III and Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (Norman, University of Oklahoma Press, 2009), 101 (Table 3.6).
[81] See, e.g., Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York, Cambridge University Press, 1992), 50-51.
[82] The fact that partisan identification was becoming more racially polarized than in the past does *not* suggest that the *cause* of the polarized voting was partisanship rather than race. Racially polarized voting was the dominant pattern in interracial contests both under Democratic majorities and, after 2002, under Republican majorities.
[83] Bullock and Gaddie, *Triumph of Voting Rights*, 100.

supported the Democratic candidate at rates between 81 and 92 percent, whereas whites voted Democratic at rates between 23 and 45 percent.[84]

38. Georgia elections, like elections elsewhere in the United States, are usually characterized by racial disparities in voter participation.[85] Official data on turnout by race – such as Georgia provides – reveal that, from 1992 through 2006, the white percentage of registered voters who turned out to vote in the general election for president – normally the highest turnout election for all voters – was consistently higher than for Black Georgians. In the 1996 presidential election, for example, white turnout was 64.3 percent and Black turnout only 53.5 percent. In 2000 the presidential election brought 71.4 percent of whites to the polls but only 62.8 percent of Blacks. In the 2004 contest white turnout was at 80.4 percent and Black turnout at only 72.2 percent.[86]

39. The election of the first Black president in 2008 was seen by some as a sign that racially polarized voting had declined in the United States – and in the South. In fact, if we look at exit poll data for the nation – as well as for Georgia

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[84] *Id.*, 100, 103 (Table 3.8).

[85] Bullock and Gaddie cite the estimates of registration and turnout by race for Georgia from 1980 through 2006 published by the Bureau of the Census. *Id.*, at 380 (Table B.1: registration by race), and 383 (Table B.2: turnout by race). The Census Bureau at that time included Hispanics with non-Hispanic whites in the published estimates of white voters; correcting that error, Bullock and Gaddie report that non-Hispanic white registration and turnout in Georgia continues to exceed that for Blacks, according to the Census estimates.

[86] *Id.*, 86 (Table 3.2).

and other states formerly covered by the preclearance requirements of Section 5 of the Voting Rights Act – the pattern looks quite different. Based on exit poll data, three respected political scientists found that "the magnitude of race-based differences in voting preferences *increased* across the nation in the 2008 election," but especially in Georgia and other Southern states.[87] Turnout among Blacks increased from 2004 to 2008, "and they voted more solidly for the Democrats in 2008 than they did in 2004."[88] The level of racial polarization was greater in the states covered by Section 5 than in the rest of the country. In the covered states there was a 71 percent difference between presidential preferences for whites and Blacks: only 26 percent of whites supported Barack Obama, compared with 97 percent of Blacks, and 67 percent of Hispanics. In noncovered states a much greater 48 percent of whites voted for Obama, compared with 96 percent of Blacks (a smaller gap of 48 percent, compared with 71 percent in covered states).[89]

40. Georgia's voting patterns resembled trends in the rest of the South in 2008. Only 23 percent of Georgia whites voted for Obama (the same percentage as voted for Democratic nominee John Kerry in 2004). Thus, it was the

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[87] Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, "Race, Region, and Vote Choice in the 2008 Presidential Election: Implications for the Future of the Voting Rights Act," 123 *Harv. L. Rev*. 1385, 1401, 1409-10 (2010), emphasis added.
[88] *Id.*, 1412.
[89] *Id.*, 1415 (Table 5).

overwhelming support of Black voters – turning out in greater numbers – that boosted Obama's total vote in Georgia (increasing the vote received by the Democratic candidate from 41 percent in 2004 to 47 percent in 2008).[90] The results when President Obama sought re-election in 2012 displayed the same pattern, as the three political scientists noted in a follow-up study: "Voting in the covered jurisdictions has become even more polarized over the last four years, as the gap between whites and racial minorities has continued to grow. This is due both to a decline among whites and an increase among minorities in supporting President Obama's reelection."[91]

41. Party identification estimates in Georgia from a 2014 survey designed by political scientists show only 25 percent of whites still reporting themselves as Democrats while 59 percent said they were Republicans and 17 percent were Independents. Among Black Georgians reporting their party identification in the survey, 73 percent saw themselves as Democrats, only 12 percent as Republicans and 15 percent as Independents.[92] According to exit poll data, the 2014

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[90] *Id.*, 1422 (Table 9). The Republican candidate, John McCain, still carried Georgia in the 2008 election.

[91] Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, "Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act," 126 *Harv. L. Rev. Forum*, 205, 206 (April 2013).

[92] Declaration of Vincent L. Hutchings, *Georgia State Conference NAACP v. Gwinnett County Board of Registrations and Elections*, C. A. No.1:16-cv-02852 (N.D. Ga.), August 6, 2017, Table 1. (p. 9), relying on Georgia statewide survey

gubernatorial election in Georgia displayed the same general pattern of racial polarization as in past years. Only 25 percent of whites voted for the Democratic gubernatorial candidate in the 2014 poll data, as compared with 89 percent of Blacks. The victorious Republican candidate, Nathan Deal, won the support of 73 percent of white voters but only 10 percent of Black Georgians.[93]

42. Republicans controlled the governor's office after 2002, both houses of the General Assembly by 2004, and – after the 2006 election of Republican Karen Handel – the office of Secretary of State. According to political scientists Hood and McKee, the likeliest threat to Republican domination of Georgia elections – should it materialize – came from "changing demography and minority voter mobilization in favor of Democrats."[94] Between 1990 and 2016, Georgia's Black population – by now including modest percentages of African immigrants – increased from 27 to 31 percent, and Hispanics from two to nine percent. As a result, the non-Hispanic white population declined from 71 to 60 percent.[95] Because in the 21st century minority voters routinely support Democratic candidates, Republicans stood to benefit from making registration and voting by minority citizens more difficult. "Control of election administration," note Hood

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data from the Pew Research Center.
[93] *Id.*, 11, relying on CNN exit poll data.
[94] Hood and McKee, "Why Georgia, Why?" 1832.
[95] *Id.*, 1833.

and McKee, "has increasingly been recognized and deployed as a means to seek electoral advantage," not just in Georgia but in the United States generally."[96]

Immigration and Citizenship Issues

43. A key aspect of demographic change that could add to the threat against Republican strength at the polls in recent decades has been immigration. In the 1990s Georgia experienced – in proportion to its prior population – the second highest increase in minority population of any state in the country. Much of this growth was due to migration from Latin America, Asia, and Africa[97] – but also to migration of Hispanics, Asians, and Africans from other states in this country. These immigrants were attracted by booming economic conditions in agriculture, construction, poultry processing, and the carpet industry.[98] A lawyer for the

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[96] *Id.* The specific election administration issues Hood and McKee cite (pp. 1833-34) are: the first Georgia law establishing a very strict photo identification requirement for in-person voting, Georgia's "use it or lose it" law (that may have been noncompliant with the National Voter Registration Act), the requirement that the information on voter registration applications match *exactly* the information for the applicant on the driver's license database or that of the Social Security Administration, and the vulnerability of the state's voter registration database to hacking.

[97] We learn from Stephanie A. Bohon, Megan Conley, and Michelle Brown, "Unequal Protection Under the Law: Racial Disparities for Hispanics in the Case of *Smith v. Georgia*," *American Behavioral Scientist*, (2014), 12, that according to ACS data Georgia had over 10,000 black non-citizens, mostly from Africa.

[98] Micki Neal and Stephanie A. Bohon, "The Dixie Diaspora: Attitudes Toward Immigrants in Georgia," *Sociological Spectrum*, 23 (2003), 181-212 (data cited on p. 182), noting that 25 Georgia counties saw increases in immigrants of 50 percent or greater. *Id.*, 191.

Immigration and Naturalization Service declared: "Immigrants are the key to the Georgia economy. Hispanics keep the poultry industry running in Gainesville and the carpet industry productive in Dalton."[99] By 2005, moreover, four counties in the Atlanta metropolitan area – Fulton, DeKalb, Cobb, and Gwinnett, where construction, manufacturing, and retail provided plenty of jobs – were home to more than half of the state's 650,000 Hispanics.[100]

44. Increased immigration unsurprisingly brought a growing percentage of non-citizens. In 1990 only 2.7 percent of the state's population was foreign-born. By 2000 those born in other countries made up 7.1 percent of the population; by 2017 the one-year American Community Survey (ACS) estimated that 10.2 percent of Georgia's population was foreign-born.[101] Some, however, had lived in other states before moving to Georgia in search of opportunity. Many of the foreign-

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[99] *Id.*, 190. Corporate executives in Dalton's carpet factories described Mexican immigrants as the "lifeblood" of the industry.

[100] Debra Sabia, "The Anti-Immigrant Fervor in Georgia: Return of the Nativist or Just Politics as Usual?" *Politics & Policy*, 38 (No. 1, 2010), 53-80 (data reported on p. 56). See also Robert A. Yarbrough, "Becoming 'Hispanic' in the 'New South': Central American Immigrants' Racialization Experiences in Atlanta, GA, USA." *GeoJournal* 75 (No. 3, 2010), 249-60. After mapping the location of Central American immigrants in the Atlanta region, using a measure known as a Location Quotient, Yarbrough notes (p. 251) that their greatest concentration was in "the I-85/Buford Highway corridor stretching through northern DeKalb and western Gwinnett counties," an area "known for its immigrant residential settlement as well as immigrant-driven business activities."

[101] Migration Policy Institute (MPI), "State Demographics Data: Georgia." MPI reports rely on data from the decennial U.S. Census and estimates from the American Community Survey which are reported here.

born became U.S. citizens – and could then legally register and vote. The proportion of the foreign-born in Georgia who were naturalized citizens was 29.3 percent in 2000, and 43.6 percent according to the 2017 ACS estimate.[102]

45. Georgia continued to have increases in its Hispanic community. Between 2000 and 2015, the state had the highest growth rate in its Hispanic population in the entire country – 118.8 percent.[103] Hispanics constituted the largest contingent of the state's foreign-born immigrants, according to the 2017 estimates: 48.1 percent. Breaking down the total number of Hispanics by nation of origin, Mexicans made up 23.1 percent of the state's foreign-born, other Central American countries 8.9 percent, the Caribbean 9.4 percent, and South American countries another 6.7 percent.[104] Predictably, the changing demographics in the Atlanta metropolitan area, the smaller urban centers of Dalton, Gainesville, and Athens, and the agricultural counties of southeastern Georgia had a significant impact on the state's politics – still under Republican control.

46. Republican legislators' concern about the effects of rapid immigration was already on display by 2006 when the state adopted SB 529, the Security and

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[102] *Id*.

[103] Atlanta Regional Commission, "Regional Snapshot: Metro Atlanta's Hispanic and Latino Community" (February 2018), citing the Pew Research Center tabulations of the 2000 census and the 2015 ACS.

[104] MPI, "State Demographics Data: Georgia." The percentage who are non-citizens had decreased from 70.7 percent in 2000 to 56.4 percent in 2017.

Immigration Compliance Act. Two key provisions of the act required verification of citizenship for either applications for employment or applications for public benefits. Section 2 of the bill required employers hiring a new worker to participate in a federal work authorization program – E-Verify – to determine, among other things, whether the applicant was a U.S. citizen.[105] Section 9 required citizenship verification for any person applying for public benefits (local, state, or federal benefits), utilizing a program operated by the Department of Homeland Security called Systematic Alien Verification of Entitlement (SAVE).[106]

47. Two other provisions of SB 529 created a process for local and state law enforcement to assist in enforcing federal immigration laws.[107] Section 4 directed the state's Commissioner of the Department of Labor to negotiate a Memorandum of Understanding (MOA) with the U.S. Department of Justice or the Department of Homeland Security "concerning the enforcement of federal immigration and

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[105] S.B. 529, pp. 2-3, Section 2, amending Code Section 13-10-91 (and applying to some but not all categories of employers). Ryan Mahoney, "Perdue Signs Illegal Immigration Bill," *Atlanta Business Chronicle*, April 17, 2006, characterized this provision as "targeting illegal immigrants and their employers."

[106] S.B. 529, pp. 11-13, Section 9, Code Section 50-36-1 to Title 50 of the Georgia Code. The policies at issue in these provisions were designed to identify – and remove – undocumented immigrants who were not U.S. citizens. Identifying undocumented immigrants was a legitimate goal, but the laws were drafted in such a way that – at least as implemented – they swept more broadly than necessary, risking a discriminatory effect.

[107] S.B. 529, pp. 5-6, Section 4 (relating to "peace officers") and Section 5 (relating to penal institutions).

custom laws, detention and removals, and investigations" in Georgia.[108] Federal funding would be required under such an MOA to provide for training Georgia law enforcement officers to enforce federal immigration law, "while performing within the scope of his or her authorized duties."[109] Section 5 of the act specified that whenever a person charged with a felony (as well as "with driving under the influence") is confined to jail in a municipality or county "a reasonable effort shall be made to determine the nationality of the person." If the person proved to be a foreign national, law enforcement was to seek citizenship verification through the Department of Homeland Security. The Georgia Sheriffs Association was to issue guidelines and procedures for carrying out this responsibility.[110]

48. When signing the bill Republican Governor Sonny Perdue justified SB 529 in inflammatory language reflecting his party's current preoccupation with the problem of illegal immigrants gaining access to welfare benefits – as well as committing voter fraud – that rose to the level of demagoguery. "It is simply unacceptable for people to sneak into this country illegally on Thursday, obtain a government-issued ID on Friday, head for the welfare office on Monday, and go to vote on Tuesday."[111] The state's voting process at the time – including a restrictive

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[108] S.B. 529, p. 5, Section 4 adding a new code section, 35-2-14.
[109] *Id*.
[110] *Id*.
[111] Quoted in Sabia, "Anti-Immigrant Fervor in Georgia," 62. Although inflammatory, the Governor's remarks did not rise to the level of a contemporary

photo identification requirement for in-person voting – made the Governor's claim of undocumented immigrants voting extremely unlikely, unless local election officials were routinely failing to enforce the law.

49. Six of 18 members of the Latino Commission for a New Georgia – established by Perdue in 2003 to "play a consulting role in policy development" – resigned in protest over his decision to sign SB 529 into law. As one of those resigning in protest – a restaurateur who described himself as "a dedicated Republican and citizen of Georgia" – put it: "By continuing to serve, I feel I would be giving you credibility for having compassion and understanding of the plight of the Latino people which you obviously do not have."[112] According to an Associated Press story, "Hispanic groups warned that Georgia's immigration crackdown would turn conservative Hispanic voters away from the Republican Party."[113]

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speech given by activist D. A. King to a Republican audience, warning that illegal immigrants were "not here to mow your lawn. They're here to blow up your buildings and kill your children, you, and me."

[112] Alex Salgueiro, president of the Savannah Restaurants Group, quoted in Walter C. Jones, "6 Latinos Leave Perdue Panel; One-Third of Economic Group Resigns; Many Cite Immigration Bill," *Florida Times Union*, April 21, 2006. Other members submitting their resignations included Sara Gonzalez, president of the Georgia Hispanic Chamber of Commerce, and Venus Gines, former Cobb County chair of the Republican National Hispanic Association.

[113] Vicky Eckenrode, Associated Press, "Athens March, Vigil One of Many Scheduled Today," *Athens Banner-Herald*, May 1, 2006.

50. Governor Perdue's assertion that immigrants cost taxpayers by depending on public assistance programs, was factually incorrect, according to an analysis of the issue by the Georgia Budget and Policy Institute (GBPI) a few months earlier. The author, Sara Beth Coffey, addressed the "belief among some Georgians that undocumented immigrants are abusing the system and receiving services from which they are restricted by federal law."[114] She pointed out that legislation currently under consideration – likely SB 529 – "seeks to restrict undocumented immigrants from government services," but the majority of those services are already restricted by federal law." She then listed the welfare benefits "for which undocumented immigrants do not qualify" under federal law: food stamps; Social Security; Supplemental Security Income; Temporary Assistance for Needy Families (TANF); Full-Scope Medicaid; Medicare "Premium Free" (Part A); Peach Care (Georgia's children's health insurance); and HUD Public Housing and Section 8 programs. The only benefits for which undocumented immigrants *did* qualify were state-funded programs *not* affected by SB 529: "K-12 public education and emergency medical care."[115] Coffey also calculated that on average

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[114] Sarah Beth Coffey, "Undocumented Immigrants in Georgia: Tax Contribution and Fiscal Concerns" (Georgia Budget and Policy Institute, January 2006), p. 1.

[115] Coffey, "Undocumented Immigrants in Georgia," p. 3. See also Neal and Bohon, "Dixie Diaspora," 191-92, citing a 1997 report from the Georgia Department of Human Resources showing that immigrants made up only 1.2 percent of all families receiving TANF benefits and only 1.3 percent of families

an "undocumented family in Georgia contributes between $2,340 and $2,470 in state and local sales, income, and property taxes combined" – or between $1,800 and $1,860 if the family does not pay income taxes."[116] The Governor's claims about the costs to taxpayers of benefits enjoyed by illegal immigrants could only have been true if persons charged with enforcing state and federal law in Georgia failed to enforce those legal restrictions. In short, setting up barriers to the use of public benefits by illegal immigrants was a solution in search of a problem.

51. Businessmen – normally a key focus of the state's Republican leadership – struggled to understand the ways in which SB 529 would affect them. According to a news account from Gwinnett County, the local Chamber of Commerce held a session in October attended by around 50 business leaders "to try to learn how to comply with the new laws, which go into effect next year."[117] A local accountant explained to his audience that "companies that contract with the state must confirm employees are eligible through a Department of Homeland Security database" – E-Verify – "that is wrong about 20 to 40 percent of the time."[118] The accountant added that there were "a lot of reasons why the mismatches are happening," such as "the Hispanic tradition of keeping the last

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receiving food stamps.

[116] *Id.*, p. 2.

[117] "Law Boosts Businesses' Burden," *Gwinnett Daily Post*, October 20, 2006.

[118] *Id.*

name of both the father and the mother after marriage."[119] A lawyer at the Chamber of Commerce meeting saw little practical need for such restrictions as in SB 529, expressing his view that "racism never left Georgia. It just laid dormant for a while until they found someone else to pick on."[120]

52. In September 2006, a few months after SB 529 was signed into law – even before many of its provisions were implemented – local law enforcement in Georgia cooperated with U.S. Immigration and Customs Enforcement (ICE) in raids on undocumented immigrants. In Forsyth County 20 sheriff's deputies worked with ICE agents in a pre-dawn raid on a local construction firm and rounded up 30 undocumented workers who worked there. The sheriff's office had been investigating allegations of fake resident alien cards (green cards) and Social Security cards.[121] In the little southeast Georgia town of Stillmore, in Emmanuel County, federal agents raided the local chicken-processing plant and the surrounding area. "They cuffed and arrested more than 120 illegal immigrants, mostly men, and took them away."[122] When the raid went down, another reporter

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[119] *Id*.
[120] *Id*.
[121] "30 Men Snared in Raid on Company," *Forsyth County News*, September 17, 2006, p. 1A. A follow-up story reported that all of them men "have immigration holds and are likely to be deported." See "Workplace Raid Signals Changes in Strategies," *Forsyth County News*, September 21, 2006, p. 1A.
[122] *Id*. Another news account reported that many Hispanics who were not arrested fled and one family "hid for two nights in a tree." The reporter estimated that "perhaps as many as 300 others disappeared." "Crackdown on Immigrants

noted, the local sheriff "began to get calls from residents wondering why armed men with bulletproof vests were running down the sidewalk; why Mexican immigrants were hiding behind homes and in the woods."[123] By October, 2,000 people marched near the state capitol to protest SB 529, according to yet another reporter. A group of Latino men carried a sign in English that made its point despite the syntax and spelling: "I never live from welfare because I hard worker. I just build houses for yu."[124]

53. In 2011 Georgia returned to the concerns addressed in 2006 when the legislature adopted HB 87.[125] This bill – which was among the most controversial pieces of legislation in the 2011 session – was essentially an effort to provide more effective enforcement of the provisions in the 2006 law.[126] HB 87 spelled out requirements for anyone contracting with the state – and any sub-contractors – to use E-Verify.[127] It created a new crime of "aggravated identity fraud" whenever a

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Empties a Town," *Christian Science Monitor*, October 3, 2006, p. 1.

[123] "Immigration Issue Ripples Both Ways," *Atlanta Journal and Constitution (AJC)*, September 25, 2006, p. B1.

[124] "Latinos Call for Legalization," *AJC*, October 8, 2006, p. D3.

[125] HB 87 was enacted into law as the Illegal Immigration Reform and Enforcement Act, 2011 Ga. Laws 795.

[126] Note, "State Government HB 87," 28 Ga. St. U. L. Rev. 51, 57 (Fall 2011). This Note provides a detailed legislative history of HB 87 accompanied by the authors' analysis of the bill. A legislative study committee set up in 2010 concluded, after multiple hearings, that SB 529 did not have any enforcement mechanisms. HB 87 was designed to establish effective ways of putting teeth into enforcement. *Id.*, 86-87.

[127] *Id.*, 77. All employers were to submit compliance reports annually.

person used fictitious or counterfeit information for the purpose of obtaining employment, and specified the penalties for the offense.[128] The bill also specified penalties for knowingly transporting or harboring illegal immigrants or inducing them to enter the state.[129] It authorized all law enforcement officers to use the resources of their office to work with federal immigration authorities, and to arrest and transport illegal immigrants.[130] HB 87 added penalties for agency heads who violated the requirements for using E-Verify or SAVE or other requirements of the bill.[131] It set up a new Immigration Enforcement Review Board, established the procedures under which it would operate, and gave it authority to investigate complaints.[132]

54. The crackdown against undocumented immigrants threatened to cause problems with traditional Republican constituencies in business and agriculture – which underscores the importance of lawmakers' animosity against undocumented immigrants – most of whom were Hispanic. According to a report in the state's leading newspaper, Republican Governor Nathan Deal and Republican legislators "came under intense pressure in recent weeks from business groups that lobbied

[128] *Id.*, 77-78.
[129] *Id.*, 78.
[130] *Id.*, 79.
[131] *Id.*, 80-81.
[132] *Id.*, 81-82.

against the proposed law."[133] The requirement to use the federal E-Verify database was a "particular concern to Georgia businesses," in part because they faced financial penalties "for not complying with the E-Verify requirement."[134] According to another report, HB 87 "has drawn stiff opposition from the state's agricultural, landscaping, restaurant and tourism industries, who "fear the law will damage the state's economy by scaring away migrant workers" and prompting cancellations of scheduled conferences.[135] "With the law passed and ready for implementation, many rural farmers – especially in Central and South Georgia – are taking notice of the exodus of migrant workers and immigrants which has left some farmers without workers to pick crops."[136] Many of these farmers who are "losing their crops in these rural counties," the reporter added, "had voted Republican for years."[137]

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[133] Jeremy Redmon, "Georgia Lawmakers Pass Illegal Immigration Crackdown," *Atlanta Journal and Constitution*, April 15, 2011.
[134] *Id.* "We're coming out of [a] recession, and businesses are doing all they can do right now to stay afloat," according to Jann Moore of the Gwinnett County Chamber of Commerce. *Id.*
[135] Jeremy Redmon, "Governor Signs Arizona-style Immigration Bill into Law," *Atlanta Journal and Constitution*, May 13, 2011.
[136] "Rural Republicans in Georgia Can't Have It Both Ways," *Macon Examiner*, June 21, 2011.
[137] *Id.* See also Megan McArdle, "Georgia's Harsh Immigration Law Costs Millions in Unharvested Crops," *The Atlantic*, June 21, 2011.

55. The law's constitutionality was challenged by private plaintiffs seeking a preliminary injunction shortly after it was enacted into law.[138] Their primary legal argument – at least the one that succeeded before the trial court – was that Sections 7 and 8 of the act pre-empted federal immigration law.[139] Summarizing Section 7, the court said it "prohibits 'transporting or moving an illegal alien' [as well as] 'concealing or harboring an illegal alien'" and "'inducing an illegal alien to enter' into [Georgia] while committing another criminal offense."[140] Section 8, the court added, "authorizes Georgia law enforcement officers to investigate the immigration status of criminal suspects where the officer has probable cause to believe that the suspect committed another criminal offense."[141] If the officer concludes that the suspect is an illegal immigrant, moreover, "he may detain the suspect, transport him to a state of federal detention facility," or notify the Department of Homeland Security.[142] The court granted the plaintiffs' motion for a preliminary injunction as to these two sections of HB 87, because the plaintiffs "demonstrated likelihood of success on the merits of their claim that federal law preempted" the enforcement actions required by each.[143] The court added that the

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[138] *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011).
[139] *Id.* at 1340.
[140] *Id.* at 1322.
[141] *Id.*
[142] *Id.*
[143] *Id.* at 1317, 1340.

"apparent legislative intent is to create such a climate of hostility, fear, mistrust and insecurity that all illegal aliens will leave Georgia."[144]

56. When Governor Nathan Deal signed HB 87 into law, he told reporters "this legislation I believe is a responsible step forward in the absence of federal action."[145] The author of HB 87, Republican Representative Matt Ramsey, "said the bill addresses issues forced on the states because of the federal government's decades-long failure to secure the nation's borders."[146] To this claim the judge hearing the case bristled: "The widespread belief that the federal government is doing nothing about illegal immigration is a myth," and the state's claim "has no basis in fact."[147]

57. Political participation by Hispanics increased after 2004 but remained significantly lower than registration and turnout rates among African Americans and non-Hispanic whites, according to a recent study.[148] In 2008, 48 percent of the

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[144] *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d, at 1333.
[145] Quoted in "Deal Signs Immigration Bill," *Augusta Chronicle*, May 24, 2011.
[146] "Georgia Governor to Sign Law Targeting Illegal Immigrants," *CNN*, April 15, 2011.
[147] *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d, at 1335. On appeal the Eleventh Circuit upheld the preliminary injunction on Section 7 but not Section 8. Because the appeals court had affirmed the preliminary injunction against Section 7 of HB 87, however, the trial court permanently enjoined that section of the law. *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012).
[148] M.V. Hood III and Charles S. Bullock III, "Tracking Hispanic Political Emergence in Georgia: An Update," *Social Science Quarterly*, 102 (January 2021), 259-268. The authors used official data from the Georgia Secretary of State's

Hispanic citizen voting age population (CVAP) was registered to vote, compared with 87 percent for Black Georgians and 85 percent for whites. By 2016 Hispanic registration had increased to 57 percent of CVAP, compared with 92 percent for Blacks and 87 percent for whites. By the 2018 off-year elections, Hispanic registration dropped to 54 percent of CVAP, but Black registration represented 81 percent and white registration was at 81 percent.[149] Turnout as a percentage of registered voters revealed even greater disparities. In the historic 2008 election Hispanic turnout was only 53 percent, while Blacks turned out as 68 percent of registered voters – and white turnout was an even higher 70 percent. In the 2016 presidential election 54 percent of Hispanic registered voters turned out to vote, 56 percent of Blacks, and a far higher 68 percent of white registrants. In 2018 only 43 percent of Hispanic registrants voted, compared with 54 percent of Blacks and 62 percent of whites.[150]

Implementation of the Help America Vote Act (HAVA)

58. Following the 2000 election controversy surrounding the disputed presidential election between Republican George W. Bush and Democrat Albert Gore, the Congress adopted the Help America Vote Act (HAVA) in 2002. Georgia's compliance with the requirements of the HAVA reflected an uncertain

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office.

[149] *Id.*, 262 (Table 2).

[150] *Id.*, 265 (Figure 3).

grasp of what HAVA requires. Decisions by the federal courts and by the Department of Justice in a Section 5 preclearance review were often necessary to obtain Georgia's compliance with the law. This was especially true of the state's flawed implementation of HAVA's requirement that states use electronic database matching to create a voter verification program.

59. Among other requirements all states must meet under HAVA, Georgia was obligated to create a digital statewide voter registration database and compare the information provided by registration applicants with information provided by those individuals to the state's driver license database – or for those without drivers' license or other state identification – to the database of the Social Security Agency (SSA).[151] The purpose of this database matching was to identify the applicant as a resident of the state and county and to confirm that the person was a citizen of the United States. To be clear, HAVA did *not* require states to deny voter registration to persons whose information in the paired databases did not satisfy an exact match requirement. As the Department of Justice noted in objecting to Georgia's voter verification program in 2009: "HAVA does not speak to the question of whether a state should deem an applicant eligible or ineligible, whose information fails to match on some element contained in a state or federal

[151] *Morales v. Handel*, No. 1:08-CV-3172, 2008 WL 9401054, at *5 (N.D. Ga. Oct. 27, 2008).

database."[152] Whether the applicant was qualified under state law for registration as a legal voter, in other words, was left to the judgment of the states – and was thus subject to the preclearance requirements of Section 5.[153]

60. Georgia had not undertaken HAVA's voter verification requirement for several years because it contended the state was exempt from this requirement on the theory that its voter registration law already obligated voter registration applicants to supply their full nine-digit Social Security number.[154] That defense had been rejected by a federal court decision in 2005, however.[155]

61. Georgia began to comply with the voter verification provisions of HAVA in March 2007, when Secretary of State Karen Handel entered into an information-sharing agreement with the state's Department of Driver Services (DDS).[156] Under this agreement DDS was to compare the information about each new applicant for voter registration with information about that individual in the

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[152] Loretta King, Acting Assistant Attorney General, to Attorney General Thurbert Baker, May 29, 2009. This objection letter accurately summarizes relevant aspects of HAVA. See Arthur L. Burris and Eric A. Fisher, *The Help America Vote Act and Election Administration: Overview and Selected Issues for the 2016 Election* (Congressional Research Service, October 18, 2016).
[153] King to Baker, May 29, 2009.
[154] *Id.* at *6, 9, n.9.
[155] *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga., 2005), rejecting the state's interpretation of 42 U.S.C. Sec. 15483(a)(5)(D).
[156] *Morales*, at 6. See "Memorandum of Understanding Between the Georgia Department of Driver Services and the Office of the Secretary of State" (March 27, 2007).

DDS database of persons with drivers' licenses – and to flag any individual whose information did not *exactly* match in this process as unverified.[157]

62. In addition, the state's increasing concern about verifying citizenship status led to a new source of information from the federal government. According to the DDS: "As of January 1, 2008, Georgia state law requires DDS to verify all immigration documents presented by non-citizens via SAVE" – the acronym for "Systematic Alien Verification for Entitlements" – "prior to issuing a driver's license/permit/ID card."[158] SAVE is a program permitting a state agency supplying benefits or services to legal residents (who are not citizens of the United States) to ask U.S. Citizenship and Immigration Services (the federal agency administering SAVE) for information about an applicant's citizenship status. The inquiry does *not* utilize a database matching methodology: as USCIS puts it, SAVE is "not itself a database." The inquiring agency supplies "the applicant's biographic information (first name, last name and date of birth)," and one of three numeric identifiers supplied by USCIS or "an unexpired foreign passport number."[159] Most importantly, SAVE supplies the citizenship status of persons applying for government benefits or services "at the time an application is initially

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[157] *Id*. The database matching was to examine the following fields: "driver's license number, last name, first name, date of birth, last four digits of Social Security number, and citizenship status.
[158] Citing O.C.G.A. 40-5-21.1. (https://dds.georgia.gov/save).
[159] https:www.uscis.gov/save/verification-process.

filed."[160] That is, when DDS checks SAVE for information about citizenship status of a voter registration applicant who is a naturalized citizen, the information may well date from a time *prior to* naturalization and thus be inaccurate at the time of applying for voter registration.

63. DDS had, in turn, signed a memorandum of understanding with the Social Security Administration (SSA) to verify – through a database SSA designated HAVV – an applicant's status where the applicant lacked a driver's license.[161] This made Georgia one of the first states to require evidence of a voter registration applicant's citizenship status through database matching.[162]

64. As it turned out, using HAVV was problematic. Database matching is a complex process requiring a reliable methodology – and requiring an exact match between variables in separate databases is guaranteed to produce errors. This problem is explained in an inspector general's report from the Social Security Administration, designed "to assess the accuracy of the verification responses

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[160] Immigration Policy Center, "Using the Systematic Alien Verification for Entitlements (SAVE) Program for Voter Eligibility Verification" (August 2012), p. 1 (emphases in original document).

[161] "User Agreement for Voter Registration Information Verification System Services between The Georgia Department of Driver Services (MVA) and the Social Security Administration (SSA)," (signed February 14, 2007, by the Commissioner of DDS and April 23, 2007, by the Regional Commissioner of SSA).

[162] Ana Henderson, "Citizenship, Voting, and Asian American Political Engagement," 3 *UC Irvine L. Rev*. 1077, 1084 (2013).

provided by the Help America Vote Verification (HAVV)."[163] The Inspector General reported that, as of December 2008, SSA had signed user agreements with state drivers' license offices from 46 states and territories "to use the HAVV system when a voter registrant who does not have a driver's license number provides the last four digits of their SSN for verification purposes."[164] SSA had been able to provide a match for *only 69 percent* of the applicants nationwide – some of those matches also applied to another applicant as well – and a *"no-match"* response for 31 percent. "This occurs because the last four digits of the SSN is [sic] not a unique identifier," the Inspector General explained.[165] As a result of its investigation, the report concluded that HAVV had "a significantly higher no-match response rate when compared to other verification programs used by States and employers," which ranged from 6 to 15 percent.[166]

65. The Inspector General identified the problem as HAVV's use of an "exact match" requirement, searching "for exact matches on the first and last name, which is problematic because it does not consider possible human error (that is, data entry errors, transpositions [of characters], and nicknames."[167] He then

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[163] "Quick Response Evaluation: Accuracy of the Help America Vote Verification Program Responses," A-03-09-29115, June 2009, p. 1.
[164] *Id.*, p. 2.
[165] *Id.*, p. 2 (emphasis added).
[166] *Id.*, p. 4.
[167] *Id.*, p. 6. Table 3 on p. 7 of the report provided illustrations of the sort of human errors that result in a no-match in HAVV.

added a damning lament: "The HAVV program provided the States with responses that may have prevented eligible individuals from registering to vote and allowed ineligible individuals to vote."[168] This inspector general's report clearly should have raised a red flag for officials charged with administering Georgia's voter verification process about the state's use of an exact match methodology like that used by HAVV.[169]

66. On May 29, 2009, the Department of Justice objected to Georgia's voter verification program.[170] "Our analysis shows that the state's process does not produce accurate and reliable information and that thousands of citizens who are in fact eligible to vote under Georgia law have been flagged" as ineligible.[171] The objection letter cited "deposition testimony by state employees" in the *Morales* litigation indicating "that an error as simple as transposition of one digit of a driver license number can lead to an erroneous notation of a non-match across all

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[168] *Id.*, p. 11.

[169] The same sort of human error that affected the no-match results in HAVV searches are inevitable in *any* exact match data linkage – such as efforts to match individual records in a voter registration database and a driver's license database (matches affecting far more Georgians than the linkage between DDS and HAVV). To be reliable, Georgia would have to devise ways of checking and cleaning up its database matching results to address these routine human errors or face the prospect of disfranchising numerous individuals who were, in fact, qualified to vote.

[170] Loretta King, Acting Assistant Attorney General, to Attorney General Thurbert Baker, May 29, 2009, p. 1.

[171] *Id.*, p. 3.

compared fields."[172] The problem was compounded when inquiring into an applicant's citizenship status. Georgia's use of data from HAVV to ascertain whether individual applicants were citizens increased "the potential for unreliable results." Of the 7,007 individuals who have been flagged as non-citizens due to the use of HAVV data, "more than half were in fact citizens."[173]

67. The Department noted further that "[t]he impact of these errors falls disproportionately on minority voters," including Hispanic and Asian as well as Black applicants.[174] The state generated two reports for use by local registrars, R1 (examining variables other than citizenship) and R2, "which seeks to verify citizenship status," explained the Department.[175] The R1 report for those applying between May 2008 and March 2009 indicated that "sixty percent more African American" than white applicants were flagged as non-matches, although Blacks and whites "represent approximately equal shares" of new registrants. On the R2 report, Hispanics and Asians were "more than twice as likely to appear on the list" of non-citizens "as are white applicants."[176]

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[172] *Id.*
[173] "Of those persons erroneously identified as non-citizens, 14.9 percent, more than one in seven, established eligibility with a birth certificate, showing that they were born in this country. Another 45.7 percent provided proof that they were naturalized citizens, suggesting that the driver's license data base is not current for recently naturalized citizens." *Id.*, p. 4.
[174] *Id.*, p. 4.
[175] *Id.*, p. 3.
[176] *Id.*, p. 4.

68. In 2010, after apparently taking steps to reform its procedures for implementing the state's exact match law, Georgia sought preclearance of its newly revised voter verification process from a three-judge court in the District of Columbia as well as through administrative review by the Department of Justice.[177] The submission followed shortly after Republican Governor Sonny Perdue appointed Brian Kemp as Secretary of State, when the prior Secretary, Karen Handel, resigned to run (unsuccessfully) for governor.[178]

69. Although the new procedure submitted by the Secretary of State's office continued to employ an exact match requirement, the submission letter set forth a detailed explanation of the revised program, including its database matching with DDS and SSA. The revised voter verification system, according to the state, called for careful monitoring of the voter verification process on a daily basis, with

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[177] *Georgia v. Holder*, 748 F. Supp. 2d 16 (D.D.C. 2010); Submission letter from Anne W. Lewis to T. Christian Herren, August 17, 2010. At the time I was employed as a social science analyst in the Voting Section of the Civil Rights Division. For the record, however, I was involved neither in the Section 5 litigation nor in the administrative review of this submission and have never examined the internal documents relating to the preclearance of this version of Georgia's voter verification process.

[178] According to a news account, Georgia Attorney General Thurbert Baker, an African American Democrat, "refused to file the lawsuit," which was filed instead by private attorney Anne Lewis, serving as a special attorney general for this purpose. Ewa Kochanska, "Georgia Files Lawsuit Against U.S. Justice Department," *Atlanta Examiner*, June 23, 2010. According to this account, new Secretary Brian Kemp "accused the Obama administration of playing politics" when objecting to the prior submission of the state's voter verification process, a charge with which Baker disagreed.

prompt notice to any applicant whom the system could not verify as a citizen and resident of Georgia under the exact match requirement.[179] According to the federal court, on August 18, 2010 the Department "informed the plaintiff [Georgia] that it did not intend to object to implementation of the revised Verification Process."[180] "With preclearance in hand," noted a staff member in the Secretary of State's office a few years later, Georgia's voter verification procedures "remained largely unchanged until 2016."[181]

Georgia's Flawed System of Voter Verification in Operation, 2010-2016

70. The central focus of the state's voter verification process remained its use of an inflexible and unsystematic "exact match" procedure for database

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[179] Lewis to Herren, August 17, 2010, Exhibit 1, pp. 1-5. According to another news account, a spokesman for the Secretary of State confirmed that the state was proposing changes in "the scope of the [verification] program." Aaron Gould Sheinin, "Justice Department Approves Georgia Voter Verification System," *Atlanta Journal-Constitution*, August 23, 2010. The Department's decision not to object to the revised voter verification system was apparently based on its assessment that – by comparison to the system which had prompted an objection in 2009 – this new version did not appear retrogressive in effect.

[180] 748 F. Supp. 2d at 18. Secretary of State Brian Kemp characterized the preclearance decision to suggest that administrative review would have had a different result without court involvement. "After the litigation was filed, it took less than two months for the DOJ to consent to preclearance of the verification process and determine that Georgia's verification process, including citizenship verification, does not have a discriminatory effect or purpose." See his op-ed column, "Kemp: Victory for Georgia Voters," *Athens Banner-Herald*, August 27, 2010.

[181] Kevin Rayburn, "Georgia HAVA Verification," Power Point presentation (undated, but based on internal evidence prepared in 2017), p. 7. At the time, Rayburn was assistant general counsel to the Secretary of State.

matching. Evaluating Georgia's implementation of its exact match requirement after the 2010 preclearance requires an understanding of the methodological problems confronting any database matching.[182] Most experts on database matching use several different algorithms to provide a more accurate result, rather than a simple (and inflexible) "exact match" of each pair of variables such as Georgia's voter verification system employed.[183]

71. A reliable example of how database matching should be used – and how it can be employed properly in a system of voter verification – is provided by expert witness reports in a voting rights case filed against the state in 2016. Both

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[182] A careful study examining the degree of election fraud in Georgia by political scientists M.V. Hood and William Gillespie describes how database matching *should* work – using official data provided by the Secretary of State's Office. M. V. Hood III and William Gillespie, "They Just Do Not Vote Like They Used to: A Methodology to Empirically Assess Election Fraud," *Social Science Quarterly*, 93 (March 2012), 79-94. They explain that to produce valid data, researchers "cannot simply stop with matching cases" – the first step (and in some instances the last step) in Georgia's exact match methodology. "The next step must involve manually examining those cases where matches [or non-matches] between databases are produced" – to examine whether the initial finding is in error. *Id.*, 80. "The more characteristics of a subject one can utilize (i.e., county of residence, race/ethnicity, sex)," Hood and Gillespie point out, "the more confidence one can have in matching cases or in eliminating cases that are not, in reality, matches."

[183] "Probability theory dictates that when dealing with a large number of cases, a certain number of false matches will be produced. For example, the *birthday paradox* or *problem* tells us that by random chance a certain number of unrelated registrants under examination will have the same date of birth and even name," Hood and Gillespie, "They Just Do Not Vote Like They Used to," 80, citing Michael P. McDonald and Justin Levitt, "Seeing Double Voting: An Extension of the Birthday Problem," *Election Law Journal*, 7 (No. 2, 2008), 111-22.

Gary Bartlett – for two decades the executive director of the North Carolina State Board of Elections – and political scientist Michael McDonald, who has examined database matching in several states, including Georgia, describe in detail how Georgia's voter verification process worked between 2010 and 2016, relying on documents received from the state through the discovery process in that case. Both experts criticize the state's inadequate methods of applying the exact match requirement.[184] McDonald's report also provides detailed quantitative evidence regarding the racial *effects* of Georgia's implementation of the exact match law.[185] These careful studies demonstrate that the state's assurances in its 2010 Section 5 submission of its revised voter verification program – that it would carefully monitor the exact match requirement on a daily basis to prevent errors in determining voter eligibility (and promptly notify applicants which documents they needed to provide– were not, in fact, effectively implemented.

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[184] See Gary O. Bartlett, Declaration, September 14, 2016, *Georgia State Conf. NAACP v. Kemp*, No. 2:16-cv-00219 (N.D. Ga.), September 14, 2016; Dr. Michael P. McDonald Expert Report, September 14, 2016, *Georgia State Conf. NAACP v. Kemp*, No. 2:16-cv-00219 (N.D. Ga.). The plaintiffs also used a third expert, Christopher Brill, a senior data analyst with TargetSmart Communications, LLC, who prepared data files for use by Professor McDonald and provided a preliminary analysis of the data. See "Declaration of Christopher Brill," *Georgia State Conf. NAACP v. Kemp*, September 14, 2016 (hereafter Brill 2016 Declaration).

[185] McDonald 2016 Report, and McDonald 2018 Declaration.

72. Statisticians and social scientists have known for decades that an exact match procedure such as Georgia's is deeply flawed.[186] "The DDS exact matching procedure is a primitive method that is no longer an accepted practice in the field."[187] Georgia's exact match method does not even take simple steps such as standardizing how names are recorded, such as by removing all spaces, hyphens, or apostrophes, McDonald points out.[188] In his view, when Georgia revised its voter verification process in 2010 it ignored the criticism of the exact match procedure identified in the 2009 evaluation of the HAVV system by the Social Security Administration's Inspector General.[189]

73. McDonald examines all the records of applicants whom Georgia ruled ineligible to register and those whose applications were listed as pending – between July 7, 2013, and July 15, 2016. These were the files provided to the plaintiffs during the discovery process in that litigation.[190] Black Georgians were 28.2 percent of those registered during a roughly comparable period, but an astonishing *68.5* percent of the applicants in the pending or cancellation files

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[186] McDonald 2016 Report, 8-9, citing Ivan Fellegi and Alan Sunter, "A Theory for Record Linkage," *Journal of the American Statistical Association*, 64 (1969), 1183-1210, and Ahmed Elmagarmid, Panagiotis Ipeirotis, and Vassilios Verykios, "Duplicate Record Detection: A Survey," *IEEE Transactions on Knowledge and Data Engineering*, 19 (2007), 1-16.
[187] McDonald 2016 Report, 9.
[188] *Id.*
[189] *Id.*, 11-14.
[190] *Id.*, 16-17.

(25,213 individuals). In contrast, only 4,409 non-Hispanic white applicants were in the cancelled or pending files (12.0 percent).[191]

74. Separating the applicants who failed the exact match requirement with DDS from those failing the SSA exact match, McDonald finds the same pattern of racial disparity in each. In the DDS match, Black Georgians, who made up only 28.2 percent of the registered voters (as noted above), were 53.3 percent of applicants in the cancelled and pending files. By contrast, non-Hispanic whites – 48.3 percent of the registered voters – were a far lower 18.3 percent of those canceled or pending.[192] In the SSA match, Blacks made up 74.6 percent of applicants in the cancelled and pending files, and non-Hispanic whites were only 9.5 percent.[193]

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[191] *Id.*, 17 (Table 2). Because Hispanics as well as Asian and Pacific Islanders constituted such small percentages of the registered voters statewide, it is useful to consider their proportion of those in pending or canceled status separately. Only 3.7 percent of the registered voters during this period were Hispanics, but they made up 6.9 percent of those in pending or canceled status (almost twice as high). Only 2.6 percent of the recently registered voters were Asian or Pacific Islanders, but they constituted 3.3 percent of those in the pending or canceled category.

[192] *Id.*, 18 (Tables 3A and 3B). In the DDS match Hispanics, who were (as noted above) only 3.7 percent of recently registered voters, made up 13.2 percent of those in the canceled or pending files. Asian or Pacific Islanders were only 2.6 percent of the registered voters but 7.5 percent of those canceled or pending. The data for both groups, in short, revealed a significantly higher rate of non-matches compared with their percentage of the registered voters, resembling the patterns for African Americans.

[193] *Id.*, 18 (Tables 3A and 3B). In the SSA match Hispanics, who were (as noted above) only 3.7 percent of recently registered voters, made up 4.4 percent of those in pending or canceled status. Surprisingly, Asian and Pacific Islanders were 2.6

75. Summing up these findings, McDonald observes that "there are almost twice as many registered whites than blacks, but there are nearly six times more black applicants than whites in cancelled or pending status who failed the DDS or SSA exact match." This leads him to the natural conclusion that Georgia's practice of requiring an exact match of information in its voter registration files with DDS or SSA records "has a clear discriminatory effect."[194]

76. Beyond the racial effect of the exact match protocol, the battle faced by persons whose registration was cancelled or pending carries additional burdens. As McDonald notes, a "voter registration application is effectively a literacy and writing test."[195] In addition to the need for sufficient education to understand the application form, trying to secure approval of their voter registration requires rejected applicants to "overcome a series of unduly burdensome and arbitrary hurdles," as the veteran state election director Gary Bartlett put it in his expert report.[196]

77. First, each failed applicant had a problem finding out just why his or her registration application was flagged as a non-match – and how to cure the defect.

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percent of the registered voters but only 1.6 percent of the pending or canceled.

[194] *Id.*, 27. Election Director Chris Harvey later confirmed in a deposition that "70 or so percent of the applicants in pending status were African American." Chris Harvey, Deposition, December 5, 2019, *Fair Fight Action v. Raffensperger*, p. 207.

[195] *Id.*, 24.

[196] Bartlett 2016 Declaration, 14.

The notification letter sent to rejected applicants set a "40 day clock" in motion – the time the individual has to provide corrective information to the local registrar – but does not say when the 40 days begin.[197] Nor do the letters "provide any instruction to the applicants about what they should do if the information they originally provided in their voter registration applications was correct" – if, for example the failure to match the DDS or SSA databases was due to a clerical error by the person doing data entry for the local registrar, rather than by the applicant, or perhaps because of data entry mistakes in the DDS database.[198] In addition, "the letters fail to inform applicants that they will not be able to vote in an upcoming election unless they submit a new application before the close of registration."[199] The wording of the notification letters was sufficiently obscure that applicants "who have not attained a high school diploma or post-secondary degrees may also have difficulty understanding the letter or the urgency by which they need to act" to have their registration finally approved.[200]

78. The process, in short, was especially difficult for individuals with lower educational achievement. Just as political scientists have demonstrated the importance of disparities in socio-economic characteristics such as educational

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[197] *Id.*, 15.
[198] *Id.*, 16.
[199] *Id.*, 17.
[200] *Id.*, 18.

achievement (as measured by the census) in deterring political participation rates,[201] those disparities would also affect the ability to cope with the bureaucratic hurdles involved in correcting their registration applications. Among Black Georgian 25 years or older, 16.6 percent had less than a high school degree, whereas only 10.1 percent of non-Hispanic whites had failed to graduate from high school.[202] For Hispanics the disparity was even greater: 39.6 percent had less than a high school degree.[203]

79. Lower educational achievement was also related to economic status. The poverty rate for persons of all races 25 years or older was 29.4 percent for those with less than a high school degree, but 16.4 percent for those with a high school degree or higher (and only 4.6 percent for those with a bachelor's degree or higher.[204] The proportion of Blacks below the poverty level was 24.4 percent, compared with only 11.1 percent among whites.[205] Among Hispanics in Georgia

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[201] See for example, the classic study by Steven J. Rosenstone and Raymond E. Wolfinger, *Who Votes?* (New Haven, Yale University Press, 1978) and, following up on their insights with more recent data, Jan E. Leighley and Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States*, Princeton, Princeton University Press, 2013).
[202] *American Fact Finder*, S1501, p. 2, reporting American Community Survey, 2013-2017 5-year Estimates. I calculated each estimate of persons with less than a high school degree by subtracting the proportion with a high school degree or higher from 100 percent.
[203] *Id*.
[204] *Id*.
[205] *Id*., S1701, p. 1.

26.7 percent were below the poverty level.[206] Employment, not surprisingly, affected the degree to which persons of all races fell below the poverty level; only 8.0 percent of employed persons were below the poverty level, as compared with 35.6 percent among those unemployed.[207] The unemployment rate among African Americans in Georgia was 11.5 percent, but only 5.6 percent among non-Hispanic whites.[208] In short, there were consistent racial disparities in those socio-economic characteristics usually affecting participation rates and the same disparities are likely to have a significant impact on the ability to remedy exact match failures in the state's flawed voter verification program.

80. Minority plaintiffs filed a lawsuit on September 14, 2016, challenging the administrative policy employed by the office of the Secretary of State to enforce Georgia's exact match law, relying in part on the Bartlett and McDonald expert reports whose findings are reported in preceding paragraphs.[209] "HAVA does not mandate that voter registration applications be cancelled if the information contained on the application fails to match fields in the DDS or SSA databases," the plaintiffs noted in their complaint.[210] Nor, they argued, does the

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[206] *Id*.
[207] *Id*., p. 2.
[208] *Id*., S2301, p. 3. Among Hispanics the unemployment rate was 6.1 percent.
[209] Complaint, *Georgia State Conf. NAACP v. Kemp*, No. 2:16-cv-00219 (N.D. Ga.), September 14, 2016.
[210] *Id*., 12, citing 52 U.S.C. Section 21083, *Fla. State Conf. NAACP v. Browning*, 522 F.3d 1153, 1171-72 (11th Cir. 2008), *Washington Ass'n of Churches v. Reed*,

Georgia Election Code "specify that the 'match' be an exact match or require the cancellation of applications that do not match the DDS database," and the matching protocol adopted as an administrative policy by the Secretary of State "is not codified in any statute or regulation.[211]

81. Plaintiffs moved for a preliminary injunction shortly after filing the case. Before the preliminary injunction hearing, the defendant Secretary of State agreed to interim relief.[212] Chris Harvey, the director of the Elections Division, then sent an Official Election Bulletin (OEB) to county election and registration officials listing certain changes the state had decided to make in the voter verification process.[213] "All voters that were moved into Cancelled status by the 40 day clock because they failed verification," he added, "as of October 1, 2014 will be moved out of Cancelled status and placed into Pending status." Such applicants would be run through the exact match system again and "new [notice]

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492 F. Supp. 2d 1264, 1268-69 (W.D. Wash. 2006), *Morales v. Handel*, No. 1:08-CV-3172, 2008 WL 9401054, * 7-8 (N.D. Ga. Oct. 27, 2008).

[211] *Id.*, 12, 14, citing Ga. Code Ann. Section 21-2-216(g)(7).

[212] Kristen Clarke, Julie Houk, and John Powers, "Strict Construction of Voter Registration Laws; Georgia's Experience in 2018," Chapter 2 of *America Votes! Challenges to Modern Election Law and Voting Rights* (4th edition, American Bar Association, 2019), 21-41 (at p. 30).

[213] Chris Harvey, Official Election Bulletin (OEB), "Recent Actions for Previously Unverified Voter Registration Applicants," September 27, 2016, p. 1). Harvey's OEBs were regularly sent to all county election and registration officials in Georgia whenever regulations of the law changed, explaining precisely how the state's exact match verification was to be implemented under the new rules.

letters will be generated if they fail verification." The new notice letters would specify that – instead of the prior 40-day clock – the applicant had "one year to respond before their application is rejected." During that time, moreover, "they will be able to cast a ballot as if they were an active voter if they are able to present appropriate ID," and documentary proof of citizenship, if their citizenship was unverified through the exact match.[214] After several months the state agreed to settle the case.[215]

82. Under this agreement, applications for voter registration with fields that failed to match the records in the DDS or SSA databases would be placed in pending status and – in contrast to the prior 40-day limit (or even the one year limit just adopted in September) – would "not be under any time limitation to cure the mismatch or otherwise confirm their identity," whether the "failure to match" related to DDS, SSA, or citizenship.[216] The state also agreed to move from

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[214] *Id.* The OEB also gave two pages of detailed instructions for registrars concerning how to administer these changes. A somewhat more cumbersome process was required as to the November general election of 2016 for persons flagged as potential non-citizens, who had to present proof of citizenship to a registrar or deputy registrar to vote a regular (rather than provisional) ballot. Official Election Bulletins, "More Details on Pending Voter Registration Processing," November 4, 2016, pp. 2-4, and "Processing 'Pending' Voters on Election Day," November 4, 2016, pp. 1-2.

[215] "Settlement Agreement," February 8, 2017.

[216] *Id.*, 2. The state could still cancel applications when a notification letter as returned by the post office and applicants failed to confirm their address through the procedures spelled out in the prior exact match policy. Id., 2-3.

cancelled to pending status all applications cancelled "on or after October 1, 2013," but would then send those applications "back through the HAVA match process."[217]

Continuing Flaws in Georgia's Voter Verification System

83. Shortly after the settlement agreement, however, the Georgia legislature adopted a bill (HB 268) that undermined equitable implementation of the settlement. The prior exact match protocol – previously only an unpublished administrative procedure devised by the Secretary of State – remained in place and was now codified in Georgia law.[218] The state was on notice from expert testimony in the 2016 lawsuit that the state's exact match procedures operated with a racially discriminatory effect.[219] Despite that awareness, HB 268 left in place those very procedures requiring an exact match between the voter registration database and the DDS database – and in some instances with the SSA database.

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[217] *Id.*, 3. The settlement agreement spelled out various changes in the process of notifying applicants and new training for county registrars to administer the altered procedures for voter verification. *Id.*, 3-6 and Exhibits 2-4 (the notification process), and Exhibit 5 (training). Chris Harvey informed county election officials and registrars of the procedures revised by the settlement agreement in an Official Election Bulletin, "Updated Pending Voters Action," February 23, 2017, pp. 1-2.
[218] The Power Point presentation prepared for county election official training by Kevin Rayburn, "Georgia HAVA Verification," [2017], p. 11, confirms that, in the view of the Secretary of State's office, HB 268 "codifies the Georgia HAVA verification process."
[219] See McDonald 2016 Declaration, *passim*.

84. In October 2018 minority plaintiffs filed suit against implementation of the new law, alleging that Georgia's voter verification program continued to produce a high rate of erroneous non-matches with racially disparate results. They also filed an emergency motion for a preliminary injunction, asking the court to protect new voter registration applicants from the use of inaccurate *citizenship* information in the state's database.[220] They emphasized that the provisions of HB 268 regarding citizenship were *not* in effect at the time the parties settled the 2016 lawsuit.[221]

85. HB 268 would require different treatment for applicants with a non-match on citizenship status, as compared with all other applicants with non-matches. As Chris Harvey, the director of the Election Division, explained to county election officials and registrars in an OEB, the passage of HB 268 meant that poll workers would find in the Express Poll equipment used at every precinct "two different indicators for voters in Pending status" – either a "V" or an "X."[222] Persons with non-matching information *other than* their citizenship status (identified as "V") would, as under the settlement agreement, be able to cast a

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[220] *Georgia Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d 1251 (N.D. Ga. 2018). The allegation about the numerous non-matches with a racially discriminatory effect was supported by the Declaration of Michael McDonald, October 19, 2018, filed with the preliminary injunction motion.
[221] 347 F. Supp. 3d, at 1259.
[222] Chris Harvey, Official Election Bulletin, "Handling Pending Verification Registrations at Voting Location," October 23, 2018, p. 4.

regular ballot if they produced readily available photo identification to a poll worker.[223]

86. Persons flagged as potential non-citizens because of a failure to match exactly that individual's record in the DDS database, on the other hand, were treated differently at the polls. "If a Poll Worker pulls up [on the screen] a voter that is in X status, they will notice that the record is highlighted in purple."[224] That meant that the person was flagged as a possible non-citizen and was to be issued a "Challenged Ballot." The poll worker then had to refer the person to a deputy registrar – if the voter had the required ID documentation and proof of citizenship and if a deputy registrar happened to be at the polling place. If no deputy registrar was available, the Poll Manager had the authority to contact the county registrar's office and provide a copy of the individual's proof of citizenship "if the technology [for copying and sending the document] is available." The county registrar would then update the voter's citizenship status in eNet, instruct the poll manager "to override the X status," and the voter would then become an active voter (and eligible to case a regular ballot).[225] That presented a series of bureaucratic hurdles

[223] *Id*. A voter who did *not* have one of the required ID documents, however, would "be sent to the provisional ballot station.
[224] *Id*.
[225] *Id*.

that could take lots of time to resolve, even if the voter had proper identification, proof of citizenship, and could afford plenty of time away from work or child care.

87. According to the defendants, persons whose citizenship status was in question had several options for satisfying the requirements of HB 268. They could: 1) provide the registrar's office before the election with citizenship identification by personal delivery, mail or email; 2) produce proof of citizenship to a deputy registrar at a polling location (deputy registrars are authorized by the statute to approve the person's right to cast a regular ballot; 3) present proof of citizenship to the poll manager for the precinct, who must then transmit the proof to the county registrar's office, which can then approve the person to cast a regular ballot; 4) cast a provisional ballot if the poll manager is unable to contact the county registrar's office but confirms in writing that proof of citizenship was provided at the poll; or 5) cast a provisional ballot and submit proof of citizenship to the county registrar before the Friday after the election.[226]

88. Plaintiffs presented evidence at the preliminary injunction hearing that persuaded the court that the state's claims were not factually correct.[227] A man named Yotam Oren became a naturalized citizen on December 18, 2017. He then completed a Georgia voter registration application and included a copy of his

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[226] *Georgia Coalition for the People's Agenda v. Kemp*, at 1261-62 (summarizing the state's representation of the options).
[227] *Id.*, 1262.

naturalization certificate with the form. Mr. Oren "does not recall ever being informed that he needed to update his records with DDS" – he had been a licensed driver in Georgia since 2010 – "to reflect the change in his citizenship after becoming a naturalized citizen."[228] A notice letter from the state informed him that his application was in pending status because the DDS record showed that he was a non-citizen. He understood from the notice letter – and from the website of the Secretary of State – that he could simply bring proof of citizenship to the polling station at the time he voted and cast a regular ballot.[229]

89. When Mr. Oren went to his designated early voting location and presented his valid U.S. passport, however, poll officials were unable to approve changing his status from pending to active and told him he would have to wait or come back at another time to vote, so he left without voting.[230] On his second trip to the polling station Mr. Oren's status was changed from pending to active – "and he was finally able to cast his first vote as a United States citizen."[231] He was able to vote only "after two trips to his polling location, looking up information on the Defendant's website, placing his own call to the Fulton County voter registration

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[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.* "At a minimum," the court observed (p. 1263), of the five options the state contended were available to persons flagged as non-citizens by the Enet system, "Mr. Oren was not offered Options 3, 4, and 5."

office, and providing election officials with a name and telephone number to call to help change his status," summarized the court. The state "seems to overlook the hurdles Mr. Oren jumped" to cast his ballot.[232]

90. The court pointed out that the 2018 edition of the Georgia Poll Worker Manual did not list many of the options the state claimed were available to persons flagged as non-citizens. "This indicates a lack of training to poll workers about the citizenship verification process."[233] The Secretary of State's website, the court added, is both contrary to the language of HB 268 and to actual experience.[234] County registrars are not *required* by Georgia law to change naturalized citizens in the Enet system from pending to active status when presented with proof of naturalization at the time of the registration application. Nor does the training by the Secretary of State's office address this issue. Evidence submitted by the plaintiffs included a declaration from Diana Cofield, a recently retired deputy registrar from Troup County, Georgia.[235] "During my tenure as a deputy registrar," she notes, "I became aware of several instances where applicants were put into pending status due to the failure to verify for citizenship" – as a result of the exact

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[232] *Id.*, 1263.
[233] *Id.*
[234] *Id.*
[235] *Georgia Coalition for the People's Agenda v. Kemp*, Declaration of Diana Cofield, October 29, 2018. Ms. Cofield had worked for the Troup County Board of Elections and Registration for 14 years, ten of them as deputy registrar. She retired two months before her sworn testimony was filed.

match process with DDS – "even though they had submitted a copy of their naturalization certificate with their voter registration form."[236] Ms. Cofield testified that, to the best of her knowledge, the state's training during her service as deputy registrar never "mandat[ed] that I review the original voter registrations and accompanying documents for pending voters to determine whether they had submitted proof of their identity or citizenship."[237] Nevertheless, "I chose to do this because I believed it was a good practice to follow."[238]

91. The state's exact match methodology on applicants flagged as potential non-citizens continued to have a racially discriminatory effect.[239] McDonald reported that non-Hispanic Blacks were 30.7 percent of the applicants required to provide documentary proof of citizenship – roughly their proportion of all registered voters. Non-Hispanic whites, by comparison, who made up 54 percent of registered voters, were only 13.7 percent of applicants in pending status. Naturally the proportional effect of the exact match system on Hispanics and Asians was far greater. Hispanics were only 2.8 percent of all registered voters but

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[236] Cofield Declaration, p. 6. "I made this discovery as a result of my practice of reviewing the original applications and any accompanying documents submitted by the applicant with their registration form if the applicant was put into pending status."
[237] Cofield Declaration, pp. 6-7.
[238] *Id.*, p. 7.
[239] *Georgia Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d at 1263-64. McDonald's analysis was not contested at the preliminary injunction hearing. *Id.*, at 1264.

17 percent of persons in pending status. Asian or Pacific Islanders made up only 2.1 percent of all registered voters in Georgia, but 27 percent of applicants required to document their United States citizenship.[240]

92. The court found that plaintiffs had shown "that the burden is severe for those individuals who have been flagged and placed in pending status due to citizenship."[241] The court agreed with the state that it had an interest "in assuring that voters are United States citizens."[242] It was far too close to the 2018 election, moreover, to "require the county registrars of the 159 counties in Georgia to review the voter registration applications for all individuals placed in pending status due to citizenship by checking to see if these individuals submitted proof of citizenship with their applications" – the practice followed by the conscientious Diana Cofield of Troup County.[243]

93. On the other hand, the state's interest did *not* require "placing needless hurdles in from of voters when they bring documentary proof of citizenship with them to vote!"[244] As the court saw it, "Defendant's requirement that proof of citizenship may be accepted only by a deputy registrar cannot survive any level of

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[240] McDonald Declaration, Tables 3 & 4, p. 8.
[241] *Georgia Coalition for the People's Agenda v. Kemp*, 347 F. Supp. 3d at 1264.
[242] *Id.*
[243] *Id.*
[244] *Id.*, at 1265.

scrutiny."[245] The only justification offered by the state, the court noted, "was because the law requires deputy registrars to do so."[246] This requirement "crumbles" in light of the way in which the state actually implements citizenship identification in the election process.[247] As a result the state's requirements for citizenship verification "sweep broader than necessary to advance the State's interest, creating confusion as Election Day looms," and plaintiffs have shown "a substantial likelihood of success on the merits of their claim that Defendant has violated the right to vote for individuals placed in pending status due to citizenship."[248] The court ordered the state "to allow county officials to permit individuals flagged and placed in pending status due to citizenship to vote a regular ballot by furnishing proof of citizenship to poll managers or deputy registrars."[249]

94. Elections Division Director Chris Harvey later testified that judicial orders such as this were helpful "in that they gave us specific things to do."[250] He immediately sent out an OEB explaining to local officials: "District Court Judge Eleanor Ross has just issued an injunction regarding the way voters in pending

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[245] *Id.*
[246] *Id.*, citing O.C.G.A. Sec. 21-2-216(g)(1), codifying a provision of HB 268.
[247] *Id.*
[248] *Id.*, at 1267.
[249] *Id.*; Chris Harvey, Official Election Bulletin, "Pending Citizenship Registrations at Voting Locations," November 2, 2018), summarized District Judge Eleanor Ross's order granting the preliminary injunction in this case for election officials and registrars.
[250] Harvey, August 2019 Deposition, pp. 138-39.

citizenship status are able to resolve their citizenship verification issue at the polls."[251] He also made the judge's order available as an OEB. The key change was that "**Poll Managers**, in addition to Deputy Registrars, be allowed to verify proof of citizenship at the polls."[252] To perform this function poll managers were to be provided with "the list of acceptable proof of citizenship," which they were also to post for view at the polling place. Poll managers were also to document whenever someone in pending status on citizenship provided proof of citizenship and voted, "so that registrars can update the person's record in ENET," and the voter could be restored to active status.[253]

95. According to Harvey, the state responded to the changes required by Judge Ross's injunction by adopting HB 316 (2019).[254] Under the new law a voter's record "will no longer be placed in pending status" when flagged as a non-match by DDS or SSA database matching. Instead, the record "will be flagged Missing Identification Required (MIDR).[255] The OEB included an explanation of how to override the non-citizen flag in eNet when a voter provided proof of

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[251] Harvey, OEB (November 2, 2018).
[252] *Id*. (emphasis in original).
[253] *Id*. If the voter did *not* have proof of citizenship, he/she was still to be allowed to vote a provisional ballot. *Id*., p. 3.
[254] Harvey, August 2019 Deposition, pp. 138-39.
[255] Harvey, Official Election Bulletin, June 26, 2019, p. 1.

citizenship at the polls "and prevent new citizens that have not updated their information with DDS from failing verification."[256]

Senate Factor 5: The Continuing Effects of Past Discrimination

96. Political scientists have long documented that disparities in socio-economic characteristics such as educational achievement, per capita or household income, or employment. routinely diminish political participation rates.[257] As Bernard Grofman, the political scientist whose expert testimony for the minority plaintiffs was cited approvingly by the Supreme Court in *Gingles*, explained in a co-authored study of the totality of circumstances test: "It is one of the best established generalizations in political science that voter turnout and other forms of political participation are lower for individuals of lower socio-economic status."[258]

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[256] *Id.*

[257] See for example, the classic study by Steven J. Rosenstone and Raymond E. Wolfinger, *Who Votes?* (New Haven, Yale University Press, 1978) and, following up on their insights with more recent data, Jan E. Leighley and Jonathan Nagler, *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States*, Princeton, Princeton University Press, 2013).

[258] Bernard Grofman, et.al., "The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective," *Law & Policy*, 7 (April 1985), 199-223 (quoted passage at 220 n. 31). As Jan E. Leighley and Arnold Vedlitz, "Race, Ethnicity, and Political Participation: Competing Models and Contrasting Explanations," *Journal of Politics*, 61 (Nov. 1999), 1092-1114, observe in a careful empirical analysis based on individual-level data from Texas (at p. 1092, citing decades of research): "Studies of mass participation in the U.S. repeatedly demonstrate the critical importance of socioeconomic status (SES) as a determinant of political involvement." Their specific empirical findings (at pp. 1098-1099) show higher levels of political participation by Anglos in Texas, than for Blacks, Mexican Americans, and Asian

97. The data in the American Community Survey from the Bureau of the Census document that among Black Georgians 25 years or older, 12.4 percent had less than a high school degree, whereas only 8.8 percent of non-Hispanic whites had failed to graduate from high school. For Asians 13.4 percent had less than a high school degree, but among Hispanics a striking 35.8 percent had not graduated from high school. The same sort of disparities are found in the racial differences among persons over 25 with bachelor's degrees or higher: 25.1 percent of Blacks (and an even lower 19 percent of Hispanics), compared with 35.8 percent of non-Hispanic whites. Asians over 25 years of age were an even higher 56.9 percent.[259] As one would expect from data on educational attainment, the proportion of Black Georgians below the poverty level was 20.1 percent, compared with only 9.8 percent among non-Hispanic whites. Among Hispanics, 21.0 percent were below the poverty level, but only 10.4 percent of Asians.[260]

Americans.

[259] American Community Survey, S1501, 2020 5-year Estimates. I calculated each estimate of persons with less than a high school degree by subtracting the proportion with a high school degree or higher from 100 percent. Lower educational achievement was predictably related to economic status. Among all persons with less than a high school degree, 25.3 percent lived below the poverty level. High school graduates were only 15.3 percent below the poverty level, compared with only 10.6 percent of those with some college. Only 4.5 percent of persons with a bachelor's degree or higher fell below the poverty level. *Id*., S1701, 2020 5-year estimates.

[260] *Id*., S1701, 2020 5-year estimates. The same pattern of disparities is displayed in looking at the percent of families below the poverty level: 16.8 percent among African American and 18.1 percent among Hispanics, compared with 6.6 percent

98. Per capita income, not surprisingly, displayed racial disparities between Blacks and Hispanics when compared with non-Hispanic whites. The average per capita income among Blacks was $24,114 and $19,944 among Hispanics, compared with a much higher average per capita income among non-Hispanic whites of $39,850. Asian per capita income was almost as high as that of whites: $38,185.[261] Employment rates displayed a more mixed picture. The unemployment rate among Blacks in Georgia (8.7 percent) was twice as high as that of non-Hispanic whites (4.3 percent). Among Hispanics, however, the unemployment rate was only 4.3 percent (the same as among non-Hispanic whites), and the unemployment rate was even lower (3.3 percent) among Asians.[262]

99. In a February 28, 2022, Order Following Coordinated Hearing on Motions for Preliminary Injunction, the court observed that "Plaintiffs have offered unrebutted evidence that Black Georgians suffer socioeconomic hardships stemming from centuries-long racial discrimination."[263] The analysis by a plaintiffs' expert political scientist, furthermore, persuaded the court that "many of

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among non-Hispanic whites and 7.7 percent among Asians.

[261] *Id.*, S1902, 2020 5-year estimates.

[262] *Id.*, S2301, 2020 5-year estimates.

[263] *Alpha Phi Alpha, et.al., v. Raffensperger*, No. 1:21-CV-5337, No. 1:21-CV-5339, and No. 1:22-CV-122 (N.D. Ga.), February 28, 2022, Order Following Coordinated Hearing on Motions for Preliminary Injunction, slip op., at 212-213, citing expert testimony by political scientist Loren Collingwood, and factual stipulations between plaintiffs and defendants.

the socioeconomic disparities discussed above have been a *cause* of lower political participation among Black Georgians."[264] The court then recited census data (to which the parties had stipulated) addressing the sort of racial disparities in socioeconomic characteristics documented in the preceding paragraphs of this report.[265]

100. Georgia continues to experience racial disparities in voter turnout between non-Hispanic whites and minority citizens – previously demonstrated in the extended discussion of the history of racial discrimination affecting voting – in recent years. In the 2020 general election, according to the state's official turnout data by race, white turnout was 72.6 percent of the white registered voters but only 60 percent of registered Blacks turned out to vote.[266] Only 55.4 percent of

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[264] *Id*., at 214 (emphasis added).

[265] *Id.* Parties in cases consolidated with this one stipulated to comparable census data showing racial disparities in socio-economic characteristics. In *Grant v. Raffensperger*, No. 1-22-CV-00122 (N.D. Ga.), Joint Stipulated Facts for Preliminary Injunction Proceedings, February 4, 2022, for example, the parties agreed that: Para. 79, "the unemployment rate among Black Georgians (8.7 percent) is nearly double that of whites Georgians (4.4 percent)." Para. 80, "White households are twice as likely as Black households to report an annual income above $100,000. Para. 81, "Black Georgians are more than twice as likely . . . to live below the poverty line." Para. 82, "Black Georgians are nearly three times more likely than white Georgians to receive SNAP benefits." Para. 83, "Black adults are more likely than white adults to lack a high school diploma – 13.3 percent as compared to 9.4 percent." Para. 84, "35 percent of white Georgians over the age of 25 have obtained a bachelor's degree or higher, compared to only 24 percent of Black Georgians over the age of 25."

[266] https://sos.ga.gov/sites/default/files/bulk/Voter_Turn_Out_By_Demographics.

registered Hispanics turned out, but turnout for Asians was 64.6 of those who were registered, a higher rate than any racial group except non-Hispanic whites.[267] Voter participation was, as usual, lower in off-year elections than in general presidential elections. In the most recent off-year contest (2022), the lower turnout nevertheless revealed the usual racial disparity: 58.3 percent for whites but only 45 percent for Blacks, 37.5 percent for Asians, and 30.3 percent for Hispanics.[268] In the 2016 presidential election turnout was 67.9 for whites, 56.2 percent for Blacks, 53.6 percent for Hispanics, and 52.9 percent for Asians.[269] Clearly racial disparities in socioeconomic characteristics continue to depress minority turnout in Georgia.

101. In a very recent case addressing the statewide election of candidates for the Georgia Public Service Commission, the court's discussion of Senate Factor 5 relied on the expert testimony of political scientist Bernard Fraga, who reported the same pattern of racial disparities in turnout as documented in this court's preliminary injunction order: the "lingering effects of discrimination" continue to produce "lower rates of participation in the electoral process."[270] The

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[267] Id.

[268] Id. In the 2018 off-year elections, 62.2 percent of whites turned out, compared with an African American turnout of only 53.9 percent. Turnout for Hispanics in the 2018 contests was only 43.2 percent and for Asians only 44.4 percent.

[269] Id.

[270] *Rose v. Raffensperger*, No. 1:20-cv-02921 (N.D. Ga.), August 5, 2022, Opinion and Order, slip op., at 17, citing the Expert Report of Bernard l. Fraga, April 21,

turnout by race in the statewide Public Service Commission elections from 2016 through the 2021 runoff, using the state's citizen voting age population as the denominator, showed that non-Hispanic white voters turned out consistently at higher rates than African Americans (differences between five and 10 percent).[271] Even the defendants' expert, according to court, testified that there were "large and persistent gaps in voter turnout by race."[272] The court concluded, not surprisingly, that "Senate Factor 5 weighs in Plaintiffs' favor."[273]

102. In short, there is overwhelming empirical evidence that in Georgia the long-standing racial disparities in both socioeconomic characteristics continue along with lower voter participation by minority citizens in very recent elections, even where candidates preferred by minority voters have won. The pattern of racial discrimination against Blacks in Georgia public education documented in this report in Paragraph 14 above – reinforced by the census data cited by the Department of Justice and summarized in Paragraph 28 above – makes it clear that the current disparities in socio-economic characteristics between African Americans and non-Hispanic whites may accurately be understood as "caused" by

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2021.

[271] Fraga Expert Report, Table 1, p. 6.

[272] *Rose v. Raffensperger*, Opinion and Order, slip op., at 48, leading the court to conclude that "Senate Factor weighs in Plaintiffs' favor." *Id.*

[273] *Id.*

historical discrimination.[274] As the Congress emphasized in amending Section 2 in 1982: "Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation."[275]

Senate Factor 7: Minority Group Members Elected to Public Office

103. Minority representation in public office – like the participation rates of minority voters discussed in the preceding paragraphs – remains lower for each race than its share of Georgia's registered voters (or voting age population). Black Georgians currently make up 29.5 percent of the state's registered voters; Hispanics make up 3.9 percent and Asian/Pacific Islanders 2.8 percent of the state's registered voters. These groups total 36.1 percent, compared with the proportion of registered voters who are non-Hispanic whites (51.6 percent).[276] The state's data show that the non-Hispanic white proportion of Georgia's registered

[274] Of course, Hispanics and Asians have experienced a much shorter history in Georgia, largely restricted to the last three decades, and are a much smaller percentage of the electorate than are blacks.
[275] "Report of the Committee on the Judiciary[,] United States Senate[,] on S. 1992, Report No. 97-417, 97th Congress, 2d Session (May 25, 1982), at 29, n. 114.
[276] https://sos.ga.gov/election-data-hub. These data are provided by the state as of December 5, 2022.

voters (and its voting age population) had been declining – and the minority percentage has been increasing – for years.[277]

104. Contests for statewide constitutional offices reveal the highest degree of minority under-representation but offices elected by single-member districts, such as the congressional and state districts at issue in this litigation also show a degree of under-representation.[278]

105. Of the eight Georgia constitutional officers elected statewide, only four Black candidates in modern times have ever been elected to office in statewide general elections – as of January 1, 2022.[279] In 1998, 2002, and 2006, Thurbert

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[277] Non-Hispanic whites made up 53 percent of the state's registered voters in 2020; Blacks were only 30 percent, Hispanics only 4 percent, and Asian/Pacific Islanders only 3 percent of the registered voters. Source: Georgia Secretary of State, https://sos.ga.gov/index.php/Elections/voter_turn_out_by_demographics. In 2010 non-Hispanic whites made up a larger percentage of the state's registered voters (61.8 percent), Blacks were 29.2 percent, Hispanics only 1.5 percent, and Asian/Pacific Islanders only 1.3 percent. *Id.* The minority proportion of the state's voting age population was, of course, higher than its share of the registered voters (because not all eligible adults are registered). Georgia's voting age population was 32.9 percent single race Black, and 33.8 percent any part Black, according to the 2020 Census; the citizen voting age population was 32.9 percent single race black and 33.8 percent any part Black. *Pendergrass v. Raffensperger*, No. 1:21-CV-05339-SCJ (N.D. Ga.), Joint Stipulated Facts for Preliminary Injunction Proceedings Paragraphs 33 and 34.

[278] The districts in use in the 2020 election were, of course, drawn almost a decade earlier, with the exception of a small number of districts realigned in a mid-decade redistricting. Between the decennial census of 2010 and the 2020 census,

[279] The election of judges on the Court of Appeals and justices of the Supreme Court), constitute a special case. Members of both courts are elected statewide to staggered six-year terms. See *Legislator's Guide to the Judicial Branch* (January 2007). Judicial elections operate under special rules not applied to executive or

Baker was elected (and re-elected) Attorney General of Georgia and Mike Thurmond was elected (and re-elected) Commissioner of Labor. David Burgess was elected to the Public Service Commission.[280] Burgess was first appointed to the PSC in 1999, narrowly won his first election in 2000, and lost a re-election bid to a white candidate in a runoff election in 2006.[281] No Hispanics or Asians have ever been elected to statewide office. As was all over the news, however, Raphael Warnock was elected to the U.S. Senate in the January 2021 runoff contest – the first Black person ever elected to the U.S. Senate from Georgia – and then re-elected in 2022.

106. Five of the 14 congressional districts in Georgia elected Black candidates in the 2020 general election (all Democrats).[282] One of the five, incumbent Lucy McBath in Congressional District 6 in the suburbs of Atlanta, was re-elected despite the fact that it was a white-majority district.[283] Because of

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legislative offices. These judicial offices are discussed below.

[280] Bernard Fraga, Expert Report, April 21, 2021, *Rose v. Raffensperger*, No. 1:20-cv-02961-SDG (N.D. Ga.), at 11. Fraga, a political scientist, notes that from 1972 through 2020 there were 164 general elections for statewide office in Georgia. Blacks won only 8 of those contests (4.9 percent).

[281] *Id.*, at 12-13.

[282] See the data regarding officeholding in https://Ballotpedia.org/United_States-congressional_delegations_from_Georgia (hereafter cited as Ballotpedia Congressional).

[283] *Id.* McBeth's election in this district illustrates the importance of examining the actual patterns of minority cohesion and white cross-over voting in determining what is necessary for a fairly drawn district. See the classic analysis by Bernard Grofman, Lisa Handley, and David Lublin, "Drawing Effective Minority Districts:

McBath's success in a majority-white district, there were still five Black members in the Georgia congressional delegation (35.7 percent of the delegation).[284] One of the nine non-Hispanic white members of Georgia's congressional delegation, Carolyn Bourdeaux in District 7, was a Democrat.[285]

107. The results of the 2022 general elections did not significantly change the degree of minority representation. In the Georgia congressional delegation there were still 5 African American Representatives; each incumbent was re-elected,[286] but only because Lucy McBath moved to the 7th Congressional District after the boundaries of her 6th District were realigned beyond recognition. There were still 9 non-Hispanic whites in the delegation, but one white Democrat – Representative Carolyn Bourdeaux in the 7th District – was not re-elected, and a white Republican replaced Lucy McBath in the 6th District.[287]

108. The records of the General Assembly identify 56 members who served in the State Senate in the 2021-2022 Regular Session – one for each of the 56 senate districts.[288] Of the 56 state senators, white Republicans constituted 34 of the

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A Conceptual Framework and Some Empirical Evidence," 79 *N. Car. L. Rev.* 1383 (June 2001).

[284] See Note 277 above, citing Georgia Secretary of State, https://sos.ga.gov/index.php/Elections/voter_turn_out_by_demographics

[285] Ballotpedia Congressional.

[286] Results.enr.clarityelections.com/GA/115465/web.307039/#/summary.

[287] Id.

[288] https://Legis.ga.gov/members/Senate (hereafter cited as Georgia State Senators).

members (60.7 percent), far above their percentage of the registered voters (53 percent); there was also one Hispanic Republican.[289] There were 4 white Democratic state senators (7.1 percent of the members). Thus, there were 38 white state senators (67.9 percent). Among persons of color, there were 16 Black state senators – all Democrats – (28.6 percent of the members).[290] Two of the state senators were Asian – both Democrats – (3.6 percent). Two state senators were Hispanic – one Democrat and one Republican – (3.6 percent).[291]

109. The 2022 elections – under the new redistricting plan at issue in this litigation – resulted in 37 non-Hispanic white state senators out of 56 (66.1 percent). Of these non-Hispanic white members, 33 were Republican (60.7 percent) and 4 were Democrats (7.1 percent). There were 17 Black state senators (30.4 percent), all Democrats, 1 Asian, a Democrat, and 1 Hispanic, a Republican (1.8 percent each).[292]

110. The records of the General Assembly for the 2021-2022 Regular Session list 184 individuals as serving as members of the State House – although

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[289] See Note 277 above.
[290] Blacks were 30 percent of the registered voters. See Note 277 above.
[291] https://ballotpedia.org/Georgia_State_Senate_elections_2022; Georgia State Senators; https://www.sos.ga.gov/georgia-act-voters-report. Hispanic and Asian state senators were roughly proportional to their percentage of registered voters. See Note 277 above.
[292] Id.

there are only 180 House districts.[293] White Republicans made up 106 of the 184 persons serving in the House during the 2021-2022 session (57.6 percent); there were also 20 non-Hispanic white Democrats (10.9 percent). Thus, whites made up 68.5 percent of House members, significantly higher than their proportion of the state's registered voters.[294] Blacks made up 53 of the members (28.8 percent), all Democrats; 3 House members were Asian Democrats (1.6 percent), and 2 were Hispanic Democrats (1.1 percent).[295]

111. There was also little change in minority representation in the state House as a result of the 2022 elections. Black members elected in 2022 made up 54 members of the House (30 percent), up from 53 in 2020 (all Democrats).[296] Asian Democrats had increased from 3 elected in 2020 to 6 members after 2022 (3.3 percent), again all Democrats. There are now no Hispanic Democrats in the House. Non-Hispanic white Democrats have declined from 20 elected in 2020 to 16 elected in 2022 (8.9 percent). Non-Hispanic white Republicans are a majority

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[293] https://Legis.ga.gov/members/house (hereafter cited as Georgia Representatives). It appears that several individuals served less than a full term in the House during the 2021-2022 Regular Session.

[294] Georgia Representatives. Including the 20 white Democrats with the 106 white Republicans, non-Hispanic whites were 68.4 percent of the 184 persons who served in the House during the 2021-2022 session. Non-Hispanic whites made up 53 percent of the state's registered voters in 2020. See Note 277 above.

[295] Georgia Representatives. Blacks were only 30 percent, Hispanics only 4 percent, and Asian/Pacific Islanders only 3 percent of the registered voters. See Note 277 above.

[296] African Americans made up 30 percent of the state's registered voters. Id.

of House members at 103 (57.2 percent); there is one Hispanic Republican.[297] Thus non-Hispanic whites make up a total of 119 House members (66.1 percent) – slightly down from 126 in the previous session – but still significantly higher than its 53 percent of registered voters, according to the official figures from the Secretary of State.[298]

112. Judicial elections represent a special case in Georgia. Looking at the current members of the Georgia Supreme Court supplies an explanation of the special features of election to judicial office in the state, compared to non-judicial offices. Of the nine current justices, *eight* were first appointed to office before running and winning election as incumbents.[299] In order to assess the degree to which minority candidates have been elected to judicial office in Georgia – which differs from the process of election for non-judicial office in the state – we must start by examining the appointive process for judges.[300]

113. The great majority of judges – from the trial court level to all the higher courts – have come to the bench by appointment.[301] Since Governor Jimmy

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[297] https://ballotpedia.org/Georgia_State_Senate_elections_2022.
[298] https://sos.ga.gov/Georgia-active-voters-report. See also Note 277.
[299] https://www.gasupreme.us/court-information/biographies.
[300] See *Georgia v. Reno*, 881 F. Supp. 7 (D.D.C. 1995). The data summarized here are taken from a law review article by one of the lawyers in that case: David F. Walbert, "Georgia's Experience with the Voting Rights Act: Past, Present, and Future," 44 *Emory L.J.* 976 (1995).

[301] *Id.*, at 988. Looking first at the trial court judges, the record from the 1995 case establishes that from 1968 to mid-1944, 133 of the 233 superior court

Carter's term in office in the early 1970s, "a Judicial Nominating Commission (JNC) has screened applicants and made recommendations to the Governor," who has appointed judges "almost exclusively from the names recommended by the Commission."[302]

114. The nine current members of the Georgia Supreme Court in 2020-2022 included two persons of color (22.2 percent), both appointed by Governor Brian Kemp: African American Verda Colvin (7.1 percent) and Asian/Pacific Islander Carla Wong McMillan (7.1 percent). Both ran as incumbents for election in 2022 and won.[303] Harold Melton is an African American who served as a Georgia Supreme Court justice from 2005, when he was appointed by Governor Sonny Perdue, until 2018, when he was elevated to Chief Justice, serving until his

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judges, were first appointed to office by the governor. Of those serving in mid-1994, 100 of 145 superior court judges (69 percent) were first appointed to office, *not* running in an open election. Thus, when elected, these judges were running as incumbents. During this time period, "there were 621 instances where an incumbent superior court judge stood for election," and in 530 of those elections the incumbent ran unopposed. In only 26 of the 90 contests where the incumbents had opponents (four percent) did the incumbent lose. A similar pattern characterizes the higher courts.

[302] *Id*.

[303] Supreme Court of Georgia: https://www.gasupreme.us/court-information/biographies. Justice McMillan is the first Asian American to serve on the Supreme Court and the first to be elected to a statewide office in Georgia, first to the Court of Appeals in 2014, to which she was appointed the previous year by Governor Nathan Deal. *Id.* Justice Colvin had served for almost six years as a superior court judge before appointment to the Supreme Court. *Id.*

retirement in 2021.[304] Black Georgian Leah Ward Sears served as an associate justice of the Supreme Court from 1992, when she was appointed by Governor Zell Miller, until 2005; she was then appointed to serve as Chief Justice, retiring in 2009 from the Supreme Court.[305] Robert Benham is an African American who was appointed an associate justice in 1989 by Governor Joe Frank Harris. He was elevated to Chief Justice in 1995, serving until 2001; appointed that year to serve once again as an associate justice, Benham retired from the Supreme Court in 2020.[306] I am aware of no other persons of color who have served on the Georgia Supreme Court in the modern era, and none who were not first appointed by the Governor – and then always running as incumbents.

115. Of the 14 judges currently serving on the Court of Appeals – one seat is vacant due to the recent death of Black judge Clyde Reese[307] – there is now only one person of color on the Court (7.1 percent): Judge Yvette Miller.[308] The first Black woman to serve on the Court of Appeals, Judge Miller was appointed in 1999 by Governor Roy Barnes. She was also the first Black woman to serve as

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[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *GPB News*, "Georgia Court of Appeals Judge Clyde Reese Dies at 64," December 19, 2022. I have not found evidence regarding the choice of a replacement for Judge Reese to date.
[308] https://ballotpedia.org/Georgia_Court_of_Appeals. Before Judge Reese's death there were only two minority members of the Court (14.3 percent).

Chief Judge of the Court.[309] Governor Barnes also appointed Black judge Herbert Phipps to the Court of Appeals in 1999. Judge Phipps retired before his term ended in 2016 and was succeeded by Judge Clyde Reese.[310] In 1990 Clarence Cooper, then a Black superior court judge in Fulton County, was appointed to the Court of Appeals in 1990, where he served appointed to the federal bench in 1994 as a district court judge in the Northern District of Georgia.[311]

116. *Even in the special case of judicial office*, where gubernatorial appointment of judges and justices enables minority lawyers to run for election in the first instance with the benefit of being incumbents, election of minority candidates to public office in Georgia continued to lag behind the rate of election for non-Hispanic white candidates through the 2020 general election. The 2022 general elections did not change this pattern.

Conclusion

117. My analysis in this report demonstrates that the State of Georgia has a long history of discriminating against Black voters and other voters of color and restricting their franchise. This discrimination is not a relic of the past, but stubbornly persists to this day. Assuming that the plaintiffs meet the *Gingles* preconditions, it is my expert opinion that the Senate Factors I have examined

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[309] https:www.gaappeals.us/m-yvette-miller.
[310] https:www.gaappeals.us/Herbert-e-phipps.
[311] https://ballotpedia.org/Clarence_Cooper.

weigh in favor of finding that Georgia has violated Section 2 of the Voting Rights Act.

I reserve the right to supplement this report if additional facts, testimony, and/or materials that may come to light.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of January, 2023 at 5:00 PM.

Peyton McCrary

Peyton McCrary

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TING DETERMINATION LETTERS FOR GEORGIA

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Determination Letters for Georgia, by date.

Jurisdiction and date	Description and submission numbers	Notes
State of Georgia 06/19/1968 (pdf)	Act No. 997--assistance to illiterates (S1444)	
State of Georgia 07/11/1968 (pdf)	Act No. 993--assistance to illiterates; literacy tests; poll officials' qualifications (S1445)	
State of Georgia 08/30/1968 (pdf)	Literacy test for registration (S1492)	
Webster County 12/12/1968 (pdf)	Polling place consolidation for special election (T2055)	
Summerville (Chattooga Cty.) 12/13/1969 (pdf)	Paragraph 7--change in election procedures ()	
Clarke County School District 08/06/1971 (pdf)	Act No. 257--reduction in size of board; redistricting (V3157)	
Bibb County School District 08/24/1971 (pdf)	Act No. 747 (1971)--at-large elections (71-1306)	
Hinesville (Liberty Cty.) 10/01/1971 (pdf)	Numbered posts and majority vote requirement (V3437-3438A)	
Newnan (Coweta Cty.) 10/13/1971 (pdf)	Numbered posts (V3622)	

Exhibit
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Albany (Dougherty Cty.) 11/16/1971 (pdf)	Polling place (V3300)	
Conyers (Rockdale Cty.) 12/02/1971 (pdf)	H.B. No. 1590--terms of office; numbered posts; majority vote requirement (V3660-3662)	
Albany (Dougherty Cty.) 01/07/1972 (pdf)	Act No. 627--dates of elections (V3734)	Withdrawn 12-7-73
Waynesboro (Burke Cty.) 01/07/1972 (pdf)	Act No. 572--majority vote requirement (V3915)	
Jonesboro (Clayton Cty.) 02/04/1972 (pdf)	Act No. 323--numbered posts; majority vote requirement; election date (V3604-3605; V3859)	
State of Georgia 02/11/1972 (pdf)	Congressional reapportionment (V3679)	
State of Georgia 03/03/1972 (pdf)	State Senate and House redistricting (V3677-3678)	
State of Georgia 03/24/1972 (pdf)	State house redistricting (V4066)	
Newnan (Coweta Cty.) 07/31/1972 (pdf)	Act No. 912--numbered posts; majority vote requirement (V4482-4483)	
Twiggs County 08/07/1972 (pdf)	Act No. 649--at-large elections; residency requirement (V4594-4595)	
Thomasville School District (Thomas Cty.) 08/24/1972 (pdf)	Act No. 765--numbered posts; majority vote requirement (V4139-4140)	
Atlanta (Fulton Cty.) 11/27/1972 (pdf)	Polling places; precinct lines (V4785; V4645)	
Harris County 12/05/1972 (pdf)	Act No. 1359--numbered posts (V4767)	Withdrawn 3-30-73

Cochran (Bleckley Cty.) 01/29/1973 (pdf)	Majority vote requirement (V4817)	
Cuthbert (Randolph Cty.) 04/09/1973 (pdf)	Numbered posts (V4781)	
Ocilla (Irwin Cty.) 06/22/1973 (pdf)	Act No. 1205--majority vote requirement; filing fee increased (V4850-4851)	
Sumter Cty. School Board 07/13/1973 (pdf)	At-large elections (V5576)	
Hogansville Board of Education (Troup Cty.) 08/02/1973 (pdf)	Act No. 1052 (1973)--numbered posts; majority vote requirement (V5046-5047)	
Hogansville (Troup Cty.) 08/02/1973 (pdf)	Act No. 1053 (1973)--majority vote requirement (V5045)	
Perry (Houston Cty.) 08/14/1973 (pdf)	Majority vote requirement (V4971)	
Thomasville School District (Thomas Cty.) 08/27/1973 (pdf)	Act No. 418 (1973)--majority vote requirement; residency requirement (V5035-5036)	
Albany (Dougherty Cty.) 12/07/1973 (pdf)	Filing fees (V5761; V6028A-6029A)	
East Dublin (Laurens Cty.) 03/04/1974 (pdf)	Act R667 (1973)--numbered posts; staggered terms (V6005-6306)	
Ft. Valley (Peach Cty.) 05/13/1974 (pdf)	Numbered posts; majority vote requirement (city council and utility board) (V6250-6251)	
Fulton County 05/22/1974 (pdf)	Act No. 130 (1973)--numbered posts; majority vote requirement (V6291B-6292B; V6293)	Withdrawn 7-2-76

Clarke Cty. School District 05/30/1974 (pdf)	Act No. 602--at-large elections; numbered posts; majority vote requirement (V6311-6312; V6589-6590)	
Louisville (Jefferson Cty.) 06/04/1974 (pdf)	Act No. 1071--numbered posts; majority vote requirement; staggered terms (V5732-5733)	
East Dublin (Laurens Cty.) 06/19/1974 (pdf)	Postponement of election (V6412)	
Meriwether County 07/31/1974 (pdf)	Act No. 1046 (1970)--at-large elections; numbered posts (V3440)	Withdrawn 10-25-74
Jones County 08/12/1974 (pdf)	Polling place (V6851)	
Thomson (McDuffie Cty.) 09/03/1974 (pdf)	Numbered posts; staggered terms; expansion of council; extended terms; majority vote requirement (mayor only) (V6717-6718)	
Wadley (Jefferson Cty.) 10/30/1974 (pdf)	Act No. 1304--numbered posts; majority vote requirement (V6642)	
Stockbridge (Henry Cty.) 05/09/1975 (pdf)	Registration procedures (V6572-6574)	
Newnan (Coweta Cty.) 06/10/1975 (pdf)	Act No. 675 (1973)--staggered terms (V8149)	
Macon (Bibb Cty.) 06/13/1975 (pdf)	Redistricting (V8796)	
Madison (Morgan Cty.) 07/29/1975 (pdf)	Act Nos. 58 (1975) and 826 (1974)--numbered posts; majority vote requirement and staggered terms for board of education and city commission (V8494; V8738)	
Rome (Floyd Cty.) 08/01/1975 (pdf)	Sixty annexations (V6612)	Partial Withdrawal 10-20-75 and 8-12-76; declaratory judgment denied in City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), aff'd, 446 U.S. 156 (1980); remainder of objectionWithdrawn 8-5-80 upon change in method of election
Harris County School District	Act No. 179 (1975)--at-large elections; residency requirement	

08/18/1975 (pdf)	(V9103)	
Covington (Newton Cty.) 08/26/1975 (pdf)	Act No. 514--city charter provisions for majority vote requirement; numbered posts; staggered terms (V8698)	
Ocilla (Irwin Cty.) 10/07/1975 (pdf)	Increase in candidate's filing fees (V9325)	
Crawfordville (Taliaferro Cty.) 10/20/1975 (pdf)	S.B. No. 310 (1975)--city charter; majority vote requirement; numbered posts (V9148)	
Rome (Floyd Cty.) 10/20/1975 ()	Residency wards for board of education; majority vote and numbered post requirements with staggered terms for board of education and city commissioners (V9465-9473)	Declaratory judgment denied in City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), aff'd, 446 U.S. 156 (1980)
Athens (Clarke Cty.) 10/23/1975 (pdf)	Majority vote requirement (mayor, aldermen and recorder) (V9018)	
Newton County School District 11/03/1975 (pdf)	Act No. 163 and Act No. 332--staggered terms; majority vote requirement; at-large elections; multimember districts; residency requirement (V8862-8863)	
Glynn County 11/17/1975 (pdf)	Act No. 398 and Act No. 292--majority vote requirement; staggered terms (V9073B; V9896)	
Newton County 01/29/1976 (pdf)	Act No. 293 (1967)--multimember districts; staggered terms; and Act No. 436 (1971)--at-large elections; staggered terms; residency requirement (V8348-8349; V8350)	
Sharon (Taliaferro Cty.) 02/10/1976 (pdf)	Act No. 409 (1975)--numbered post requirement (V9074)	
Wilkes County School District and Commissioners 06/04/1976 (pdf)	At-large elections; residency requirement; staggered terms; numbered posts (X5809)	Declaratory judgement denied inWilkes County v. United States, 450 F. Supp. 1171 (D.D.C. 1978), aff'd mem. 439 U.S. 999 (1978)
Social Circle (Walton Cty.) 06/18/1976 (pdf)	Act No. 307--staggered terms; increase term (X6376)	
Long County School District	Act No. 1200 (1976)--residency requirement (X6692)	

07/16/1976 (pdf)		
Monroe (Walton Cty.) 10/13/1976 (pdf)	Two annexations (X7826)	Withdrawn 11-25-77
Rockmart (Polk Cty.) 11/26/1976 (pdf)	At-large elections; residency requirement (V7995A)	
Palmetto (Fulton Cty.) 04/27/1977 (pdf)	Act No. 489 (1977)--majority vote requirement (X9172)	
Bainbridge (Decatur Cty.) 06/03/1977 (pdf)	Reduction in size of board of aldermen; majority vote requirement; numbered posts (X7847)	
Charlton County 06/21/1977 (pdf)	Act No. 1222 (1974), Section 2--numbered posts; Section 3--staggered terms (A9353)	
Charlton Cty. School District 06/21/1977 (pdf)	Act No. 360 (1975), Sections 2, 3 and 9--at-large elections; residency requirement; numbered posts; staggered terms; majority vote (A1196)	Declaratory judgment granted in Charlton County Board of Education v. United States, No. 78-0564 (D.D.C. Nov. 1, 1978)
Moultrie (Colquitt Cty.) 06/26/1977 (pdf)	Act No. 277 (1965) and Act No. 1448 (1972)--majority vote requirement (X9984)	
Rockdale County 07/01/1977 (pdf)	Act No. 119 (1977)--at-large elections; majority vote requirement; numbered posts; staggered terms (A0930)	Withdrawn 9-9-77
Palmetto (Fulton Cty.) 07/07/1977 (pdf)	Act No. 489 (1977)--majority vote requirement (X9172)	
College Park (Fulton Cty.) 12/09/1977 (pdf)	Redistricting; seventeen annexations (V8970; A2049-2081)	Objection to annexationsWithdrawn 5-22-78
Terrell County School District 12/16/1977 (pdf)	At-large elections; staggered terms; residency requirement (A1901)	
Quitman (Brooks Cty.) 06/16/1978 (pdf)	Act No. 1011 (1970)--majority vote requirement (A5916)	

Savannah (Chatham Cty.) 06/27/1978 (pdf)	Annexation; at-large elections; numbered posts (A6074-6077)	Withdrawn 10-2-78
Kingsland (Camden Cty.) 08/04/1978 (pdf)	Polling place (A6780-6781)	
Mitchell County School District 09/15/1978 (pdf)	Act No. 832 (1970), Section 4--at-large elections; numbered posts; majority vote requirement (A3849)	Withdrawn 5-3-79
Lakeland (Lanier Cty.) 10/17/1978 (pdf)	Act No. 1053, H.B. 1278 (1974)--numbered posts (X9979)	Withdrawn 2-9-79
Pike County School District 03/15/1979 (pdf)	H.B. No. 1947 (1972)--at-large elections; residency requirement (A8374-8375)	
Henry County 07/23/1979 (pdf)	Act No. 186 (1969) - At Large method of election from residency districts for the Board of Commissioners of Henry County Georgia; and Act No. 1240 (1976) - Staggered terms under an at large method of election (C2620-2627)	
Henry County School District 07/23/1979 (pdf)	Amendment to State Constitution (H.R. No. 223-967 (1966))--at-large elections; residency requirement; staggered terms (X9999; C3246-3247)	
Statesboro (Bulloch Cty.) 12/10/1979 (pdf)	Annexation (C4120)	
Alapaha (Berrien Cty.) 03/24/1980 (pdf)	Act No. 227, H.B. No. 551 (1979))--numbered posts; majority vote requirement; filing fees; dual registration (county and city) as a prerequisite to voting in municipal elections (80-1423)	
Henry County 05/27/1980 (pdf)	Act No. 679--redistricting; 5:1 method of election (80-1579)	
Dooly County 07/31/1980 (pdf)	Act No. 237 (1967)--at-large elections; residency requirement; staggered terms (7X-0084)	
Statesboro (Bulloch Cty.) 08/15/1980 (pdf)	Annexation (80-1432)	

DeKalb County 09/11/1980 (pdf)	Disallowance of neighborhood voter registration drives (80-1489)	
Statesboro (Bulloch Cty.) 02/02/1981 (pdf)	Act No. 109 (H.B. No. 675 (1966))--increase in terms of office from two to four years (80-1433)	Withdrawn 5-13-81
Augusta (Richmond Cty.) 03/02/1981 (pdf)	Act No. 1167 (H.B. No. 1531 (1980))--majority vote (80-1648)	
Griffin-Spalding County School District (Spalding Cty.) 07/06/1981 (pdf)	Act No. 933 (H.B. No. 1127 (1972))--abolishment of the two multi-member election districts and their attendant residency districts; the establishment of a numbered posts system (81-1535)	
State of Georgia 09/18/1981 (pdf)	Act No. 793 (H.B. No. 405) and Act No. 794 (H.B. No. 406), Sections 2, 6 & 8--registration procedures; assistance to illiterates (81-1402-1403)	Objection to Section 2Withdrawn 7-26-82
State of Georgia 02/11/1982 (pdf)	Act Nos. 4, 3, and 5 (1981)--Senate, House and Congressional redistricting (81-1438)	Declaratory judgment denied as to Act No. 5 in Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem. 459 U.S. 1166 (1983)
DeKalb County 03/05/1982 (pdf)	Restriction of neighborhood voter registration drives to even-numbered years, requirement that written preclearance be received, and adoption of written policy concerning these changes (81-1425)	
Adel (Cook Cty.) 06/29/1982 (pdf)	Act No. 855 (H.B. No. 1553 (1976))--charter amendments; Ordinance No. 81-5--annexation; 21 annexations (81-1387)	Withdrawn 8-11-83 following change in method of election
Dougherty County 07/12/1982 (pdf)	Redistricting (commissioner districts) (82-1785)	
Glynn County 07/12/1982 (pdf)	Redistricting (commissioner districts) (82-1842)	
State of Georgia 08/12/1982 (pdf)	H.B. 1 EX., 1982 Extra Session Part II--proposed schedule for the conduct of 1982 Congressional elections (82-1835)	
Brunswick and Glynn Cty. 08/16/1982 (pdf)	Charter for the consolidation of Glynn County and the City of Brunswick; 6:1 method of election and districting plan; procedures for referendum election (single referendum) (81-1458; 82-1837; 81-1460; 82-1838)	

McDonough (Henry Cty.) 11/22/1982 (pdf)	Redistricting (82-1875)
Bibb County School District 11/26/1982 (pdf)	Act No. 1185 (H.B. No. 1918 (1982))--redistricting (board of education) (82-1690)
Sumter County School District 12/17/1982 (pdf)	Redistricting (82-1952)
Kingsland (Camden Cty.) 01/03/1983 (pdf)	Numbered positions (7X-0076)
Taylor County School District 08/19/1983 (pdf)	Act No. 283 (H.B. No. 566 (1975))--method of election (board of education); redistricting decrease from 9 to 5 board members (82-1954)
Sumter County School District 09/06/1983 (pdf)	Redistricting (83-1972)
Baldwin County School District 09/19/1983 (pdf)	Act No. 1275, S.B. No. 614 (1972)--at-large elections (83-1554)
College Park (Clayton and Fulton Ctys.) 12/12/1983 (pdf)	Redistricting (councilmanic districts) (83-1656)
Brunswick (Glynn Cty.) 02/21/1984 (pdf)	Procedures for referendum election on consolidation (use of only county registration list) (83-1774)
Bacon County 06/11/1984 (pdf)	Act No. 470 (H.B. No. 786 (1983))--at-large elections; Act No. 1177 (H.B. No. 1901 (1982))--at-large elections (83-1544; 83-1546)
Bacon County 06/11/1984 (pdf)	Act No. 204 (H.B. No. 243 (1963))--method of election--single-member districts to at-large with residency districts (83-1547; 83-1549)
Thomas County 07/23/1984 (pdf)	Act No. 27 (H.B. No. 762 (1983))--method of election--at-large to single-member districts; districting plan (commissioners) (83-1986)

Newnan (Coweta Cty.) 08/31/1984 (pdf)	Act No. 640 (S.B. No. 505 (1984))--method of electing the city council from at-large to single-member districts with two at-large seats; increases the number of councilmembers from four to six; districting plan (84-2106)	
McDonough (Henry Cty.) 12/03/1984 (pdf)	Districting (councilmanic districts) (84-2348)	
Griffin (Spalding Cty.) 09/25/1985 (pdf)	Method of election--from at large to 4:1; districting plan (board of commissioners) (85-2440)	
Lyons (Toombs Cty.) 11/29/1985 (pdf)	Act No. 76 (H.B. No. 327 (1985))--method of election; districting plan (85-2475)	
Forsyth (Monroe Cty.) 12/17/1985 (pdf)	Majority vote requirement; numbered positions; 10 annexations (85-2383; 85-2388; 85-2380-2381)	Objection to annexationsWithdrawn 7-8-88
Lamar County 03/18/1986 (pdf)	Act No. 513 (H.B. No. 1048 (1985))--method of election--four single-member districts and one at-large; majority vote requirement; increase in the number of county commissioners--from three to five; decrease in the terms of office--from six to four-year, staggered terms; implementation schedule; districting plan (85-2316)	
Jesup (Wayne Cty.) 03/28/1986 (pdf)	1968--numbered positions; majority vote; 1985--method of election; districting plan (85-2526)	
Quitman (Brooks Cty.) 04/28/1986 (pdf)	Method of election--from at-large to two multimember districts and one at-large position; majority vote requirement; districting plan (85-2047)	
Wrens (Jefferson Cty.) 10/20/1986 (pdf)	Majority vote requirement and the numbered posts for the election of mayor and city commission (86-2974)	
Forsyth (Monroe Cty.) 03/03/1987 (pdf)	Thirteen annexations (87-2543)	Withdrawn 7-8-88
Macon (Bibb and Jones Ctys.)	Deannexation (Act No. 590, S.B. No. 298 (1984)) (84-1966)	

04/24/1987 (pdf)		
Augusta (Richmond Cty.) 07/27/1987 (pdf)	Eight annexations (87-2594; 87-2595; 87-2596)	Withdrawn 7-15-88 upon change in method of election
Rome (Floyd Cty.) 08/11/1987 (pdf)	Act No. 240 (1987)--staggered terms and schedule for implementing staggered terms (87-2336)	
Waycross (Pierce & Ware Ctys.) 02/16/1988 (pdf)	Act No. 414 (1987)--increase in number of city commissioners from five to six, direct election of mayor by majority vote for four-year term, change in powers, duties, and authority of mayor, implementation schedule, March 8, 1988, special mayoral election (87-2691)	
Lumber City (Telfair Cty.) 07/08/1988 (pdf)	Act No. 650 (1973)--majority vote requirement for the election of the mayor and council and a runoff election procedure and date, and to the provisions of the January 8, 1988, ordinance, insofar as they codify the majority vote requirement and designated posts (88-3383-3384)	
Augusta (Richmond Cty.) and Richmond County 07/15/1988 (pdf)	Date selected for conducting consolidation referenda elections (88-3312; 88-3326)	
Augusta (Richmond Cty.) and Richmond County 05/30/1989 (pdf)	Consolidation of the City of Augusta and Richmond County, Georgia (Act No. 934 (1988)) and the attendant repeal of the city charter for the City of Augusta (Act No. 938 (1988)) (88-3313; 88-3329)	
State of Georgia 06/16/1989 (pdf)	Establishment 48 additional superior court judgeships, the specification of the date on which the first full term of office commenced for each new judgeship, and the establishment of two superior court circuits and district attorney positions to serve those circuits (88-2560-2561)	Withdrawn 4-25-90 as to the two additional superior court circuits and the district attorney positions to serve those circuits.
Lumber City (Telfair Cty.) 11/13/1989 (pdf)	Majority vote for mayor; majority vote, numbered posts and staggered terms for at-large council positions (89-2200-2201)	
State of Georgia 04/25/1990 (pdf)	Establishment of ten additional superior court judgeships and the specification of the date on which the first full term of office commenced for	Declaratory judgment granted in Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995)

	each new judgeship (90-2185; 90-3077)	
Georgia Military College District (Baldwin Cty.) 03/11/1991 (pdf)	Act No. 1155, S.B. No. 623 (1990)--which provides for a change from an elected board (six members elected from single-member districts in the City of Milledgeville and the mayor of Milledgeville, who is elected at large) to a statewide board of twelve members appointed by the governor (90-2210)	
East Dublin (Laurens Cty.) 04/26/1991 (pdf)	Method of election, districting plan, numbered posts, and a majority vote requirement for the at-large council positions (90-2776)	
State of Georgia 06/07/1991 (pdf)	Act Nos. 25 and 27 (1991), which provide respectively for the establishment of an additional superior judgeship in the Atlanta and Eastern Judicial Circuits, and specify the date on which the first full term of office for each new judgeship commences (91-1051)	
Elberton (Elbert Cty.) 07/02/1991 (pdf)	Annexation embodied in Ordinance No. 951 (1989) and the apportioning of the annexed area to single-member election districts (90-2527)	
Monroe (Walton Cty.) 07/03/1991 (pdf)	Majority vote requirement for city offices (90-4602)	Deemed precleared upon failure to object to controlling provision in 1968 Georgia State Election Code City of Monroe v. United States (11/17/97)
Hinesville (Liberty Cty.) 07/15/1991 (pdf)	Adoption of a majority vote reqirement for the election of the mayor (90-2784)	
Athens-Clarke County 10/01/1991 (pdf)	Act No. 28 (1990), which provides for an additional State Court judgeship, the creation of the State Court clerk's position, and the specification of the dates on which the relevant terms of the offices begin in the context of an at-large method of election with a majority vote requirement, and with anti-single-shot provisions in the judgeship elections (91-1258)	Withdrawn 10-23-95
State of Georgia 01/21/1992 (pdf)	1991 redistricting plans for Georgia State House, Senate and Congressional districts (91-3556; 91-3557; 91-3558)	
Sparta (Hancock Cty.) 02/04/1992 (pdf)	Adoption of numbered positions for city council elections (91-2166)	
State of Georgia 02/11/1992	Reduce the minimum number of permanent satellite voter registration locations to be	

(pdf)	established by certain counties, and eliminate the requirement for Saturday registration hours for satellite voter registration locations in the period outside the six months preceding the close of registration for November general elections in even-numbered years (89-2268)	
State of Georgia 03/20/1992 (pdf)	1992 redistricting plans for Georgia State House, Senate and Congressional districts (92-1035; 92-0712; 92-0713)	
State of Georgia 03/29/1992 (pdf)	Second 1992 redistricting plan for the Georgia State House (92-1440)	
Effingham County 07/20/1992 (pdf)	Act No. 608 (1992), which provides for a change in the method of selecting the chairperson from appointment among the commissioners to election from the county at large; expansion of the number of officials on the board of county commissioners from five to six; an increase in the term of the chairperson from a one-year to a four-year term; and the increase in the compensation for the chairperson (92-1162)	
Union City (Fulton Cty.) 10/23/1992 (pdf)	Annexation embodied in Ordinance No. 92-5 (92-2037)	Withdrawn 8-9-93
Johnson County 10/28/1992 (pdf)	Relocation of the polling place for the Wrightsville precinct from the county courthouse to the American Legion (92-3863)	
Griffin (Spalding Cty.) 11/30/1992 (pdf)	1992 redistricting plan (92-3226)	
Conyers (Rockdale Cty.) 02/16/1993 (pdf)	32 residential annexations (92-4776)	Withdrawn 9-23-93 upon change in method of election
Twiggs County 03/12/1993 (pdf)	Procedures for conducting the March 16, 1993, special tax referendum (93-0701)	
Butler (Taylor Cty.) 06/25/1993 (pdf)	Majority vote requirement and runoff provision for mayor (88-3378; 92-3058)	
Randolph County 06/28/1993 (pdf)	1993 redistricting plan for the board of commissioners; 1993 districting plan and qualifications to serve in office for the board of education (93-0299-0300)	

Millen (Jenkins Cty.) 08/02/1993 (pdf)	Implementation schedule (93-2161)	
Baldwin County 08/13/1993 (pdf)	Method of selecting magistrate: nonpartisan elections with majority vote requirement (93-2097)	
Clay County School District 10/12/1993 (pdf)	Qualifications to serve in office for the board of education (minimum education requirement) (93-2816)	
Early County School District 10/15/1993 (pdf)	Qualifications to serve in office for the board of education (minimum education requirement) (93-1830)	
Monroe (Walton Cty.) 10/22/1993 (pdf)	Method of election and districting plan (93-1647)	
McIntyre (Wilkinson Cty.) 11/09/1993 (pdf)	Majority vote requirement in elections to fill a town council vacancy (93-1432)	
LaGrange (Troup Cty.) 12/13/1993 (pdf)	Method of election: 4 single-member districts and two at large (93-1248; 93-1372; 93-3303)	
Waynesboro (Burke Cty.) 05/23/1994 (pdf)	Majority vote requirement for mayor (88-2659)	
State of Georgia 08/29/1994 (pdf)	Act No. 774 (1994), which provides for a 45 percent plurality requirement in partisan and nonpartisan general elections (94-1595)	Withdrawn 9-11-95
Fayette County 09/16/1994 (pdf)	Act No. 1129 (1994), which provides for the creation of a state court, establishes four-year terms for an elected judge and solicitor (non-partisan judicial election), candidate qualifications including residency requirements, compensation for elected positions, an implementation schedule, and designates the clerk of the Superior Court the clerk for the State Court (94-2005; 94-3614)	Withdrawn 10-23-95
LaGrange (Troup Cty.) 10/11/1994 (pdf)	Act No. 652 (1994), which provides for an increase in the number of city councilmembers from six to seven, a change in the method of electing the city council from at large to four single-member districts, two "super" districts, and one at-large	

	position (94-2267)	
State of Georgia 10/24/1994 (pdf)	Voter purge procedures proposed by Act No. 1207 (1994), which provided for mailing a registration confirmation notice to any voter that does not vote or otherwise have "contact" with the state's election administration system for a three-year period (94-2672)	
Decatur County 11/29/1994 (pdf)	Establishment of an elected chairperson, the increase in the number of county commissioners and the change in the method of election (94-2499)	
Macon (Bibb and Jones Ctys.) 12/20/1994 (pdf)	Redistricting plan (94-4188)	
Fulton County 01/24/1995 (pdf)	Act No. 731 (1994)--addition of a ninth state court judgeship, four-year term of office, and implementation schedule (94-4447)	Withdrawn 10-23-95
Jenkins County 03/20/1995 (pdf)	Polling place (District 1) (94-2260)	
State of Georgia 03/15/1996 (pdf)	1995 Georgia State House and Senate redistricting plans (95-3656)	Withdrawn 10-15-96
Webster County School District 01/11/2000 (html | pdf)	Redistricting plan (98-1663)	
Tignall (Wilkes Cty.) 03/17/2000 (html | pdf)	Proposed addition of numbered posts, staggered terms and a majority vote requirement to the method of electing councilmembers (99-2122)	
Ashburn (Turner Cty.) 10/01/2001 (html | pdf)	Adoption of numbered posts and majority-vote requirement (94-4606)	
Putnam County 08/09/2002 (html | pdf)	2001 redistricting plan (2002-2987)	
Putnam County School District 08/09/2002 (html | pdf)	2001 redistricting plan (2002-2987; 2002-2988)	
Albany (Dougherty Cty.)	2001 redistricting plan (2001-1955)	

09/23/2002 (html | pdf)	
Marion County School District 10/15/2002 (html | pdf)	2002 redistricting plan (2002-2643)
Randolph County 09/12/2006 (html | pdf)	Change in voter registration and candidate eligibility (2006-3856)
State of Georgia 5/29/2009 (html | pdf)	Voter information verification program (2008-5243)
Lowndes County 11/30/2009 (html | pdf)	2009 redistricting plan (2009-1965)
Greene County 4/13/2012 (html | pdf)	2011 redistricting plan for the Board of Commissioners and Board of Education (2011-4687)
Long County 8/27/2012 (html | pdf)	2012 redistricting plan for the Board of Commissioners and Board of Education (2012-2733)
State of Georgia 12/21/2012 (html | pdf)	Act 718 (2012) - Section 9; election date (2012-3262)

Updated August 7, 2015

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Fair Fight Action, Inc. v. Raffensperger

United States District Court for the Northern District of Georgia, Atlanta Division

September 30, 2022, Decided; September 30, 2022, Filed

CIVIL ACTION FILE No. 1:18-CV-5391-SCJ

Reporter
2022 U.S. Dist. LEXIS 179889 *; __ F.Supp.3d __; 2022 WL 4725887

FAIR FIGHT ACTION, INC., et al., Plaintiffs, v. BRAD RAFFENSPERGER, et al., Defendants.

Prior History: Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 2019 U.S. Dist. LEXIS 216866, 2019 WL 6836774 (N.D. Ga., May 30, 2019)

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Exhibit
0006
Peyton McCrary

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For Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia, Defendant: Alexander Fraser Denton, Andrew M. Swindle, Anna Nicole Edmondson, Danielle Maria Hernandez, Edward Bedard, Javier Pico-Prats, Melanie Leigh Johnson, Vincent Robert Russo, Jr., Robbins Alloy Belinfante Littlefield LLC, Atlanta, GA; Brian Edward Lake, Robbins Ross Alloy Belinfante Littlefield, LLC -Atl, Atlanta, GA; Bryan Francis Jacoutot, Diane Festin LaRoss, Taylor English Duma LLP, Atlanta, GA; Bryan P. Tyson, Strickland Brockington Lewis, LLP, Atlanta, GA; Carey Allen Miller, Robbins Alloy Belinfante Littlefield, LLC, Atlanta, GA; Joshua Barrett Belinfante, Robbins Ross Alloy Belinfante Littlefield LLC, Atlanta, GA.

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For Janice Johnston, in their official capacities as members of the STATE ELECTION BOARD, Edward Lindsey, Defendants: Bryan P. Tyson, Strickland Brockington Lewis, LLP, Atlanta, GA.

Judges: HONORABLE STEVE C. JONES, UNITED STATES DISTRICT JUDGE.

Opinion by: STEVE C. JONES

Opinion

OPINION AND MEMORANDUM OF DECISION

This is a voting rights case that resulted in wins and losses for all parties over the course of the litigation and culminated in what is believed to have been the longest voting rights bench trial in the history of the Northern District of Georgia. "[B]earing in mind that these circumstances involve 'one of the most fundamental rights of . . . citizens: the right to vote,'" the Court now, in accordance with applicable law, approaches this case with caution to render its Opinion and Memorandum of Decision, [*9] inclusive of findings of fact and conclusions of law. Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs, 775 F.3d 1336, 1343 (11th Cir. 2015) (citations omitted).

A. Procedural History

A review of the record shows that on November 27, 2018, Fair Fight Action and Care in Action filed a Complaint in this Court for declaratory and injunctive relief in which they alleged "serious and unconstitutional flaws in Georgia's elections process." Doc. No. [1], ¶ 2. The Complaint has since been amended twice, first as a matter of right on February 19, 2019, and again with permission of the Court on December 3, 2020. See Doc. Nos. [41]; [570]; [582]. Four faith-based organizations—Sixth Episcopal District of the A.M.E. Church, Ebenezer Baptist Church, Baconton Missionary Baptist Church, and Virginia-Highland Church—subsequently joined the Amended Complaint as Plaintiffs. Doc. No. [41].[12]

In the operative Second Amended Complaint, Plaintiffs sue Secretary of State Brad Raffensperger in his official capacity.[23] Doc. No. [582]. Plaintiffs also sue the State Election Board ("SEB") itself and members of the SEB in their official capacities. Id. Plaintiffs allege violations of federal law related to: the fundamental right to vote secured by the First and Fourteenth Amendments to the United States Constitution (Count I); the ban on racial discrimination in voting secured by the Fifteenth Amendment (Count II); violation of equal [*11] protection secured by the Fourteenth Amendment (Count III); violation of procedural due process secured by the Fourteenth Amendment (Count IV);[34] and violation of Section 2 of the Voting Rights Act of 1965 (Count V). Id.

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I. FINDINGS OF FACT

Having considered the evidence at trial, the parties presentations (pursuant to Federal Rule of Civil Procedure 52(c)), and closing arguments, this Court makes the following [*10] findings of fact.

[2] In the Amended Complaint, Plaintiffs modified the case-style to include the corporate names of the original two Plaintiffs, i.e., "Fair Fight Action, Inc." and "Care in Action, Inc."

[3] Plaintiffs also sued Secretary Raffensperger in his capacity as Chair of the State Election Board. Doc. No. [582], 1. However, the parties removed the "Chair" language from the case caption in their submission of their proposed consolidated pretrial order. Doc. No. [658]. The evidence at trial was that up until 2021, the Secretary of State was the chairman of the State Election Board. Tr. 4008:22-23. Pursuant to Federal Rule of Evidence 201, the Court also takes judicial notice that following recent legislation, Secretary Raffensperger is no longer the chair of the State Election Board. See O.C.G.A. § 21-2-30(a) ("There is created a state board to be known as the State Election Board, to be composed of a chairperson elected by the General Assembly . . . .").

[4] Counts I, II, III, and IV cite the alleged constitutional violation and include the language "as enforced by 42 U.S.C. § 1983." "Title 42 U.S.C. § 1983 provides every person with the right to sue those acting under color of state law for violations of federal constitutional and statutory provisions." Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1299 (11th Cir. 2007).

The Court has issued a number of substantive orders in this case. First, on May 30, 2019, the Court ruled on a Motion to Dismiss brought by Defendants. Doc. No. [68]. The Court granted the Motion to the extent it sought to dismiss the claims against the SEB premised on 42 U.S.C. § 1983 and on the Help America Vote Act (which Plaintiffs subsequently eliminated from the case with respect to all Defendants by the filing of the Second Amended Complaint). See Doc. Nos. [68], 84; [570]; [582]. The Court denied the Motion to the extent it sought to dismiss the remaining counts against all Defendants or to dismiss the Voting Rights Act claim against the SEB. Doc. No. [68], 83-84. The Court found all elements of standing were satisfied. Id. at 22.

Second, on December 27, 2019, the Court issued its decision on Plaintiffs' Motion for Preliminary Injunction, which concerned Georgia's list maintenance process and the changing of the status of a large number of Georgia voters on the State's inactive voter list to canceled status. Doc. No. [188]. The motion initially concerned 120,561 voters; however, "[s]ubsequent to the filing of Plaintiffs' motion, the Secretary of State returned 22,000 of the 120,561 voters [at issue] to the voting roll (after [*12] review of Plaintiffs' briefing and based upon the definition of a calendar year)." Doc. No. [188], 2-3. The Court eventually denied Plaintiffs' motion on Eleventh Amendment and state sovereignty grounds. Id. at 32. At the conclusion of the order, the Court exercised its inherent authority to control the conduct of the parties and ordered Defendants to make additional diligent and reasonable efforts (through notices on the Secretary of State's website and press releases) to inform the general public of the voter list maintenance process and the need for the canceled voters to reregister to vote during the applicable registration time period. Id. at 188.

Third, on February 16, 2021, the Court issued a decision on Defendants' Motion for Summary Judgment with respect to jurisdictional issues. Doc. No. [612]. The Court dismissed Plaintiffs' claims about changes in precincts and polling places on standing grounds, and it dismissed Plaintiffs' claims as they pertained to security of the voter registration database, dates of birth on absentee ballots, and failure to notify voters of absentee ballot rejections for mootness. Id. at 71-72. The standing dismissal was based largely on a recent opinion from the Eleventh [*13] Circuit, Jacobson v. Florida Secretary of State, 957 F.3d 1193 (11th Cir.), opinion vacated and superseded, 974 F.3d 1236 (11th Cir. 2020). The mootness dismissal was based upon the State of Georgia's significant change to its election laws in the form of HB 316 and HB 392 and cessation of the behavior on which Plaintiffs' claims were based. As stated in the Court's prior orders:

> During the 2019 Legislative Session, the Georgia General Assembly passed HB 316 and HB 392. HB 316, which was signed into law by the Governor on April 2, 2019, amends the Georgia Election Code to, among other things, provide for more notice under Georgia's voter-list-maintenance process; to provide that a voter registration is not automatically rejected under the Exact Match policy; to provide for the implementation of new voting machines; to prohibit the superintendent of a county from changing a polling place less than thirty days before a general primary or general election; to authorize the Secretary of State to become a member of a nongovernmental entity whose purpose is to share and exchange information in order to improve the accuracy and efficiency of voter registration systems; and to change the way which provisional ballots and absentee ballots are counted
>
> . . . .
>
> HB 392, which was signed into [*14] law by the Governor on April 29, 2019, requires the Secretary of State to promulgate a regulation establishing industry-based security standards and to annually certify that Georgia is substantially complying with its own security regulations.

Doc. No. [68], 23-24; see also Doc. No. [612], 58-64.

Fourth, the Court issued a decision on Defendants' Motion for Summary Judgment on the merits on March 31, 2021. Doc. No. [617]. The Court dismissed claims relating in general to provisional ballots, absentee ballot rejections, the untimely mailing of absentee ballots, and the "voter purge" process.[45] Id. at 24. The Court also dismissed Fifteenth Amendment claims and equal protection claims based on racial discrimination (other than those pertaining to Exact Match);[6] equal protection

[45] Throughout the litigation, Plaintiffs have used the term "voter purge," while Defendants have used the term "list maintenance" to refer to the process by which inactive voters are moved to canceled status in the voters rolls upon the occurrence of certain triggering events. Doc. No. [617], 10. As this issue has been dismissed, it is not necessary to enter a ruling in this Opinion as to the proper term.

Finally, on November 15, 2021, the [*15] Court issued a decision on Defendants' Renewed Motion for Summary Judgment on Plaintiffs' Voting Rights Act claim following the Supreme Court's July 1, 2021, decision in Brnovich v. Democratic National Committee, __ U.S. __, 141 S. Ct. 222, 207 L. Ed. 2d 1165 (2020), which was consolidated with Arizona Republican Party. See 141 S. Ct. 2321, 210 L. Ed. 2d 753 (2021). This Court denied Defendants' Renewed Motion for Summary Judgment as to Plaintiffs' Voting Rights Act claim. See Doc. No. [636], 47.

After the summary judgment proceedings concluded, the Court entered a series of pretrial orders, and the Court's Amended-Final Consolidated Pretrial Order (Doc. No. [753]) governed the issues for trial. In Plaintiffs' Statement of the Case for purposes of the Pretrial Order, Plaintiffs described their remaining claims as follows:

> Plaintiffs contend that Defendants the Georgia Secretary of State (SOS), the State Election Board (SEB) and the SEB members are denying and abridging Georgians' right to vote through: (1) the SOS's "Exact Match" policy and its application; (2) extensive mismanagement of the statewide voter registration list; and (3) non-uniform and improper practices regarding in-person cancellation of absentee ballots. These three policies and practices violate federal law, as follows:
>
> • The Exact Match policy and its [*16] application: (a) violate the fundamental right to vote as guaranteed by the First and Fourteenth Amendments; (b) racially discriminate against Georgians of color in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment; (c) discriminate against Georgians based on where they live and based on naturalized citizenship status in violation of the Equal Protection Clause of the Fourteenth Amendment; and (d) deny or abridge the right to vote in violation of the Voting Rights Act.
>
> • Defendants' extensive mismanagement of the statewide voter registration list violates Georgians' fundamental right to vote in violation of the First and Fourteenth Amendments.[7]
>
> • The non-uniform and improper practices regarding in-person cancellation of absentee ballots (a) violate Georgians' fundamental right to vote in violation of the First and Fourteenth Amendments; and (b) discriminate against Georgians based on where they live, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Doc. No. [753-1], 1-2.

In Defendants' Statement of the Case for purposes of the Pretrial Order, Defendants presented the following affirmative defenses: (1) failure to state a claim upon which relief can be granted; (2) failure to name necessary and indispensable parties; (3) lack of standing; (4) mootness; (5) Eleventh Amendment bar; and (5) Political Question Doctrine. Doc. No. [753], 2-3.

After a delay in the start of trial due to the Omicron [*17] variant of COVID-19, trial began on April 11, 2022. Doc. Nos. [694]; [703]; [789]. Trial concluded on June 23, 2022.

Collectively, the parties presented over fifty witnesses, including Plaintiffs' expert witnesses, current and former employees of the Secretary of State's Office, and members of the SEB. Among the witnesses who testified at trial were Georgia voters whom this Court recognizes with gratitude. It is no small undertaking to sit for a deposition, to travel to a federal courthouse, or to swear an oath and testify in public before a federal court. The participation of these witnesses merits recognition, and the Court further finds that these voters provided credible testimony useful to this Court's consideration of the issues presented at trial.

At the close of Plaintiffs' case-in-chief on May 11, 2022, the Court heard Plaintiffs' remedies presentation, laying out the remedies sought and the basis for granting such relief. See Tr. 3181:20-3232:12 (remedies).

On May 12, 2022, the Court heard Defendants' argument for granting their oral motion for a Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c). Tr. 3294. The Court also heard Plaintiffs' arguments for denying the Rule 52(c) motion. Tr. 3335. [*18] During Plaintiffs' presentation, Plaintiffs, through Counsel, specifically delineated the issues and challenged practices as follows:

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Tr. 3335-3410.

On May 16, 2022, the Court ruled on Defendants' Rule 52(c) motion, "exercis[ing] its discretion to decline to render any judgment until the close of all of the evidence." See Doc. No. [839], 2.

On June 13, 2022, Defendants began their case-in-chief. Defendants presented six fact witnesses and no expert testimony. On June 21, 2022, Plaintiffs presented their rebuttal case, followed by the parties' closing arguments on June 23, 2022. Doc. Nos. [848-1]; [849]; [850]; [851]; [852]; [853].

B. The Named Parties

The Court will now set forth evidence presented at trial concerning the parties.[58]

1. Plaintiffs

a) Fair Fight Action, [*19] **Inc.**

Originally founded in 2014 under the name "Voter Access Institute," Fair Fight Action, Inc. ("Fair Fight") is a nonprofit advocacy group operating nationwide. Tr. 1383:22-1384:1, 1395:12-17 (Stewart-Reid). The heart of Fair Fight's activities are based in and focus on the State of Georgia. Tr. 1383:22-25 (Stewart-Reid).

Fair Fight offered three representative witnesses at trial: Lauren Groh-Wargo, Cianti Stewart-Reid, and Liza Conrad. Lauren Groh-Wargo served as Fair Fight's Executive Director from 2014 to November 2021. Tr. 3847:15-23 (Groh-Wargo). Cianti Stewart-Reid is the current Executive Director of Fair Fight. She has held this role since December 2021. Tr. 1383:20-21, 1384:4-6 (Stewart-Reid). Liza Conrad currently serves under Ms. Stewart-Reid as Deputy Executive Director for Fair Fight. Ms. Conrad was previously Fair Fight's Voter Protection Director and served in that role from April 2019 until she was elevated to Deputy Executive Director in February 2022. Tr. 1048:14-1049:8 (Conrad).

b) Care in Action, Inc.

Care in Action, Inc. ("Care in Action") is a nonprofit advocacy group that operates nationwide, with substantial focus on efforts in Georgia. Tr. 83:20-23 (Livoti). [*20]

Jessica Livoti testified on behalf of Plaintiff Care in Action at trial. Executive Director of Care in Action from August 2017 until January 2021, Ms. Livoti now serves as a Care in Action board member. Tr. 80:24-81:1 (Livoti).

c) Baconton Missionary Baptist Church, Inc.

Baconton Missionary Baptist Church, Inc. ("Baconton") is a church located in Walthourville, Georgia in Liberty County. Tr. 2526:1-2 (Scott). The church is affiliated with the General Missionary Baptist Convention of Georgia and the Zion Missionary Baptist Association, the oldest African American Association in North America. Tr. 2526:1-8, 2531:13-17 (Scott). Founded in 1869 by newly freed slaves, Baconton's congregation is presently approximately 400 members strong. Tr. 2532:23-2533:10, 2545:24 (Scott).

Pastor Hermon Scott, who has served as the church's pastor since July 1997, testified on behalf of Baconton at trial. Tr. 2531:18-19 (Scott).

d) Ebenezer Baptist Church of Atlanta, Georgia, Inc.

Ebenezer Baptist Church of Atlanta, Georgia, Inc. ("Ebenezer") is a historic church located in Atlanta, Georgia in Fulton County. PX. 2053, Tr. 87:17 (Warnock Dep.).[69]

At trial, United States Senator Reverend Raphael Warnock[710]

[9] The Court takes judicial notice that Ebenezer is in Fulton County, Georgia; this fact is generally known within the Northern District of Georgia. Fed. R. Evid. 201(b)(1).

[10] This Court will refer to Senator Reverend Raphael Warnock as "Reverend Warnock" throughout the remainder of this Opinion because Reverend Warnock testified specifically in his capacity as a church leader and his testimony pertained to his church's activities and mission.

[8] Additional findings of fact concerning the named plaintiffs will be discussed in the standing section of this Opinion.

testified [*21] via deposition, and Reverend John Vaughn testified in person for Ebenezer. Reverend Warnock has been Senior Pastor for Ebenezer since 2005. PX. 2053, Tr. 16:1-2 (Warnock Dep.). Reverend Vaughn is Ebenezer's Executive Pastor and has been with the church for two-and-a-half-years. Tr. 2941:12-16, 2941:21-22 (Vaughn). He describes his role within the church as akin to a chief operating officer, or "COO." Tr. 2941:18-20 (Vaughn).

e) The Sixth Episcopal District, Inc.

The African Methodist Episcopal ("A.M.E.") Church was founded by a small group of African Americans in Philadelphia, Pennsylvania in 1816. Tr. 2978:24-25 (Jackson). Today, the A.M.E. Church has over two-and-a-half million members in thirty-three countries. Tr. 2978:9-2979:3 (Jackson). One of twenty A.M.E. Church districts globally, the Sixth Episcopal District, Inc. ("Sixth District") serves the State of Georgia, with its headquarters in Atlanta. Tr. 2972:22-24, 2974:12-13 (Jackson). The Sixth District includes more than 500 A.M.E. churches and more than 96,000 members statewide. Tr. 2974:7-13, 2980:19-20 (Jackson).

Bishop Reginald Jackson, who has served as the Sixth District's Bishop since 2016, testified on behalf of the Sixth [*22] District at trial. Tr. 2973:2-10 (Jackson).

f) Virginia-Highland Church, Inc.

Founded in 1923, Virginia-Highland Church, Inc. ("Virginia-Highland") is a church located in the Virginia-Highland neighborhood of Atlanta, Georgia in Fulton County. DX. 731 at 2.[811] Originally part of the Southern Baptist Convention, Virginia-Highland has been associated with the United Church of Christ since 2002. Tr. 527:11-528:23 (Laney). Virginia-Highland has roughly 300 members in its congregation; twenty percent of the congregation are people of color, and forty percent are LGBTQIA.[912] Tr. 529:9-18 (Laney).

Pastor Matt Laney testified on behalf of Virginia-Highland at trial. Pastor Laney has been the church's pastor since January 2018. Tr. 524:21-22, 525:18-20 (Laney).

2. The Named Defendants

a) The Secretary of State

During the years relevant to this lawsuit, Georgia had three Secretaries of State: Brian Kemp, who is currently Georgia's Governor; Secretary Brad Raffensperger; and Secretary Robin Crittenden, who served briefly between Secretary Kemp's resignation in November 2018 and Secretary Raffensperger's inauguration in January 2019. Tr. 3461:21-3462:2 (Harvey). [*23]

The Secretary of State is a constitutional officer elected by Georgia voters every four years. Ga. Const. Art. 5, Sec. 3, Par. 1. In addition to other duties and obligations, the General Assembly designated the Secretary as the State's "chief election official" under the Help America Vote Act of 2002 ("HAVA"). O.C.G.A. § 21-2-50.2(a); see also 52 U.S.C. § 20509 ("Each State shall designate a State officer or employee as the chief State election official to be responsible for the coordination of State responsibilities under this chapter."). Under Georgia law, the Secretary shall "maintain the official list of registered voters for this state and the list of inactive voters required by this chapter." O.C.G.A. § 21-2-50(a)(14). Georgia law also requires that the "Secretary of State shall exercise all the powers granted to the Secretary of State . . . [t]o conduct training sessions at such places as the Secretary of State deems appropriate in each year, for the training of registrars and superintendents of elections." O.C.G.A § 21-2-50(a)(11).

As relevant to this case, the Secretary maintains two divisions that impact elections: the Elections Division and the Investigations Division. Tr. 3462:3-5, 3461:5-17, 3492:10-19 (Harvey).

The Elections Division had about sixteen employees during the relevant time of this lawsuit. Tr. 3462:3-5 (Harvey). It [*24] includes at least a training group, four to six county liaisons,[13] legal counsel, and an Elections

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[11] The Court takes judicial notice that Virginia-Highland is in Fulton County; this fact is generally known within the Northern District of Georgia. Fed. R. Evid. 201(b)(1).

[12] "LGBTQIA . . . . refers to the broad array of self-identified sexes, genders, and sexual orientations . . . ." 3 Rossein, Merrick, Employment Discrimination Law and Litigation § 27:1 (database updated Aug. 2022).

Most investigators are certified by the Georgia Peace Officer Standards and Training Council ("P.O.S.T."). Tr. 3461:5-17 (Harvey). Two to four investigators would generally focus on elections, and they would handle multiple cases at a time. Tr. 3492:10-19 (Harvey).

This Court heard testimony from the following former and current employees of the Secretary of State's Office concerning their employment, job duties, and policies and practices of the Secretary of State's Office: Chris Harvey, Gabriel Sterling, Ryan Germany, Kevin Rayburn, Melanie Frechette, and John Hallman.

Chris Harvey served as the deputy-inspector general/chief investigator for the Secretary of State's Office from 2007 until July 2015 and then as the Elections Division Director from July 2015 until his departure from the Secretary of State's Office in July 2021. He now serves as the Deputy Director at P.O.S.T. Tr. 3459:25-3460:6 (Harvey).

Gabriel Sterling is the current chief operating officer for the Secretary of State's [*25] Office. Tr. 4177:10-15. He has a political science degree from the University of Georgia and has worked in Georgia elections, in both volunteer and paid capacities, in most election cycles since 1986. Tr. 4177:16-18, 4175:2-6 (Sterling).

Ryan Germany is the General Counsel for the Secretary of State's Office. Tr. 1517:7-9 (Germany). He has held that position since 2014. Tr. 1517:10-11 (Germany). As General Counsel, Mr. Germany works with every division of the Secretary of State's Office, including but not limited to the Elections Division, on legal issues. Tr. 1517:16-17 (Germany). He also spends time on the promulgation of rules and regulations for the SEB. Tr. 1522:1-3 (Germany).

Kevin Rayburn was the Deputy Elections Director and Deputy General Counsel at the Georgia Secretary of State's Office at the times relevant to this lawsuit. PX. 2054, Tr. 11:7-11:9 (Rayburn Dep.). He began working at the Georgia Secretary of State's Office in July of 2016. PX. 2054, Tr. 10:11-10:22 (Rayburn Dep.). Mr. Rayburn's job responsibility as Deputy Elections Director was to support the Director, Mr. Harvey, in managing the Elections Division. PX. 2054, Tr. 16:2-16:9 (Rayburn Dep.).

Melanie Frechette [*26] was employed with the Secretary of State's Office from February 2017 through February 2020, as a county liaison and then as the training administrator. Tr. 1216:7-23 (Frechette). In her role at the Secretary of State's Office, one of Ms. Frechette's responsibilities was to receive and respond to questions from county election officials, as well as to provide guidance on certain aspects of election administration. Tr. 1220:6-13 (Frechette).

John Hallman was employed by the Secretary of State's Office from 2013 to 2020. Tr. 758:12-20 (Hallman). Mr. Hallman was the Election Systems Manager of the statewide voter registration system known as eNet from July 2016 to February 2020. Tr. 759:3-18 (Hallman).

b) The State Election Board

The Georgia General Assembly created the SEB in O.C.G.A. § 21-2-30(a). It consists of five members, including a representative of each of the two major political parties. O.C.G.A. § 21-2-30(c).[1014]

The General Assembly imposed ten statutory duties on the SEB, which range from promulgating rules and regulations to making recommendations to the General Assembly. O.C.G.A. § 21-2-31; see also Tr. 4095:2-6 (Mashburn); PX. 2051, Tr. 11:7-15 (Kemp Dep.). Among the SEB's statutorily enumerated duties are the duties to (a) promulgate rules [*27] and regulations to obtain uniformity in county practices (O.C.G.A. § 21-2-31(1)), and (b) formulate, adopt, and promulgate rules and regulations conducive to the fair, legal, and orderly conduct of elections (O.C.G.A. § 21-2-31(2)).

Significant testimony was dedicated to the SEB's statutory duty to investigate and address violations of the Georgia Election Code. O.C.G.A. § 21-2-31(5). When exercising this authority and obligation, the SEB would hear and decide cases of alleged violations of statutory law or regulations by individuals or counties. Id.; see also Tr. 3607:12-20 (Harvey).

This Court heard testimony from three recent SEB members—Seth Harp, Rebecca Sullivan, and Anh Le—and one active SEB member, Matt Mashburn. All were attorneys. All had either some significant state government experience before being appointed to the SEB (Harp, Sullivan, Le, and Lindsey), or had practiced election law well before their appointment (Sullivan and Mashburn). Tr. 3975:11-3976:12, 3977:1-10, 3989:9-17 (Sullivan); Tr. 4075:16-4077:18 (Mashburn); Tr. 1765:19-1766:1-24 (Le).

[1014] As indicated above, the SEB's an entity remains a Defendant only for purposes of Plaintiffs' Section 2 Voting Rights Act claim (seeking an injunction). Doc. No. 6 (Frechette) & 8 (Hallman). Other claims are brought against the SEB Members in their official capacities.

C. The Issues and Challenged Practices

1. Training on Absentee Ballot Cancelations

Plaintiffs contend that Defendants are responsible for adequate training of county election officials, that [*28] Defendants' training in absentee ballot cancelation procedures is inadequate, and that this deficiency has caused voters to be severely burdened when trying to vote in person after having requested absentee ballots. Plaintiffs assert that Defendants' failure to train on absentee ballot cancelation procedures violates the fundamental right to vote and generates a lack of adequate statewide standards in violation of the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs' claim here focuses mainly on absentee ballot procedures related to voters who want to cancel their absentee ballots so they can vote in person but do not have their absentee ballots with them at the polling place. This situation can arise, for example, when a voter has requested an absentee ballot but has not received the absentee ballot in time to cast it and have it counted.

Plaintiffs assert that Defendants' inadequate training of county election superintendents and registrars means county election personnel do not know the correct procedures for canceling absentee ballots, causing voters not to be able to vote at all or to be able to vote only after significant effort.

The process for canceling absentee ballots has changed during the pendency of this case. [*29] Prior to HB 316's passage in April 2019, Georgia law required, in pertinent part, that voters who had requested absentee ballots (but later went to the polls to vote in person and did not have their absentee ballots with them) to appear before the county registrar, deputy registrar, or absentee ballot clerk to cancel their absentee ballots. O.C.G.A. § 21-2-388(2) (2007), amended by 2019 Ga. Laws 24 (HB 316).

When HB 316 was passed, it changed the absentee ballot cancelation procedure by providing, in essence, that voters who want to vote in person but do not have their absentee ballots with them need not go to the main election office to cancel their absentee ballot. Rather, someone at the polling place can call the registrar's office and obtain approval to cancel voters' absentee ballots. See O.C.G.A. § 21-2-388 (effective Apr. 2, 2019).

a) Training generally

At the outset, based on the testimony provided in this lawsuit and the relevant testimony of Defendants' fact witnesses and Plaintiffs' training expert (Mr. Kevin Kennedy), this Court finds that—as a matter of fact—the counties train poll workers and the State trains county election superintendents and registrars, including on the cancelation of absentee ballots. Tr. 3469:4-22 [*30] (Harvey); Tr. 2864:22-2865:4 (Kennedy). Former Elections Division Director Chris Harvey testified that this training structure is a "train the trainer" scenario. Tr. 1871:8-22 (Harvey).

More specifically, "all county and municipal election superintendents, chief registrars, and absentee ballot clerks or, in the case of a board of elections or a board of elections and registration, the designee of such board charged with the daily operations" are required to become certified in election administration within six months of their appointment. O.C.G.A. § 21-2-101(a); Tr. 1569:13-18, 24 (Germany). The Secretary of State's Office provides the certification training materials. Tr. 1865:19-1866:12 (Harvey). According to Mr. Harvey, the Secretary also has a policy of trying to make the election certification materials accurate. Tr. 3538:23-25 (Harvey).

The Secretary of State's Office also makes a poll worker training manual online for counties to use. Tr. 3537:11-3538:7 (Harvey). According to Mr. Harvey, the Secretary has a policy of trying to make the poll worker manual accurate. Tr. 3538:15-17 (Harvey). However, that policy is not written down anywhere. Tr. 3538:18-19 (Harvey). Mr. Harvey did not know "to what extent" [*31] the counties use the poll worker manual and indicated that "it varies widely from county to county." Tr. 3538:8-14 (Harvey).

During either late 2018 or early 2019, the Secretary hired Melanie Frechette to become the training director. Tr. 3520:10-15. Ms. Frechette came to the Secretary of State's Office already familiar with Georgia elections and county implementation of elections; prior to joining the Secretary of State's Office, she served with the Gwinnett County election office for six to eight years and the Hall County election office for a year or more. Tr. 3523:15-22 (Harvey).

b) Impact of the COVID-19 Pandemic on training

Training efforts in 2020, after the election law changes in HB 316, were significant both in terms of frequency and quantity of topics to discuss. For example, the training division began providing information and training on the State's new Dominion Ballot Marking Devices, which represented the first time that Georgia returned to using paper ballots in over 15 years. Tr. 4192:15-4193:6 (Sterling); Tr. 3520:20-3521:3 (Harvey). The COVID-19 pandemic also necessitated significant training efforts, as many of the efforts to address the virus's impact on elections [*32] were unprecedented. Tr. 4193:2-16 (Sterling); Tr. 3521:13-17 (Harvey).

Prior to the 2020 election, absentee ballot by mail was a method of voting in Georgia that "was not really growing." Tr. 3528:15 (Harvey). Instead, it seemed to peak around the 2008 election and "generally hovered around four or five percent of the votes." Tr. 3528:12-20 (Harvey); DX. 781.

One consequence of the COVID-19 pandemic was the dramatic increase in the use of absentee ballots during the 2020 elections. Tr. 3524:21-3525:13 (Harvey); DX. 781. This was caused, in part, by the Secretary's decision to mail every active Georgia voter an absentee ballot request form. Tr. 3529:1-29 (Harvey).

During the pandemic, and in addition to the webinars and other trainings that were taking place, communications between the Secretary of State's Office and county election officials increased significantly: there were "at least weekly" conference calls between the two parties, and the calls were frequently divided between counties in North Georgia, South Georgia, and metro Atlanta counties independently. Tr. 3649:10-23 (Harvey).

In the light of Secretary's decision to issue all active voters absentee ballot request forms, the [*33] Secretary of State's Office increased training on absentee cancelation procedures. Tr. 3530:10-3531:3, 3649:24-3650:1 (Harvey).

In 2020, Georgians were to have numerous elections: (1) a Presidential Preference Primary (slated for March); (2) a general primary of state elected officials, candidates for both seats to the United States Senate, and primaries for some congressional seats; (3) a general election; and (4) potential general runoff elections. Tr. 4190:12-13; Doc. Nos. [829-6], [829-7], [829-8].

The 2020 elections also marked the first time that the State's new Dominion Ballot Marking Device technology would be used across the state. Tr. 3652:7-8 (Harvey).

Because of the COVID-19 pandemic, the Secretary exercised his existing authority to postpone the

presidential preference primary, then combine it with the general primary, and postponed both again to the latest possible time that would allow compliance with federal election laws. Tr. 4188:7-4190:9 (Sterling); Tr. 3647:13-17 (Harvey).

One reason for the postponement was the real concern that there would be an insufficient number of poll workers available to work during the pandemic. Tr. 3647:13-17; 3651:2-7 (Harvey). At that time, [*34] the Secretary of State's Office began to understand that some county election offices were getting infected and could not administer the primary election. Tr. 3647:19-25 (Harvey).

Fulton County was hit particularly hard: one of their employees died of COVID relatively early; the registration director was out with COVID for some time; and the office had to be shut down for three to four days for disinfecting after further spread of the virus. Tr. 3648:6-16 (Harvey). Adding to these health concerns was the "push" of absentee ballot requests coming into Fulton County, which led to jammed servers and an inability to print and download applications and ballots. Tr. 3648:17-25 (Harvey).

In response to the pending poll worker shortage, the Secretary began to undertake efforts to recruit poll workers by reaching out to various groups like the ACLU, State Bar of Georgia, private businesses, and others. Tr. 3651:8-3650:3 (Harvey). The end result was "a lot" of new poll workers in the 2020 election. Tr. 3652:4-6 (Harvey).

The testimony further indicated that even the best trained superintendents can still make mistakes in the training of poll workers. Tr. 3511:6-15 (Harvey).

c) Errors in Secretary [*35] of State training documents

The Secretary of State's Office did not update the election certification materials to reflect the change to the absentee ballot cancelation process after the passage of HB 316 in 2019. Tr. 2118:13-2119:11 (Harvey). Mr. Harvey acknowledged that these Secretary of State certification training materials are incorrect. Tr. 2103:22-2105:20 (Harvey) (confirming these trainings included the pre-HB 316 version of the statute); see also Tr. 3700:20-3701:17 (Harvey) (describing the failure to update as a "mistake"). Defendants proffered no certification materials showing that they have been corrected.

The poll worker manual developed by the Secretary of State's Office also was not updated to show the changes in absentee ballot cancelation procedures for the 2019 and 2020 elections. Tr. 2131:9-28 (Harvey). The poll worker manual has since been updated (in May 2021) with the correct information. PX. 1315 at 55-56; Tr. 2131:9-21 (Harvey).

In addition, there was evidence of two training presentations that were available to county superintendents and registrars in which post-HB 316 absentee ballot cancellation information was referenced. See PX. 1076, PX. 1189, Tr. 2119:16-22, [*36] 2121:4-5.

d) Plaintiffs' absentee ballot witnesses

Plaintiffs presented the following witnesses to testify about how absentee ballot issues burdened voters: Aria Aaron (PX. 2057 (Aaron Dep.)); Deborah Allen (Tr. 623-648); Patricia Andros (Tr. 2690-2709); Dayle Bennett (Tr. 2709-2724); Saundra Brundage (Tr. 1236-1253); Emily Huskey (Tr. 1141-1168); Aaron Karp (Tr. 601-622); Margaret Whatley (PX. 2050 (Whatley Dep.)).[15]

e) Webster County

The June 2019 election in Webster County, Georgia was discussed by several witnesses and is relevant to Plaintiffs' absentee ballot claim. This local election was one of the first elections held after the change in the absentee ballot cancelation process by HB 316. Specifically, HB 316 became effective on April 2, 2019, and the Webster County election took place on or around June 20, 2019. PX. 1117.

On June 20, 2019, a voter submitted a complaint to the Secretary of State's Office stating that she was denied the right to vote three times in Webster County. PX. 1117. The voter stated that she was told she had to return her absentee ballot before she would be allowed to vote in person. DX. 791 at 167; PX. 1117.

The Secretary of State's Office investigated the [*37] complaint, which revealed that the voter did attempt to vote on two separate occasions and that the voter was told both times that she needed to surrender her absentee ballot. DX. 791 at 167. The investigation further revealed that the Webster County Elections

[15] The Court will make specific findings regarding the testimony of these witnesses in the next section of this Opinion.

Supervisor and Deputy Registrar indicated that they were unaware of the proper procedure to cancel an absentee ballot at the time of the incident and believed a voter had to surrender the ballot. Id. at 167-168. They indicated that they were now aware of the proper procedure. Id. at 168.

The election at issue resulted in a tie. Id. A court challenge was filed and ended with a consent agreement to void the election results and hold a second election. Id. The investigation revealed that the second election was "due to the one . . . voter that was erroneously turned away for not having her absentee ballot with her to surrender when she presented to vote at the polls." Id. at 168.

The case was presented to the SEB at a February 17, 2021 meeting. DX. 791. SEB member Matt Mashburn referred to a situation where a voter is wrongfully turned away as "the nightmare scenario" and made a motion to refer the case to the Attorney General's Office, [*38] which motion carried. Id. at 170.

The events in Webster County, while unfortunate, appear to be an anomaly, and the circumstances of the election also appear to have been unique. Tr. 3553:6-9 (Harvey).

2. Exact Match

Plaintiffs challenge two policies under the umbrella of "Exact Match." Both policies relate to how the Secretary of State handles voter registration applications. In short, both policies match certain information from voter registration applications against either the Georgia Department of Driver Services ("DDS") or Social Security Administration ("SSA") databases. The policies differ on the particular information being matched.

The first policy Plaintiffs challenge relates to the matching of certain identification information provided on voter registration applications. If this information on the voter registration application does not exactly match, character by character, to the information in the DDS or SSA databases, the voter registration applicant is given "Missing ID Required" ("MIDR") status. Plaintiffs refer to this policy as "**Exact Match MIDR**."

Plaintiffs' second policy challenge relates to the matching of the voter registration applicant's citizenship information. [*39] Under this policy, voter registration applicants who provide a Georgia driver's license number or state identification card number on their voter registration applications will have their citizenship status matched against the DDS database. Plaintiffs refer to this policy as "**Exact Match Citizenship**."

a) Exact Match MIDR

(1) MIDR history, process, and purpose

DDS currently has a Memorandum of Understanding ("MOU") with the Secretary of State's Office dated March 27, 2007, regarding the transmission of "voter registration data between the parties for verification pursuant to the provisions of HAVA." PX. 1751; see also Tr. 1189:1-23, 1190:21-22 (McClendon); Tr. 497:12-17 (Mayer). The matching process considers information in both the DDS database and the federal SSA database. Tr. 3576:24-3577:8 (Harvey).

The purpose of the MOU is to "enable[] the Secretary of State and DDS to transmit voter registration data between the parties for verification pursuant to the provisions of HAVA." Tr. 1189:18-20; see also PX. 1751. The process for verification generally proceeds as follows.

First, the Secretary of State sends a new registering voter's information to DDS for verification. Tr. 1191:22-24 (McClendon). [*40] Pursuant to the MOU, the Secretary of State transmits voter registration information to DDS for verification on a daily basis. Tr. 1190:23-1191:7 (McClendon); see also PX. 1751.

Second, DDS takes the new registering voter's information and determines whether the record can be checked against DDS information or if it needs to go to the SSA. If the record has a driver's license or state ID number, it will be checked against DDS records. If a record does not have a driver's license number, it will be sent to the SSA for validation, with whom DDS has an agreement to verify information as required by HAVA. Tr. 1194:20-1196:18 (McClendon).

If a record has certain uncurable defects, such as an invalid date of birth or non-numeric characters in the last four digits of the applicant's social security number, DDS will stop the verification process, flag, and return the application to the Secretary of State's Office. Tr. 1196:19-1197:15 (McClendon); PX. 1753.

Third, for records that it can process for verification, DDS checks the following criteria in the record against the information it has on file to determine if it is a match:

a. Driver's license number, first twenty characters of the last name, [*41] first initial, and date of birth (if no social security number is provided); or
b. Driver's license number, first twenty characters of the last name, first initial, date of birth, and last four digits of the social security number (if provided); or
c. First twenty characters of the last name, first initial, and date of birth (if no social security number is provided and license number is not found); or
d. First twenty characters of the last name, first initial, date of birth, and last four digits of the social security number (if last four digits of social security number are provided and license number is not found).

PX. 1753 at 1; see also Tr. 1197:16-1199:18 (McClendon).

A prior version of the verification process involved comparing the first twenty characters of the first name. PX. 1752; see also Tr. 1201:9-25 (McClendon). The change was made sometime after 2017. Tr. 1202:1-4 (McClendon).

For records verified by the SSA, the SSA automatically returns to DDS the exact information provided to them. PX. 1753 at 2; see also Tr. 1200:20-8 (McClendon). These responses can include any of the following: invalid input data; multiple matches - all deceased; multiple matches - all alive; multiple [*42] matches - at least one alive and one deceased; single match - alive; single match - deceased; no match found; or system error. PX. 1753 at 2.

Fourth, and finally, after it has performed the verification process, DDS transmits the voter information back to the Secretary of State with a determination of whether the information was verified or not and, if not, the reasons therefor. Tr. 1191:11-21, 1199:19-1200:7 (McClendon); Tr. 3574:4-19 (Harvey); see also PX. 1751. DDS takes no further action regarding a voter's registration information after it returns the verification to the Secretary. Tr. 1192:7-9 (McClendon).[16]

If the information processed by DDS does not come back as a match, e.g., Jonathan William Smith registers to vote as Billy Smith, a name that he goes by, the eNet system will flag the person in what is called Active-MIDR (missing identification requirement) status. Id.; see also Tr. 3577:18-20 (defining MIDR) (Harvey). The matching is fully automated and binary: a voter is either flagged or not based on whether the information returns and is verified. Tr. 1950:12-1951:14 (Harvey); see also PX. 2054, Tr. 156:2-156:24 (Rayburn Dep.).

Persons flagged as Active-MIDR status are deemed [*43] to be registered voters in Georgia. Tr. 3581:4-8 (Harvey); see O.C.G.A. § 21-2-220.1. Regardless of the flag, these voters can vote in person so long as they present a form of acceptable identification. Tr. 3574:20-22 (Harvey); Tr. 399:12-20, 505:16-21 (Mayer). They can vote absentee by mail only by providing some form of required identification; the absentee ballot will otherwise be treated as a provisional ballot and can be cured within the three-day period by, again, providing the required identification. Tr. 3575:2-4, 9-14 (Harvey).

When persons in Active-MIDR status vote for the first time, they can use more types of information—including a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of such elector—to prove their identity than are permitted under the photo identification requirement of registered voters who are not in the MIDR status. Compare O.C.G.A. § 21-2-417(c) with O.C.G.A. § 21-2-417(a); see also Tr. 1614:20-22; 4137:23-24, 4141:11-17 (Germany). These forms of identification are referred to as HAVA ID, which is broader than the photo ID requirement for voters who previously have voted. Tr. 4137:3-10, 4141:21-25, 4142:1-7 (Germany).

Plaintiffs' [*44] expert, Dr. Mayer, concurred with this understanding, stating that "[a] registrant who's been flagged as MIDR is required to clear that flag before they are given a ballot, and they could clear that flag by showing a form of I.D. that is otherwise required by Georgia's voter I.D. law, but it's also possible for certain registrants, particularly first-time registrants, to clear that flag with a different set of identification documents." Tr. 399:14-20 (Mayer).

One purpose of MIDR is to prevent the same person from registering various aliases and proving that the registering voter is an actual person. Tr. 3604:11-19, 3606:14-24 (Harvey). A similar purpose of the match policy is to filter out false registrations. Tr. 3605:20-3606:8 (Harvey).

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[16] In general, the above-described process applies only to voters who did not register through DDS to begin with. If a voter registers through DDS, including via automatic voter registration, their information will automatically match what is on file with DDS before the registration is sent to counties to be processed. Tr. 1950:12-1951:14 (Harvey).

Importantly, an MIDR flagging also signals to the poll worker that this voter is permitted to use HAVA ID to vote. Tr. 4141:7-25, 4142:1-11, 4145:8-18, Tr. 4146:7-12 (Germany). Mr. Germany provided uncontested testimony that this notice is necessary for compliance with HAVA; without it, poll workers would be unable to identify which voters were allowed to alternatively provide a HAVA ID, as opposed to one of the photo IDs usually required by Georgia [*45] law, to vote. Tr. 4146:4-12 (Germany). In other words, another purpose of the Active-MIDR status is to ensure that those first-time voters eligible under federal law to provide HAVA ID can do so. Tr. 4145:15-18 (Germany).[1317]

If the voter does not have any of those forms of identification, they are permitted to cast a provisional ballot. O.C.G.A. § 21-2-417(c); Tr. 3578:5-10, 3604:20-3605:18 (Harvey); Tr. 4145:19-25 (Germany).

Other than being eligible to provide the aforementioned additional forms of identification—HAVA ID—when voting for the first time, there are no practical differences between a registered voter in Active-MIDR status and one that is not. Tr. 4146:13-17 (Germany).

Persons on Active-MIDR status may also vote by absentee ballot once they have provided one of the broader forms of identification to a county election office; if the voter has yet to provide the identification, the absentee ballot will be treated as provisional and can be cured within the three-day period by, again, providing the required identification. Tr. 3575:2-4, 9-14 (Harvey); Tr. 4145:19-25 (Germany).

Persons who are flagged in Active-MIDR status receive a letter from their county election office notifying them of the kinds [*46] of identification they will need to vote. Tr. 399:21-24 (Mayer); see also PX. 1900.

The letter sent to voters in Active-MIDR status informs them that they need to provide one of two forms of identification: (1) a photo ID that complies with Georgia's photo ID law (such as a driver's license) or (2) one of the alternative identification forms permitted under HAVA. PX. 1900; see also Tr. 401:22-402:5 (Mayer).

The Secretary of State's Deputy Elections Director and Deputy General Counsel explained that the requirement to provide ID would also apply to voters in MIDR status requesting an absentee ballot. Such voters would be sent a provisional absentee ballot with instructions to show ID before their vote will be counted. PX. 2054, Tr. 197:10-197:16 (Rayburn Dep.).

The placement of an individual in Active-MIDR represents a change in this process due to HB 316. Tr. 3576:24-3577:17 (Harvey); see also O.C.G.A. §§ 21-2-220.1(b), 21-2-216(g)(7); Tr. 3576:18-24 (Harvey) (reviewing DX. 42 (O.C.G.A. § 21-2-220.1)); Tr. 3580:8-23 (Harvey) (reviewing DX. 46 (O.C.G.A. § 21-2-216)). Prior to the enactment of HB 316, someone who failed the matching process would be identified as "pending registration" and not on the active list of voters. Tr. 3576:24-3577:17; 3603:14-15 (Harvey); [*47] PX. 2054, Tr. 196:16-196:22 (Rayburn Dep.). Consequently, the voter would not receive a precinct card (Tr. 3577:13-17 (Harvey)), and their time to take action to remain on the active voter list was shorter than for persons who were deemed active voters. See, e.g., O.C.G.A. § 21-2-235. Persons in pending status may have "a slight delay" to vote because the poll worker may need to call the poll manager over for "some entry to update" the voter's status. Tr. 3577:21-3578:4 (Harvey).

(2) The Impact of MIDR

Prior to the passage of HB 316, the Secretary of State's Office conducted a demographic study and concluded that 70% of those in pending status were African American. Tr. 3601:14-3602:2 (Harvey). Plaintiffs' expert evidence showed that 60,477 registrants were in MIDR status as of January 2020. PX. 1278 at 16, 18; Tr. 508:4-5 (Mayer). Of those, 69.4% were African American; 11.4% were white non-Hispanic; 5.7% were Hispanic; 3.3% were Asian or Pacific Islander; 3.4% were other or two or more demographic categories; and 7% were unknown. PX. 1278 at 18. This translates to 2.03% of registered African American voters in Georgia; 0.19% white non-Hispanic; 1.50% Hispanic; 1.19% Asian or Pacific Islander; and 1.71% [*48] other or two or more demographic categories. Id. at 19.

b) Exact Match Citizenship

(1) The citizenship verification process and purpose

[17] The Court recognizes that there is a conflict in the testimony as to the purpose of MIDR because, at one point, Mr. Harvey had no answer for the Court when asked why the Secretary of State needs MIDR. Tr. 1993:5-12. After review, however, the Court deems it proper to resolve the conflict by giving the greater weight to Mr. Harvey's subsequent trial testimony in which he provides a substantive purpose for MIDR. The Court also gives greater weight to the testimony of Mr. Germany (set out above).

In Georgia, only United States citizens are eligible to vote. O.C.G.A. § 21-2-216(a)(2); see also Tr. 3581:1-3 (Harvey). The Election Code requires the Secretary of State to "establish procedures to match an applicant's voter registration information to the information contained in the data base maintained by [DDS] for the verification of the accuracy of the information provided on the application for voter registration, including whether the applicant has provided satisfactory evidence of United States citizenship." O.C.G.A. § 21-2-216(g)(7); see also Ga. Comp. R. & Regs. 590-8-1-.02.

All voters must demonstrate citizenship at the time of registration, and the SEB has promulgated a rule establishing the types of acceptable proof for voter registration purposes. Tr. 3585:12-21 (Harvey) (considering DX. 777 (Ga. Comp. R. & Regs. 183-1-6-.06)).

In Georgia, when a voter registers using a driver's license or an ID card number, they go through a citizenship verification process. Tr. 359:8-14 (Mayer). The data used for the verification process is that which is on file with DDS. Tr. 359:19-23 (Mayer).[1419]

If during the citizenship verification process, [*49] a match does not occur with the voter's DDS file, they are flagged as needing to provide evidence of citizenship and are placed in pending status. Tr. 364:5-25 (Mayer), Tr. 3582:12-16 (Harvey).

To this end, voters in pending status are then sent a letter by a local election official by U.S. mail. Tr. 364:20-25 (Mayer). The letter indicates that a registrant placed in pending status may provide confirmation of their citizenship at the polls or while requesting an absentee ballot and be able to vote. Specifically, the letter states that the registrant may vote by providing, in addition to the valid photo ID required under Georgia law, a birth certificate issued by a U.S. State or the U.S. Department of State; a U.S. Passport; a Certificate of Citizenship; a Naturalization Certificate; a U.S. Citizen ID card; or any of the fifteen other forms of verification allowed under Georgia law. PX. 1231 at STATE-DEFENDANTS-00742580.

Individuals who are in pending status for citizenship can vote if they go to their polling place and provide proof of citizenship. Tr. 1683:5-11 (Germany). These individuals will be on the voter list at the polling location as someone who had registered but is just pending [*50] their citizenship verification. Id.

A Secretary of State regulation, Ga. Comp. R. & Regs. 590-8-1-.02, provides that if the DDS cannot determine citizenship, the county election office must make sure that the driver's license identification number or identification card was entered properly before deciding on that individual's eligibility as a voter. Tr. 3583:1-21, 3584:1-18 (Harvey); DX. 780.

The same regulation refers to the SAVE system, which the Secretary began to use after the 2020 election. DX. 780. "SAVE" stands for Systematic Alien Verification for Entitlements. Tr. 1708:14-17 (Germany).[1520] Outside the elections and voter registration context, states are required to use SAVE to check the citizenship status of individuals applying for public benefits. Tr. 282:23-25 (McCrary). SAVE is a different system than E-Verify. Tr. 282:18-22 (McCrary). In 2021, the Secretary of State's Office used SAVE to audit the voter rolls and records from DDS. Tr. 1680:15-16, 1680:20-22 (Germany). The range of dates for the registrations that the Secretary of State's Office identified

[19] Noncitizens may obtain a Georgia driver's license. Tr. 3581:18-25 (Harvey). The license is known as a "limited term" license as opposed to those that show the driver is a United States citizen. Id.; Tr. 1203:1-6, 10-17, 1204:2-4 (McClendon). Noncitizens must renew their limited term license or state ID card in person and cannot do so online. Tr. 1203:23-1204:1 (McClendon). The expiration of limited-term driver's license or state identification card is tied to the lawful duration of the noncitizen's stay in the United States. Tr. 1203:14-17 (McClendon). DDS does not know when someone becomes a citizen unless the individual informs DDS of the change in citizenship status. Tr. 1205:2-5, 1206:2-4 (McClendon). If the individual does not inform DDS of a change in citizenship status, the individual will remain in the DDS database as a noncitizen. Tr. 1205:2-5, 1203:23-24 (McClendon). Mr. Harvey testified that DDS is exempt from the "burden of proof" that SAVE doesn't to help their citizenship status" Tr. 3583:10-14 (Harvey).

[20] SAVE is a web-based program operated by the Department of Homeland Security to verify the immigration status of applicants for public benefits or licenses. PX. 2021 at 4; PX. 2014.

during the audit was from 1997 until February 24, 2022. Tr. 1728:1-2 (Germany). During that audit, the Secretary of State's Office looked at the entire [*51] voter roll. Tr. 1682:3-5 (Germany). The Secretary of State's Office worked with DDS to compare data and see what the Secretary of State's Office could do to add driver's license numbers where it did not have them. Tr. 1681:1-4 (Germany). The Secretary of State's Office also had a special process through DDS to get the alien ID numbers of voters. Tr. 1709:6-9 (Germany).

Upon receiving from DDS the alien registration numbers for voters for whom they had not been able to verify citizenship, the Secretary of State's Office ran those registration numbers through the SAVE process. Tr. 1681:21-24 (Germany). As a result of this audit, 63% of people who had been listed as pending for citizenship verification came back with their citizenship confirmed and were put into active status. Tr. 1690:13-14 (Germany).

Voters who were not verified as citizens based solely or in part on SAVE were sent a letter from the Secretary of State's Office stating the following, which Mr. Germany paraphrased at trial: "[W]e were unable to verify you. Here's how you can show your citizenship, including you can show it when you go vote . . . ." Tr. 1724:7-20 (Germany). The Secretary of State's Office is currently in [*52] discussions about implementing more frequent uses of SAVE to verify voters' citizenships going forward. Tr. 1710:2-5 (Germany).

(2) The impact of Exact Match Citizenship

At trial, Plaintiffs presented the expert testimony of Dr. Mayer. In his initial report, Dr. Mayer identified 3,073 registrants flagged as pending for citizenship verification as of January 2020. PX. 1278 at 21. Of those, 31.6% (972) were African American; 13.0% (400) were white non-Hispanic; 20.9% (642) were Hispanic; 23.2% (714) were Asian or Pacific Islander; 5.2% (159) were other or two or more demographic categories; and 6.1% (168) were unknown. Id. at 18. The African American registrants flagged as pending for citizenship verification represent about 0.9% of the African American voting age naturalized citizens living in Georgia at approximately the same time; along with about 0.5% of white non-Hispanic voting age naturalized citizens; 0.7% of Hispanic voting age naturalized citizens; 0.5% of Asian or Pacific Islander voting age naturalized citizens; and 0.4% or other or two or more demographic categories voting age naturalized citizens. Id.

In his supplemental report, Dr. Mayer compared people in pending status [*53] in a voter file dated January 28, 2020, with a voter registration file from November 2021. Tr. 365:17-366:5 (Mayer); PX. 1999 at 6. Dr. Mayer testified that of the 3,073 voters who were in pending status for citizenship verification in the January 28, 2020 voter file, 43.1% were no longer in pending status in the November 2021 voter file. Tr. 366:4-12 (Mayer); PX. 1999 at 6. In other words, 1,323 people in pending status moved to active status, and 1,750 people remained in pending status. Tr. 370:18-24 (Mayer); PX. 1999 at 6. In Dr. Mayer's view, this indicates that the verification process misidentifies citizens as noncitizens with an "error rate" of 43.1%. Tr. 365:12-14. Dr. Mayer admitted that he did not know whether the 1,750 registrants who remained in pending status for citizenship verification as of November 2021 were, in fact, citizens. Tr. 438:4-7 (Mayer). The Court notes that Dr. Mayer's findings pre-date the Secretary of State's SAVE audit, which found that 63% of voters in pending status were citizens. Tr. 1690:13-14 (Germany).

c) Plaintiffs' Exact Match witnesses

Plaintiffs presented the following witnesses to testify about their voting experiences in an effort to show how [*54] the Exact Match issue burdened voters: Dr. Benjamin Ansa (PX. 2096 (Ansa Dep.)); Cam Ashling (Tr. 294-326); Kia Carter (Tr. 2482-2516); Dr. Carlos del Rio (Tr. 467-485); Rosa Hamalainen (PX. 2048 (Hamalainen Dep.)); Dr. Ali Kefeli (PX. 2049 (Kefeli Dep.)).[21]

3. The Secretary of State's Alleged Mismanagement of Voter Rolls

Plaintiffs next contend that the Secretary of State and SEB are in violation of the First and Fourteenth Amendments of the United States Constitution due to their affirmative mismanagement of the voter registration database, which is the database that houses the registration records of eligible voters in the State of Georgia. More specifically, Plaintiffs point to three list maintenance processes that they allege fall within the Secretary of State's responsibility for managing the voter registration database: (1) the cancelation of records on the basis that the voter is convicted of a disqualifying felony; (2) the merger of voter registration

[21] The Court will make specific findings regarding the testimony of these witnesses in the next section of this Opinion.

records based on the belief that two records are duplicative and represent only one eligible voter; and (3) the cancelation of records on the basis that the voter is deceased.

a) Maintaining the official list of registered voters

Georgia law charges the Secretary of State with "maintain[ing] [*55] the official list of registered voters for this state and the list of inactive voters."[1722] See O.C.G.A. § 21-2-50(a)(14). The State's voter registration list is housed in a system known as "eNet." Tr. 759:13-21 (Hallman). In Georgia, counties enter voter registration data into the statewide voter database, including when a voter moved within the state. Tr. 1629:12-15 (Germany); Tr. 3555:9-18 (Harvey) (addressing voter moves). The Secretary of State's Office would not change data even upon a voter's request or if it knew the information was inaccurate; instead, the Secretary of State's Office would contact the county directly or inform the voter how to contact the county. Tr. 3556:6-24 (Harvey).

When a county user logs into eNet, they are presented with a dashboard listing "buckets" of information on the number of DDS applications and online voter registrations to process along with items such as duplicate matches, felon records, and death records. Tr. 772:6-773:1, 764:25-765:5 (Hallman). The county user then selects a "bucket" and is presented with a list of individual matches to process. Tr. 765:5-12 (Hallman). Ultimately, the decision of whether or not a "potential" match is a "true" match is made by the counties. [*56] Tr. 899:10-12, 899:23-900:4 (Hallman).

b) The felon matching process[1823]

In Georgia, persons convicted of felonies who have not completed their sentence are not eligible to vote. O.C.G.A. § 21-2-216(b). An individual who is convicted of or who pled to a felony but is on parole or probation will not be deemed as having completed their sentence for voting purposes. Tr. 3795:25-3796:3 (Harvey). The felony status does not, however, impair their ability to obtain a driver's license. Tr. 3796:6-9 (Harvey). Consequently, many persons who are ineligible to vote because of felony status—purposefully or inadvertently—register to vote when they obtain their driver's license and fail to opt out of the registration system. Tr. 3796:10-13 (Harvey).

The Secretary of State's Office receives information from the Department of Corrections ("DOC") and the Department of Community Supervision ("DCS") on a regular basis. Tr. 3567:5-13 (Harvey); O.C.G.A. § 21-2-231(a) ("Unless otherwise notified by the Secretary of State, the Georgia Crime Information Center shall, on or before the tenth day of each month, prepare and transmit to the Secretary of State and The Council of Superior Court Clerks of Georgia a complete list of all persons, including [*57] dates of birth, social security numbers, and other information as prescribed by the Secretary of State or The Council of Superior Court Clerks of Georgia, who were convicted of a felony in this state **since the preceding reporting period**.")[1924] (emphasis added).

Under Georgia law, "[u]pon receipt" of the felon list and "the lists of persons convicted of felonies in federal courts received pursuant to 52 U.S.C. Section 20507(g), the Secretary of State shall transmit the names of such persons whose names appear on the lists of electors to the appropriate county board of registrars." O.C.G.A. § 21-2-231. The Secretary's current practice is to run the felon list information through eNet for potential matches to provide to the counties. Tr. 862:15-18 (Hallman); Tr. 3567:13-17 (Harvey); Tr. 1329:12-20 (Frechette). The Secretary has the discretion to determine what matching criteria will be used in eNet. Tr. 3733:19-22 (Harvey).

The Secretary has programmed eNet to conduct a monthly comparison between those monthly lists and the list of registered voters in eNet. PX. 800 at 19.[25] The

[22] The parties differ on the definition of the word "maintain" and its implications. The Court will discuss the issue and reach a conclusion in the conclusions of law (standing) section of this Opinion.

[23] The particulars of the felon matching process come to the Court via testimony from the Secretary of State's Office on how it runs its eNet system. Mr. Harvey testified that the DOC and the DCS send the Secretary a list of every person who is currently serving a felony sentence in Georgia. Tr. 3567:7-18 (Harvey).

[24] Mr. Harvey testified that the DCS sends a list "every month," but the Court's finding of fact concerning the frequency of the DCS's reports is consistent with the DOC's practice *in practice*.

Potential matches between the felon lists and existing voter registration records are displayed on the county dashboard for review by the county. Tr. 1329:21-1330:1 (Frechette). Matches are highlighted if certain criteria are the same, and the Secretary of State establishes the criteria that will highlight a potential match of someone on the voter database with someone who is also on the list of felons supplied by the state and federal governments. Tr. 3720:5-9 (Harvey). eNet provides counties with "tight" felon matches listed first and then "loose" matches, which become looser as the user goes down the list. Tr. 871:8-18, 872:12-18 (Hallman). The Secretary of State's training documents provide the following comparison criteria used by the Secretary of State to highlight a potential match for the counties to process, [*59] listed from tightest to loosest:

a. Last Name, First Name, Last 4 SSN, Date of Birth - Active, Inactive, Pending, Reject
b. Last Name, First Name, Last 4 SSN, Date of Birth—Cancelled
c. Last Name, Last 4 SSN, Date of Birth
d. First Name, Last 4 SSN, Date of Birth
e. Last Name, First Name, Date of Birth
f. Last Name, Date of Birth, Race, Gender

PX. 800 at STATE-DEFENDANTS-00115960; Tr. 1337:6-23, 1337:24-1338:2 (Frechette); see also PX. 800 at STATE-DEFENDANTS-00115961.

There was evidence of eNet repeatedly flagging one voter, Elizabeth Bauer, as a felon. PX. 658.[2026] The evidence also showed that another voter, Andre Smith, was repeatedly canceled. DX. 724.

According to the Secretary of State's Office, each county is responsible for setting its own county-wide policy to apply to potential matches sent by the Secretary of State's Office to determine whether it is a true match; some counties will do extra research on their own to determine if the person who is a potential match is an actual ineligible felon. Tr. 3570:5-10 (Harvey); Tr. 1351:16-1352:11 (Frechette).

Different counties have different resources and staff available; accordingly, Mr. Hallman testified that it is difficult to choose a single [*60] procedure that fits the needs of all counties. Tr. 869:19-22 (Hallman). As such, the counties are expected to establish a uniform procedure for processing felon matches that is fair, utilizing the resources and staff available in that county, and treating each record in the same manner with no preference for one over the other. Tr. 870:3-15 (Hallman); PX. 541.

Some larger counties, such as Fulton County, told the Secretary of State's Office they found reviewing looser matches difficult due to the large number of potential matches in that bucket. Many of the smaller counties, however, find the looser matches to be a useful tool. Tr. 871:7-873:20, 873:24-874:16 (Hallman); Tr. 1359:19-23, 1360:14-25, 1361:9-12 (Frechette); PX. 1151.

Previously, in 2017, the Secretary of State eliminated a potential match filter consisting of only the last four digits of the social security number and date of birth because it was "showing too many false positives and all the good matches will be caught by other filters." Tr. 1359:12-18 (Frechette); PX. 365.

Ms. Frechette testified that she was not aware of any current issue with eNet producing "a lot of false matches" for felons. Tr. 1355:14-19 (Frechette). [*61] When the structure of the DOC was changed and split into two agencies, namely the Department of Community Services and the Department of Community Supervision, however, the number of individual felon records listed for the counties to process was higher than usual. Tr. 876:7-20 (Hallman); PX. 1151.

County election offices review these potential matches sent over by the Secretary of State and make determinations as to whether the person on the voter list is ineligible to vote by reason of a felony conviction. Tr. 3568:2-19, 3569:14-25, 3572:21-3573:6 (Harvey).[2127]

In other words, under current practices, regardless of the criteria used for identifying potential matches, the counties are the ones who make the choice as to what information is, in fact, a true match. Tr. 873:3-5 (Hallman).

Additional testimony from Mr. Harvey and 2019 training materials (PX. 1903) established that the "[t]he record when marked as a Felon match is flagged as a Challenged—Felon." PX. 1903. The training materials

[26] This exhibit was taken under advisement at trial and later admitted per the Court's Order at Doc. No. [915].

[27] The 2019 training materials also indicated that "[t]he records that are in cancelled or rejected status will no longer be listed on the felon reports" of the county user's dashboard. PX. 1903. The training materials further state that the number of felon records shown on the county user's dashboard is for the "current and later days only." PX. 1903.

further indicate that if the county eNet user is "unsure" if there is a felon match when processing the Felon Dashboard Report, "the Challenge button can be used to handle those records following O.C.G.A. § 21-2-228." PX. [*62] 1903. Said Code section involves the right of registrars to reexamine the qualifications of electors. O.C.G.A. § 21-2-228(a). It also gives the county board of registers the right to subpoena documents and witnesses and serve summonses and notices. O.C.G.A. § 21-2-228(b).

Before a county cancels a voter for felony status, the county board of registrars is required, by statute, to mail the voter a letter thirty days in advance. O.C.G.A. § 21-2-231(c)(2). Pursuant to Georgia law, the letter is supposed to state "that the board of registrars has received information that such person has been convicted of a felony and will be removed from the list of electors 30 days after the date of the notice unless such person requests a hearing before the board of registrars on such removal." O.C.G.A. § 21-2-231(c)(2). To this regard, if a voter objects to the felon designation, the voter is entitled to a hearing. Id.

During his trial testimony, former Elections Director Harvey reviewed O.C.G.A. § 21-2-231 (DX. 787) and testified that he was familiar with the § 231(c)(2) hearings. He further testified that the burden of proof at these hearings is on "the entity that is challenging the elector." Tr. 3828:6-12, 3842:12-18 (Harvey).

However, Mr. Harvey also confirmed that 2019 training materials tell the counties that the voter [*63] must provide proof to remove the felon challenge flag. Tr. 3738:23-25-3739:1-2, 3842:24-25, 3843:1-2; see also PX. 1903 at STATE-DEFENDANTS-00068941 ("If the voter provides proof to remove the Felon Challenged flag or if matched in error . . . . The record should be removed from the 40day Felon clock and the Challenged flag removed").[2228] In addition, Ms. Frechette testified that a voter who is challenged for any reason has "the responsibility to clear up the issue" before the voter could vote. Tr. 1328:1-5 (Frechette). However, Ms. Frechette also testified that she did not "remember the exact guidelines for a hearing" when asked if the voter needed to seek a hearing. Tr. 1327:16-25.

Considering witness credibility and Mr. Harvey's level of experience and familiarity with the § 231(c)(2) hearings, the Court will resolve the conflicting evidence "and trial" testimony by giving greater weight to Mr. Harvey's testimony that the burden at the § 231(c)(2) hearing is on "the entity that is challenging the elector," which would be the county in a felon challenge context. Also, Defendants note in their proposed findings that the training materials appear to be contrary to law, and they cite O.C.G.A. § 21-2-229(c) to support this statement. [*64] Doc. No. [855], ¶ 444. O.C.G.A. § 21-2-229(c) imposes the burden of challenging a voter's eligibility on the "elector" making the challenge. Said Code Section is not mentioned in the Secretary of State's felon matching training materials and utilizes the term "elector"[2329] as opposed to the terms "county" or "board of registrars." The Georgia Supreme Court has stated that: "OCGA § 21-2-228 permits a county or municipal board of registrars to challenge a person's right to register to vote or to remain on the list of electors, and OCGA § 21-2-229 permits an elector to bring the same type of challenge." Cook v. Bd. of Registrars of Randolph Cty., 291 Ga. 67, 71, 727 S.E.2d 478, 482 (2012). If it is "the same type of challenge," it is conceivable that the § 229 burden language may apply to the present circumstances under the doctrine of *in para materia*, but it is not necessary for the Court to make a definitive statutory interpretation ruling for purposes of resolving the felony match issue.

Regardless of the applicability of § 229, there was no evidence put forth of any accused felon having made a formal showing (or offer of proof) in a § 231(c)(2) hearing that he or she was not a felon. However, none of Plaintiffs' felon match witnesses ever proceeded to a § 231(c)(2) hearing; it is important to note that the evidence at trial showed that some Georgia voters [*65] found themselves incorrectly canceled as persons convicted of disqualifying felonies, without receiving any advance notice—and thus, there was no § 231(c)(2) hearing process. Those voters are Dale Thomas, Jean Duncan, Douglas Miller, and Andre Smith (discussed above). PX. 89 at 1-2, PX. 1715, PX. 2071. Furthermore, three voters, Andre Smith, Elizabeth Bauer, and Chris Warren, were either asked to provide or did provide proof that they were not felons. Tr. 2438:10-14; PX. 658, PX. 900, PX. 912, PX. 2019.[2430]

[28] The Court recognizes that the training materials provide for a "40 day Felon clock," while O.C.G.A. § 21-2-231(c)(2) provides for the Court will after 30 days for the state of the board of registrars to see.

[29] As stated in the Georgia Election Code, the term "elector" means any person who shall possess all of the qualifications for voting now or hereafter prescribed by the laws of this state, including applicable charter provisions, and shall have registered in accordance with" Georgia law. O.C.G.A. § 21-2-2(7).

[30] The Court will address the issue of the board of registrars' notice section of this Opinion.

Plaintiffs' felon match evidence at trial also showed that in 2018 and 2020, the Election Administration and Voting Survey ("EAVS"), published by the Election Assistance Commission, identified Georgia as the state with the most felon removals (68,249 and 54,730, respectively). PX. 1904; PX. 1981 at 167.

c) The duplicate matching process

In general, a potential duplicate match occurs when eNet identifies people who may be the same person, e.g., Jonathan William Smith living in Fulton County and DeKalb County. Tr. 3575:22-3576:13 (Harvey). Duplicate matches can be identified either when a new registration is processed or when counties review batches of potential matches provided by the Secretary of [*66] State's Office. Tr. 1300:8-21 (Frechette).

In either instance, the Secretary of State's Office distinguishes between "tight" and "loose" potential matches and provides both for county registrars to process. Tr. 793:18-794:9 (Hallman). A "tight" potential match is one involving a "unique identifier," like a social security number or a driver's license number, "and a lot of other information matching first name, last name, date of birth." Tr. 793:18-20 (Hallman). A "loose" potential match may include matches on one or two criteria, for example, first initial and last name. Tr. 791:6-10, 793:12-794:6 (Hallman); see also PX. 1878 at 55.

Loose matches are often used to find records where an existing voter record needs to be corrected. Tr. 793:22-794:6 (Hallman). If loose match criteria were not used, it would run the risk of permitting the system to contain multiple registrations with multiple errors. Tr. 793:18-794:4 (Hallman). Because it is a unique identifier, if two records had the same driver's license number but different first or last names or a different date of birth, it would still be treated as a potential match for comparison by the county user. Tr. 767:25-768:5 (Hallman).

When [*67] a new voter's registration information is initially entered into eNet by a county user, the system automatically searches existing voter records to identify whether there are any existing records for that voter and to avoid the creation of duplicate records. Tr. 762:15-763:1, 787:4-13 (Hallman); Tr. 1221:5-12 (Frechette).

If there is a match between certain criteria in the new application and existing record, the records are sent to the county's dashboard for review and determination of whether the records are a true match for the same person. Tr. 1222:23-1223:5 (Frechette). These criteria include, for example, first name, last name, and date of birth. Tr. 1290:10-21 (Frechette).

If the county official determines that the records are a true match for the same person, the information from the new application replaces the information in the existing record so there is only one surviving record. Tr. 1223:6-12 (Frechette). The purpose of this process is to, where necessary, update an existing voter record rather than create a new, duplicate record for the voter. Tr. 1222:1-5 (Frechette).

Ms. Frechette testified that in reviewing potential matches between a new registration and an existing [*68] voting record, county officials also conduct independent research to determine whether a true match exists. Tr. 1257:7-14 (Frechette). Ms. Frechette testified that the Secretary of State's Office does not provide a minimum number of identifiers that must match between a new application and an existing record before a county official should decide that the two records are a true match for the same voter. Tr. 1264:3-7 (Frechette). Ms. Frechette would, however, help county officials find resources and information at their disposal to resolve their questions about potential matches. Tr. 1259:18-22, 1260:8-12 (Frechette).

Ms. Frechette testified that it was not typical for a county official, in reviewing potential matches, to automatically assume there was a true match for the same voter based solely on a matching driver's license number. Tr. 1257:7-14 (Frechette). Regardless, like the felon match process, under current practices, the Secretary does not make the final determination of whether the potential duplicates are, in fact, the same person. That process is completed by the county election offices. Tr. 3576:14-19 (Harvey); Tr. 1315:23-1316:2 (Frechette).

The eNet system also runs various [*69] batch processes on a daily, weekly, and monthly schedule to identify potential duplicates, and the results appear on the dashboard for county registrars to process. Tr. 772:6-773:1 (Hallman); Tr. 1295:25-1296:13, 1300:2-4 (Frechette). eNet is programmed to apply four criteria to check for potential duplicate records: (1) first name, date of birth, and last four digits of social security number; or (2) full social security number; or (3) driver's license number; or (4) first name, date of birth, and last four digits of social security number. PX. 1903 at STATE-DEFENDANTS-00068944; see also Tr. 1300:5-7 (Frechette).

The process for handling these potential match batches is structurally similar to that used during new registration; the eNet system displays on a county worker's dashboard the existing voter registration information and the new data side-by-side for the county registrar to determine whether it is the same person. Tr. 765:13-18, 21-24 (Hallman); see also PX. 1903 at STATE-DEFENDANTS-00068944.

When there are duplicate records, the system does not automatically override an existing record; eNet requires a county user to look at the screen and make that determination manually. [*70] Tr. 765:19-766:1 (Hallman); Tr. 1305:9-16 (Frechette). Under current practices, it is the counties' responsibility to implement practices on how to process such potential duplicate records for review. Tr. 1296:14-15, 1297:14-15 (Frechette); Tr. 765:19-766:1, 772:1-773:1, 773:11-14, 774:7-15 (Hallman).

As a precautionary measure, if a county cancels a voter from another county in the duplicate merge process, the other county will be notified of the cancelation on their dashboard because that county is required to send the voter a letter. Tr. 825:21-826:4 (Hallman).

The system is designed to strike a balance between using business logic to prevent mistakes and allowing flexibility for registrars to correct errors. Tr. 805:4-806:3 (Hallman). Mr. Hallman testified that "[y]ou don't want to make the system too restrictive because then you can't fix problems or even identify problems." Tr. 805:20-22 (Hallman). Mr. Hallman also testified that adding additional criteria to the potential matching process would put more demand on the system and potentially slow down the process of voter registration applications, which is a problem the State's vendor has warned against. Tr. 848:11-849:2 (Hallman). [*71]

If a county user mistakenly merges a potential duplicate match that is not a match, the resulting voter registration file will contain errors. Tr. 794:14-21 (Hallman); Tr. 1223:13-24 (Frechette). Mr. Hallman testified that it is uncommon for county users to incorrectly merge duplicate voter records, but he stated that it has happened more than once. Tr. 798:2-5, 12-14, 818:18-25 (Hallman). Where such did occur, Mr. Hallman testified that it would likely be treated as an individual training issue for that particular county user. Tr. 803:16-22 (Hallman).

Training guides are limited in scope and do not include every aspect of election procedure, although the county users were reminded during training sessions to double check their screens and make sure they were not making mistakes. Tr. 805:22-807:4 (Hallman). None of the Secretary of State's training materials contain any best practices about which values must match, or the proper procedures to follow when evaluating two different records. See, e.g., PX. 50; PX. 800; PX. 1878; PX. 1903. The Secretary's policy is that "it's the responsibility of the county office to review the two records to determine if it is the same person or not." Tr. [*72] 1324:10-12 (Frechette). Indeed, Ms. Frechette testified: "Minimal standards just wasn't part of our vocabulary. It was review the records and make the decision for your county registrations." Tr. 1324:22-24 (Frechette).

Mr. Hallman testified that ultimately, if a county user mistakenly canceled a registered voter and that person went to his or her polling place to vote, it is "supposed to be handled" by issuing that person a provisional ballot to vote and the county going back and researching "what happened with that person's record." Tr. 812:17-813:6 (Hallman).

d) Vital records matching process

Unlike the duplicate and felon matching processes, the Secretary does remove from the voter database voters who appear on lists submitted by the Georgia Department of Public Health who are deceased. O.C.G.A. §§ 21-2-231(d), (e); Tr. 3597:2-8 (Harvey). eNet identifies deceased voters by comparing the voter registration rolls with vital records from the Georgia Department of Health on a weekly basis. Tr. 884:14-24 (Hallman).

To prevent incorrect deletions of voter records, the Secretary utilizes what is called a "tight match," which compares a (possibly deceased) voter's and recently-deceased's last name, date of birth, and [*73] Social Security Number. Tr. 3597:9-13 (Harvey); Tr. 1321:22-1322:5 (Frechette); see also PX. 800 at 12.

If those factors match, the registrant is automatically canceled in eNet. Tr. 3597:9-13 (Harvey); Tr. 1322:22-1323:11 (Frechette). Counties are sent a list of persons who have been canceled pursuant to this process so they may doublecheck the Secretary's work. Tr. 3597:16-25 (Harvey).

Counties have an independent obligation to remove from the voter registration database persons they know to be deceased based on information from "obituaries

published by local newspapers, death certificates, verifiable knowledge of the death, and information provided in writing and signed by a family member or members of the deceased person." O.C.G.A. § 21-2-231(e.1)

To facilitate this process, in addition to the automatic cancelation of "tight" vitals matches, the Secretary of State's Office also provides "loose" potential vitals matches to counties for manual review. Tr. 885:20-24, 886:5-7 (Hallman).

A loose potential vitals match is flagged when either of the following sets of criteria matches between records: (1) last name and date of birth; or (2) last name and social security number. Tr. 1323:12-21 (Frechette); PX. 800 [*74] at 13.

As with the felon and duplicate matching processes, if eNet identifies a loose match, the potential match will be displayed on the county dashboard for review by county registrars. Tr. 1323:17-21 (Frechette).

Also like these other matching processes, Ms. Frechette testified that the Secretary of State's Office does not tell the county how to make the decision of whether a true match exists between death records and existing voter registration records. Tr. 1327:3-12, 1329:4-11 (Frechette). It is, again, the counties' responsibility to review the information in the potential match, decide if there is a true match, and cancel the record. Tr. 1324:1-3, 10-12 (Frechette). Plaintiffs put forth no evidence from county officials to show that the criteria used by the Secretary of State to identify potential matches definitively led to errors occurring in counties' determinations, either due to the volume of the batches or otherwise.

Counties are encouraged to perform audits on their vital records canceled automatically by the system to ensure the files have been removed from their active voter files. Tr. 893:3-11, 894:13-15 (Hallman).

e) List Accuracy witnesses

Witnesses who testified about [*75] list accuracy burdens include the following: Kia Carter (Tr. 2482-2516); Dasia Holt (PX. 2103 (Holt Dep.)); Kelly Dermody (PX. 2101 (Dermody Dep.)); Nicole Freemon (Tr. 1494-1515); Julian Grill (PX. 2056 (Grill Dep.)); Alkhealasharteula Harrison (Tr. 2665-2690); Emily Huskey (Tr. 1141-1168); Antoinette Johnson (PX. 2105 (Johnson Dep)); Brenda Lee (PX. 2095 (Lee Dep.)); Anthony McKissic (Tr. 2723-2749); Meridith Rose (Tr. 2765-2819); Andre Smith (Tr. 2429-2481); Jayme Wills (PX. 2052 (Wills Dep.)).

4. Plaintiffs expert witnesses

At trial, Plaintiffs offered expert testimony from the following experts: Dr. Adrienne Jones; Mr. Kevin J. Kennedy; Dr. Ken Mayer; Dr. Peyton McCrary; and Dr. Lorraine Minnite. The Court will now provide an overview of the expert testimony presented at trial.

a) Dr. Adrienne Jones

Dr. Adrienne Jones received her J.D. from the University of California, Berkley. Tr. 937:7-8 (Jones). After graduating law school, she pursued a Ph.D. in political science at the City University of New York; her graduate work focused on the Voting Rights Act of 1965. Tr. 937:17-23 (Jones). Dr. Jones has been a professor of political science at various institutions for around twenty-two years. Tr. 936:7-19 (Jones). [*76] She is currently in her sixth year as a Professor of Political Science at Morehouse College, where her academic focus is on African American political development. Tr. 936:12-19, 938:13-19 (Jones). In addition to her dissertation, Dr. Jones has published two peer-reviewed articles on the VRA, and she is currently working on another peer-reviewed article and a book on the VRA. Tr. 940:1-6, 13-19 (Jones).

This Court qualified Dr. Jones as an expert of historical review. Tr. 950:3-10. At trial, Dr. Jones testified about the history of voting and voter suppression, specifically as it related to the history of African American voting in Georgia. Tr. 951:19-22 (Jones). This Court credits the testimony of Dr. Jones inasmuch as her expert report provides a historical backdrop pertinent to cases brought under Section 2 of the VRA. However, this Court ascribes only limited weight to Dr. Jones's testimony concerning the matters addressed in her

report that occurred after 1990. Likewise, this Court attributes limited weight to testimony that did not connect Dr. Jones's historical backdrop to the present practices at issue. The Court gives no evidentiary weight to Dr. Jones's statements about polling place closures [*77] as this Court has already found that Plaintiffs lack standing to assert their polling place closure claims against Defendants. Doc. No. [612], 36-42.

b) Mr. Kevin J. Kennedy

Mr. Kevin Kennedy served as Wisconsin's chief election officer from 1982 through 2016. Tr. 2820:15-19 (Kennedy).[2531] He was a member of the National Association of State Election Directors ("NASED") from 1990 to 2016 and served as the organization's president in 2006. Tr. 2825:23-2826:15 (Kennedy). He was also involved with the Election Center, a nationwide training organization for state and local election officials, from the 1980s to 2016. Tr. 2827:9-15 (Kennedy).

After concluding his time as chief election officer in 2016, he became an "inspector" for Wisconsin elections; in Georgia, this is equivalent to a poll worker. Tr. 2824:17-25 (Kennedy). He is currently Madison, Wisconsin's chief election inspector, and in that role, he is responsible for overseeing the smooth and proper administration of elections at the municipal level. See Tr. 2825:5-15 (Kennedy). The role also requires him to receive training. Tr. 2825:16-18 (Kennedy).

This Court qualified Mr. Kennedy as an expert on election training; at trial, he was permitted [*78] to testify as to the threshold level of election training in Georgia and supervision regarding election training. Tr. 2847:5-6.

At trial, Mr. Kennedy offered his expert opinion on the inadequacy of training for poll workers in Georgia regarding absentee ballot cancelation. He did not offer an opinion as to other issues in this case. This Court finds Mr. Kennedy credible. The Court will weigh his testimony in its Conclusions of Law.

c) Dr. Ken Mayer

Dr. Kenneth "Ken" Mayer has a bachelor's degree and a doctorate in political science; he received his B.A. from University of California San Diego in 1982 and his Ph.D. from Yale University in 1988. While at the University of California, he also minored in applied mathematics, and much of his coursework focused on applied statistics and quantitative methods used in political science. Tr. 327:24-328:4 (Mayer). Since 1989, Dr. Mayer has been a professor of political science at the University of Wisconsin in Madison, Wisconsin. Tr. 328:6-11 (Mayer). He is also an affiliate professor at the La Follette School of Public Affairs, located in Madison, Wisconsin. Tr. 328:7-8 (Mayer).

This Court qualified Dr. Mayer as an expert on election administration, [*79] including the analysis of voter registration files; voter verification processes; and the impact of those verification process, as far as they relate to statistical analyses. Tr. 342:18-342:1.

At trial, Dr. Mayer offered his expert opinion on Georgia's Exact Match policy and citizenship verification requirements.[2632]

Dr. Mayer testified that HAVA does not require states to implement the Exact Match policy Georgia follows. Tr. 358:13 (Mayer). His testimony indicated that while HAVA requires "that states go through a verification process by comparing registration information with information [in] driver's license or Social Security Administration files . . . it doesn't say how [states] do that. That method is left up to the state." Tr. 358:4-8 (Mayer). Dr. Mayer explained that there were other methods of voter verification available to states that still met baseline HAVA requirements. Tr. 358:16-21 (Mayer).

After an intensive statistical analysis, Dr. Mayer concluded that Exact Match did not affect voters uniformly across the state. Tr. 415:14-15 (Mayer). Dr. Mayer found "a relationship between the percentage of a county that is non-Hispanic white and the percentage of those registrants in [*80] MIDR status." Tr. 416:2-4 (Mayer). The higher the percentage of inhabitants that are non-Hispanic white in a particular county, the lower the percentage of voters in that county in MIDR status. Tr. 416:5-8 (Mayer).

Dr. Mayer also found a wide variation in the percentage of voters in MIDR in counties with similar demographics. Tr. 416:9-16 (Mayer). The variations in these

[31] Mr. Kennedy was also appointed Wisconsin's chief election officer under HAVA. Tr. 2821:21-2822:1 (Kennedy).

[32] Dr. Mayer did not offer an opinion as to whether any state officials have acted with discriminatory intent against voters of color or whether Georgia's voter registration practices and systems were adopted with discriminatory intent. Tr. 423:5-16 (Mayer). He also testified that he did not offer an opinion regarding the adoption of absentee ballot cancelation. Tr. 2842:21-2843:1 (Mayer).

comparable counties could not be explained by other factors, which Dr. Mayer felt was "consistent with and suggestive of different administrative practices in different counties." Tr. 416:17-19 (Mayer).

Furthermore, Dr. Mayer concluded that Exact Match "overwhelmingly disproportionally" impacted voters of color. Tr. 413:25-414:1 (Mayer). In examining county-level data files of registered voters as of January 2020, Tr. 412:25-413:2 (Mayer), he found that though white voters made up over half of all registered voters, only 11.4% of voters flagged for MIDR were white. Tr. 413:12-15 (Mayer). African Americans, meanwhile, made up approximately 30% of the overall voter file but nearly 70% of voters placed in MIDR status. Tr. 413:18-21 (Mayer). Using his experience in statistical analysis, he calculated that an African American [*81] voter is more than ten times likely to be placed in MIDR status under Exact Match than a white non-Hispanic voter. Tr. 414:5-9 (Mayer). In all, Dr. Mayer opined, based on data he gathered and analyzed, that voters of color were far more likely to be flagged and put in MIDR status under Exact Match than white voters. Tr. 408:10-12 (Mayer).

Dr. Mayer stated that based on relevant academic literature, it was "certainly plausible, if not likely" that being flagged as MIDR could "trigger a poll worker into thinking that they have to subject or should subject or must subject [the flagged] registrant to a higher level of scrutiny than they do other voters." Tr. 403:16-24 (Mayer). Dr. Mayer testified that another aspect of that line of academic literature suggested that poll workers "frequently" and are "more likely to" subject voters of color to a higher level of scrutiny than white voters; voters of color are also more likely to be "asked to do things the law doesn't actually require them to do" when poll workers place them under this scrutiny. Tr. 404:11-16 (Mayer). However, Dr. Mayer did not directly observe this phenomenon in Georgia. Tr. 404:24-405:1 (Mayer).

Dr. Mayer also testified that [*82] in his opinion, there was no valid reason for placing voters who fail Exact Match in MIDR status from an election administration perspective. Tr. 405:23-406:1 (Mayer).

Dr. Mayer also evaluated Georgia's citizenship verification process, and opined that the process "routinely misidentifies U.S. citizens as noncitizens." Tr. 365:12-13 (Mayer). He concluded that the verification process had an "error rate" of 43.1%; of the 3,073 people on the voter rolls flagged for noncitizenship as of January 2020, 43.1% of them had been able to provide documentation proving that they were, in fact, citizens by November 2021. Tr. 365:12-14; 366:6-12 (Mayer); PX. 1999 at 7. It was Dr. Mayer's opinion that Georgia's method of relying on driver's license data to verify citizenship was "known to produce inaccurate results and can produce errors that approach 100% in terms of every person they . . . flag as a noncitizen is actually a citizen." Tr. 366:16-20 (Mayer).

However, Dr. Mayer acknowledged that it was possible that persons in pending status for citizenship could indeed be noncitizens. Tr. 504:9-12 (Mayer). He did not conduct an analysis to determine whether any of the 1,750 registrants remaining in [*83] pending status for citizenship verification as of November 2021 were actually citizens. Tr. 439:25-440:4 (Mayer).

Dr. Mayer believes that the SAVE program would likely bring down the number of voters in pending status for citizenship. Tr. 441:21-24 (Mayer).[2733]

In addition to identifying potential accuracy issues, Dr. Mayer's study of citizenship verification led him to conclude that Georgia's citizenship verification process applies overwhelmingly to voters of color. Tr. 387:9-16 (Mayer).

When compared to their overall demographic representation in the voter file, Hispanics were between four and five times more likely to be flagged as noncitizens. Tr. 389:23-390:5 (Mayer). Asian and Pacific Islander registrants were between seven and eight times more likely to be flagged as noncitizens. Tr. 390:8-14 (Mayer). African American registrants were also slightly more likely to be flagged as noncitizens. Tr. 390:15-23 (Mayer).

Furthermore, Dr. Mayer found that white registrants were both the least likely to be flagged for noncitizenship and the most likely "to be able to overcome that or to take steps to move their registration into active status." Tr. 393:13-15 (Mayer). African American registrants [*84] flagged for noncitizenship were "least likely to be able to take the steps to . . . move their registration into active status." Tr. 393:18-21 (Mayer).

In Dr. Mayer's opinion, Georgia's citizenship "verification process overwhelmingly and disproportionately flags voters of color[,] who are more likely to be flagged and more likely to have remained in pending status." Tr. 398:7-10 (Mayer).

[2733] As stated above, SAVE is a web-based program operated by the Department of Homeland Security to help other governmental entities determine the immigration status of applicants for public benefits or licenses. PX. 2021 at 4; PX. 2014.

This Court finds Dr. Mayer credible. The Court will weigh his testimony in its Conclusions of Law.

d) Dr. Peyton McCrary

Dr. Peyton McCrary received a bachelor's and master's degrees in history from the University of Virginia; the focus of his master's program was the "History of the South." Tr. 186:14-187:3 (McCrary). Dr. McCrary went on to receive his Ph.D. in history from Princeton University, again focusing on Southern history, this time with an emphasis on the Civil War and Reconstruction Era. Tr. 187:5-9 (McCrary). Since completing his Ph.D., he has taught at various universities. Tr. 187:15-21 (McCrary). He consistently taught courses on the history of the South for twenty years. Tr. 188:7-11 (McCrary).

This Court qualified Dr. McCrary as an expert in history. Tr. 198:5-10, 22-23; 289:15. At trial, [*85] Dr. McCrary offered his expert opinion on the history of voter discrimination in Georgia; the history of racial polarization in voting in Georgia; the history of voter registration processes in Georgia; and the history of "the way in which the Georgia party system evolved over time and what that has to say about the context in which decision-making about, particularly the operation of the voter registration system, both before and after the state began to implement . . . HAVA [] in the 21st century." Tr. 200:15-201:16 (McCrary).[2834] In sum, it was Dr. McCrary's opinion that today's political context and voter registration and verification processes in Georgia resemble the political context and voter registration and verification processes in place during the Jim Crow era. PX. 1289 at 7-8. However, Dr. McCrary did not testify or speculate as to the motivations behind implementing certain voter verification processes still in use today in Georgia at trial. Tr. 231:25-232:5 (McCrary). This Court finds Dr. McCrary credible. The Court will weigh his testimony in its Conclusions of Law.

e) Dr. Lorraine Minnite

Dr. Lorraine Minnite has a bachelor's degree in American history, two master's [*86] degrees, and a Ph.D. in political science. Tr. 2332:6-7 (Minnite). She is an associate professor of Public Policy and chair of the Department of Public Policy and Administration at Rutgers University. Tr. 2331:20-22 (Minnite). Her area of academic interest is in American politics, with a special focus on elections and, more specifically, voter fraud in American elections; this has been her focus for more than twenty years. Tr. 2337:13-19 (Minnite). Drawing on her years of academic study, in 2010, Dr. Minnite wrote the peer-reviewed The Myth of Voter Fraud, published by Cornell University Press. Tr. 2339:11-13, 22-23, 2340:1-4 (Minnite). In addition to her book, she has also written four peer-reviewed academic articles on voter fraud. Tr. 2341:3-4 (Minnite). Dr. Minnite has previously testified in other cases regarding voter fraud. Tr. 2332:20-24 (Minnite).

This Court qualified Dr. Minnite as an expert "in the area of political science, specializing in elections, the political process[,] and voter fraud in American elections." Tr. 2344:19-2345:1. At trial, Dr. Minnite offered her expert opinion regarding incidents of voter fraud nationally and in Georgia. In researching and forming her [*87] expert opinions for this case, Dr. Minnite defined "voter fraud" as "the process whereby voters *intentionally* corrupt the voting or the electoral process." Tr. 2350:13-15 (Minnite) (emphasis added). Dr. Minnite concluded that empirical evidence showed that incidents of voter fraud are exceedingly rare nationally and in Georgia; this conclusion applied both to incidents of fraud at the polls on Election Day and to incidents of fraud in voter registration. Tr. 2346:3-6 (Minnite). She also found that "a review of the available evidence in Georgia finds no cases of voter impersonation at the polling place, and in addition there is minimal evidence of other forms of fraud intentionally committed by voters, such as what Georgia calls 'repeat' voting or voting when knowing one is ineligible to vote." Tr. 2346:10-15 (Minnite); PX. 1038 at 3. Dr. Minnite reaffirmed these opinions following the 2020 Election in Georgia. Tr. 2346:19-22 (Minnite); PX. 2098 at 4.

Dr. Minnite did not offer an opinion on Georgia's implementation of HAVA or on Georgia's election administration processes generally. Tr. 2404:14-18, 2405:13-15 (Minnite). As such, her research did not involve examining the amount of improper [*88] or invalid voter registration in Georgia. Tr. 2406:8-10 (Minnite). Dr. Minnite also testified that she was not opining that Georgia does not have an interest in preventing voter fraud. Tr. 2410:25-2411:5 (Minnite). This Court finds Dr. Minnite credible. The Court will

[34] While Dr. McCrary was allowed to offer expert testimony as to the history of the implementation of certain pieces of voting rights legislation in Georgia, the Court noted at trial that the portions of his testimony that were subject to objection (based upon legal conclusion) were accepted by the Court as lay witness testimony only. See, e.g., Tr. 215:4-21, 258:16-259:7.

weigh her testimony in its Conclusions of Law.

5. Other Evidence Considered

Plaintiffs also presented discriminatory purpose evidence that included the troubling and powerful story of Dr. Nancy Dennard, who, in 2010, was arrested and charged with felony charges relating to absentee ballots following the election of the first-ever majority-Black school board. Tr. 683:7-684:12, 676:1-728:7, 745:8-755:3 (Dennard). The prosecution of Dr. Dennard and others was prompted by the Secretary of State's Office, which initiated an investigation and then asked the Georgia Bureau of Investigations to become involved. Tr. 683:7-684:12, 676:1-728:7, 745:8-755:3 (Dennard). The charges were eventually dismissed after then-Attorney General Sam Olens issued an opinion interpreting O.C.G.A. § 21-2-385(a) or § 21-2-574 as not prohibiting the conduct Dr. Dennard had been accused of engaging in—merely possessing another voter's sealed absentee ballot to help have it delivered. [*89] Tr. 649:7-728:7, 745:8-755:3 (Dennard); see also PX. 2000, 2038, 2047; DX. 736.

Other asserted evidence of discriminatory purpose included 2014 and 2018 campaign speeches by then-Secretary Kemp—in one speech, he urged his supporters to register voters who would vote for Republican candidates and encourage them to vote in the same way that Democrats had previously done with minority voters. DX. 740; PX. 2051, Tr. 86:9-17, 88:9-17, 92:18-22 (Kemp Dep.). Plaintiffs thereafter attempted to tie these campaign statements to investigations into the New Georgia Project, an organization focused on registering people of color to vote. PX. 97 at 6. In May 2014, the Secretary of State's Office commenced an investigation into the New Georgia Project. The investigation began after election officials in Butts County complained to the Secretary of State's Office about a voter registration drive and the manner in which it was being conducted. Tr. 3622:21-3623:13 (Harvey). Specifically, based on the questions being asked—about personal identifiable information, social security number, driver's licenses, etc.—the elections office and sheriff's office believed that there was an identity theft ring at work. [*90] Tr. 3623:1-4 (Harvey). As the investigation developed, it became focused on forgery, making false statements on election documents, false voter registration, and providing fraudulent information on election documents. Tr. 3625:22-3626:3 (Harvey). The New Georgia Project was later dropped as a respondent in the matter because the Secretary's investigators could not find a causal link between New Georgia Project and the canvassers the investigators thought had committed forgeries. Tr. 2029:6-23 (Harvey).

a) Judicial notice of Georgia voting and voter registration statistics

Defendants moved this Court, pursuant to Rules 201(b)(2) and 201(c)(2) of the Federal Rules of Evidence, to take judicial notice of certain voter registration and election statistics maintained by the Secretary of State's Office. Doc. No. [829]. As indicated during trial, that motion was granted by this Court in the Docket Order entered June 13, 2022. Tr. 3297:10-12. Specifically, for purposes of this Opinion, this Court takes judicial notice of the following:

As of the November 3, 2020 general election, there were 7,638,898 registered voters in Georgia. Doc. No. [829-9], 4.

As of the June 9, 2020 primary election, there were 7,340,261 registered voters in Georgia. Id.

As of [*91] the November 6, 2018 general election, there were 6,935,816 registered voters in Georgia. Id.

As of the May 22, 2018 primary election, there were 6,694,441 registered voters in Georgia. Id.

As of the November 8, 2016 general election, there were 6,637,939 registered voters in Georgia. Id.

In the January 2021 runoff election between former Senator David Perdue and now-Senator Jon Ossoff, 1,084,138 absentee by mail ballots were cast. Doc. No. [829-8], 3.

In the January 2021 runoff election between former Senator Kelly Loeffler and now-Senator Raphael Warnock, 1,084,021 absentee by mail ballots were cast. Doc. No. [829-7], 3.

In the November 2, 2020 presidential election between former President Donald Trump and now-President Joe Biden, 1,316,943 absentee by mail ballots were cast. Doc. No. [829-6], 3.

In the November 6, 2018 gubernatorial election between Governor Brian Kemp and Stacey Abrams, 223,576 absentee by mail ballots were cast. Doc. No. [829-5], 3.

II. CONCLUSIONS OF LAW

The Court now sets forth its conclusions of law, which will include consideration of jurisdictional principles followed by consideration of the preponderance of the evidence as to the remaining causes of action and [*92] affirmative defenses. See Langston *ex rel.* Langston v. ACT, 890 F.2d 380, 383-84 (11th Cir. 1989) (noting that the plaintiff in a § 1983 suit bears the burden of "prov[ing] his case by a preponderance of the evidence" at trial); League of United Latin Am. Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist., 123 F.3d 843, 846 (5th Cir. 1997) (indicating that in the Voting Rights Act context, the plaintiff was "required to prove by a preponderance of the evidence that all of the Gingles preconditions were satisfied"); Swaters v. Osmus, 568 F.3d 1315, 1323-24 (11th Cir. 2009) ("The [affirmative] defense must be established by a preponderance of the evidence.").[2935]

A. Jurisdictional Considerations

1. Standing

"Standing is the threshold question in every federal case, determining the power of the court to entertain the suit." CAMP Legal Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257, 1269 (11th Cir. 2006) (internal quotation omitted). Article III of the United States Constitution limits courts to hearing actual "Cases" and "Controversies." U.S. Const. Art. III § 2; Lujan v. Defs. of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The standing requirement arising out of Article III seeks to uphold separation-of-powers principles and "to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). Standing is typically determined when the complaint is filed. Focus on the Fam. v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1275 (11th Cir. 2003) (collecting authorities).

To establish standing, a plaintiff must show three things:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or [*93] hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (internal quotations, citations, and alterations omitted). The party invoking jurisdiction bears the burden of establishing standing "with the manner and degree of evidence required at the successive stages" of litigation. Id. at 561; see Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater , 777 F.2d 598, 607 n.24 (11th Cir. 1985) (standing "is a legal determination based on the facts established by the record"). At trial, facts concerning standing must be supported by evidence. Lujan, 504 U.S. at 561; see Langston, 890 F.2d at 383-84 (noting that plaintiff in a § 1983 suit must prove his case by a preponderance of the evidence at trial). While standing is determined when the plaintiff's complaint is filed, "it must persist throughout a lawsuit." G. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cty. Bd. of Registration & Elections, 36 F.4th 1100, 1113 (11th Cir. 2022).

The Court will now consider the three requisites that the organizational plaintiffs must establish: injury in fact, traceability, and redressability.

a) Injury-in-fact

To establish an injury in fact, a plaintiff [*94] must show that it "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." Spokeo, Inc. v. Robins, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (internal

[35] Additional legal standards will be discussed, infra.

quotations omitted). "A 'concrete' injury is one that actually exists—it is 'real,' as opposed to 'abstract.'" Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1114 (citations omitted).

Organizations may have standing under a "diversion-of-resources" theory when they divert financial resources or personnel time to counteract unlawful acts of a defendant, thereby impairing the organizations' ability to engage in typical projects. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982); Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014) ("Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response."); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding an organization had standing because it diverted "resources from its regular activities to educate and assist voters in complying with" a challenged statute); Common Cause Ind. v. Lawson, 937 F.3d 944, 952-53 (7th Cir. 2019) (listing cases finding standing for voter-advocacy groups that diverted resources to counteract unlawful election activity).[3036] A diversion of resources constitutes an Article III injury in fact. See Browning, 522 F.3d at 1165 n.14.

In the Eleventh Circuit, a litigant can establish [*95] organizational standing to challenge election laws by showing it has diverted or anticipates having to divert time, personnel, or other resources from its usual projects to assist voters whose ability to vote is affected by state action. See Arcia, 772 F.3d at 1341; Browning, 522 F.3d at 1165-66 (finding organizational standing when a plaintiff diverted resources from election-day education and monitoring to educating volunteers and voters on compliance with a new election law). To create a concrete injury, the diversion must cause a perceptible impairment of organizational activities. Jacobson, 974 F.3d at 1249 (11th Cir. 2020). And to show a concrete injury, the organization must identify the specific activities from which it diverted or is diverting resources. Id. at 1250; see also Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1114 (an organization establishes diversion-of-resources standing by showing what it would have to divert resources away from to address the effects of the defendant's alleged conduct); Ga. Latino All. for Hum. Rights v. Governor of Ga., 691 F.3d 1250, 1260 (11th Cir. 2012) (finding standing for an immigration organization that "cancelled citizenship classes to focus on" increased inquiries about a new law).

As this Court stated in its summary judgment order concerning standing, a plaintiff may show a diversion of resources even if it diverts from one activity aimed at achieving an organizational [*96] mission to a different activity aimed at that same mission. See, e.g., Common Cause/Ga., 554 F.3d at 1350 (finding standing for organization that diverted resources from its regular voting-related activities to educate and assist voters in complying with a challenged statute). Similarly, when an organization diverts its resources to achieve its typical goal in a different or amplified manner, the organization may still gain standing. See Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1115 (finding that an organization diverted resources if it reassigned personnel to help Spanish-speaking voters understand English-only materials); Browning, 522 F.3d at 1166 (finding standing when organization anticipated it would "expend many more hours than it otherwise would have" on specific election-related activity).

Notably, if this Court finds that one Plaintiff has standing with respect to a challenged practice, there is standing sufficient for the Court to consider the challenge, regardless of whether any other Plaintiff has standing with respect to that challenged practice. See Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."), Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1113-14 ("We need not parse each Plaintiff's standing, however, because one—GALEO—has standing, under a diversion of resources theory, [*97] to assert all of the claims in the second amended complaint.").

Eight witnesses testified to support Plaintiffs' organizational standing: Bishop Reginald Jackson (the Sixth District); Reverend Raphael Warnock and Reverend Dr. John H. Vaughn (Ebenezer); Jessica Livoti (Care in Action); Liza Conrad and Cianti Stewart-Reid (Fair Fight); Pastor Hermon Scott (Baconton); and Reverend Matt Laney (Virginia-Highland). The Court

[36] An organization that diverts its resources voluntarily can still have standing if the "drain on [the] organization's resources arises from the organization's need to counteract the defendants' assertedly illegal practices [because] that drain is simply another manifestation of the injury to the organization's noneconomic goals." Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1166 (11th Cir. 2008) (internal quotations and citation omitted).

finds each of these witnesses credible and specifically credits their testimony summarized below.

(1) The Sixth District has suffered an injury-infact caused by Defendants.

The Sixth District is an A.M.E. church in Georgia with a long history of involvement in civil rights, particularly voting rights. Tr. 2974:7-11, 2979:15-2982:18 (Jackson). Bishop Reginald Jackson is the Bishop of the Sixth District, a role he assumed in 2016. Tr. 2973:2-10 (Jackson). Bishop Jackson has undertaken the task of ensuring that "every eligible person in the Sixth District who is 18 and above is registered to vote, and . . . actually votes." Tr. 2982:11-18 (Jackson).

In 2018, the Sixth District diverted resources to address Exact Match MIDR, voter roll inaccuracies, and absentee ballot cancelation [*98] procedures. Tr. 2999:4-12 (Jackson). Bishop Jackson diverted time preaching and communicating with his congregation about the Sixth District's voter initiatives, early voting, and voter roll inaccuracies. Tr. 2998:23-2999:12 (Jackson); PX. 741 (2018 email urging early voting). Other Sixth District staff and volunteers devoted time in 2018 to oppose challenged practices in this litigation and to update Bishop Jackson on their work. Tr. 2995:1-14, 2996:6-16, 2997:4-9 (Jackson). Similarly, the Sixth District diverted resources to address concerns with Exact Match MIDR, mismanagement of the voter rolls, and absentee ballot cancelation procedures during the 2020 election cycle. See Tr. 2984:4-2985:12 (Jackson). For example, the Sixth District focused on verifying voters' registration status, creating a voter empowerment program to assist in mobilizing voters among individual congregations, helping voters understand how to handle mail-in applications, and helping voters work through new issues relating to voting roll errors and absentee voting that differed from issues the church had addressed in "routine registration efforts[]." See Tr. 2986:6-20, 3008:7-3013:19, 3031:5-13 (Jackson), PX. 1908 [199] (document announcing church voter protection plan), PX. 1909 (showing voter registration trainings). The Sixth District also held workshops to address issues with inaccurate voter registrations, Exact Match, and canceling absentee ballots. Tr. 3024:20-3025:18 (Jackson); PX. 1992, 1909 (listing a staff member's outreach duties).

The evidence adduced at trial showed that resources—including personnel and volunteer time—were diverted from the Sixth District's other anticipated or regular activities, such as focusing staff time on Christian education, addressing other social issues like youth outreach, and focusing on church efforts related to COVID-19 or the census. Tr. 2995:19-2996:3, 2999:4-12 (Jackson).

After carefully reviewing the evidence adduced at trial, the Court finds that the Sixth District has demonstrated by a preponderance of the evidence that it suffered a concrete injury-in-fact by diverting its organizational [*100] resources from its core mission and other anticipated projects to counteract Exact Match MIDR, voter roll inaccuracies, and absentee ballot cancelation procedures.

(2) Ebenezer has suffered an injury-in-fact caused by Defendants.

Ebenezer has long been involved in voting rights efforts, and its Senior Pastor, Reverend Raphael Warnock, testified in deposition that protecting voting rights is core to the church's mission. PX. 2053 Tr. 35:10-36:9, 39:1-10, 41:3-6, 72:8-10 (Warnock Dep.).[31][37] The church's efforts have included registering, educating, and mobilizing voters, as well as challenging barriers to voting. PX. 2053, Tr. 35:10-36:9, 44:10-23, 71:15-23,[32][38] 93:2-17 (Warnock Dep.). Before the 2018 election cycle, Ebenezer devoted its voting efforts to general get-out-the-vote activities, consistent with the church's focus on voter registration, education, and mobilization. See PX. 2053, Tr. 46:6-13, 49:1-3 (Warnock Dep.).

[31] The Court overrules Defendants' objections regarding Reverend Warnock's testimony on voting rights being part of Ebenezer's mission. See Doc. No. [767-1], 30-31. The testimony is not argumentative. The witness was simply responding to questions asked. As Senior Pastor of his church, the witness also has knowledge of the matters being discussed, and the surrounding testimony shows that he laid a foundation to discuss it. Further, to the extent the witness was testifying as to facts concerning the church's mission, the Court does not uphold Defendants' objection that he was providing an improper lay witness opinion. To the extent the witness was providing testimony that could better be described as theological opinions (e.g., PX. 2053, Tr. 39:6-10 (Warnock Dep.) (stating that "democracy is the political expression of this idea that all human beings are created in the image of God"), the Court overrules Defendants' objections but gives that testimony little weight in considering legal issues. Finally, the church's mission and its connection to voting rights is clearly relevant to this case.

[32] The Court overrules Defendants' objections to this testimony. See Doc. No. [767-1], 16-17. The witness was testifying as to phone banking and similar outreach activities that the church had undertaken. As Senior Pastor of that church, the witness had a basis of knowledge to testify as to these matters, and nothing else about the facts of what the church was doing makes the testimony objectionable. To the extent Defendants are objecting to the witness's use of the term "purged" to describe voters, the Court will afford that term little weight from this witness.

But Ebenezer expanded its voting rights efforts in 2018 to counteract the effects of Defendants' challenged voting practices, such as perceived issues with the voter roll and the Exact Match MIDR policy. PX. 2053 Tr. 47:7-49:5, 104:15-18 (Warnock Dep.). Reverend [*101] Warnock testified in deposition that this new work was "much harder" than prior voting rights efforts. See PX. 2053, Tr. 108:12-16 (Warnock Dep.). To address these voting issues in 2018, the church newly focused resources—including volunteer, staff, and worship time—on verifying voter registration. PX. 2053, Tr. 49:1-20, 107:11-108:6, 185:8-24 (Warnock Dep.). Also, Ebenezer provided church space for new programs, such as a voter registration verification hotline, to assist voters grappling with issues caused by Defendants' challenged voting practices. PX. 2053, Tr. 51:7-53:12, 70:25-72:1,[33] [39] 111:10-21 (Warnock Dep.). Ebenezer also devoted financial resources, volunteer time, and worship time to educate voters regarding options to vote early or by absentee ballot. PX. 2053, 49:12-50:8, 103:3-10, 106:22-107:25, 183:12-185:14 (Warnock Dep.). Ebenezer continued and expanded these efforts during the 2020 election cycle by, among other things, devoting church space and time during ministry meetings and prayer sessions for projects to increase voter turnout and educate voters. See, e.g., PX. 2053, Tr. 59:3-8 (Warnock Dep.); see also Tr. 2944:9-2946:8, 2948:6-2949:5, 2952:1-2953:23 (Vaughn).

These programs diverted volunteer and staff time away from Ebenezer's other projects and "areas of church life." PX. 2053, Tr. 106:22-107:25 (Warnock Dep.). For instance, diverting volunteer time to these voting rights projects affected other church programs that rely on the same volunteers, such as Ebenezer's soup kitchen, programs for youth, or one of the church's other "dozens of programs." PX. 2053, Tr. 107:15-25 (Warnock Dep.). Ebenezer would otherwise devote these resources to other kinds of church outreach. PX. 2053, Tr. 190:8-16 (Warnock Dep.).[34][40]

After carefully reviewing the evidence adduced at trial, the Court finds that Ebenezer has demonstrated by a preponderance of the evidence that it has suffered a concrete injury-in-fact by diverting its organizational resources from the church's core mission and other anticipated projects to counteract voter roll inaccuracies and the Exact Match MIDR policy. Ebenezer's efforts in 2018 and thereafter to have voters check their registration status and vote by mail sufficiently differ from Ebenezer's prior voting activities to constitute a diversion of resources. Ebenezer had not previously engaged in voter registration verification, [*103] and its typical get-out-the-vote campaigns were not only different in nature but also involved less work. Under Eleventh Circuit jurisprudence concerning diversion of resources, the Court finds that even if the church had engaged in prior efforts relating to voter turnout and education, the evidence showed enough of a difference in the work undertaken in 2018 and 2020 to demonstrate a diversion of resources sufficient to establish an injury in fact.

(3) Care in Action has suffered an injury-in-fact caused by Defendants.

Care in Action is a nationwide nonprofit organization with a focus in Georgia. Tr. 83:20-23 (Livoti). It aims to assist domestic workers, and its mission includes helping such workers exercise their right to vote. Tr. 83:7-12 (Livoti). Care in Action's prior voting efforts focused on increasing voter turnout among domestic workers; voter protection was not part of its mission before 2018. Tr. 91:2-93:23 (Livoti).

In 2018, Care in Action planned for its voting-related work in Georgia to end on Election Day. Tr. 94:6-10 (Livoti). But because some voters were unable to cast their ballots, the organization's voting work continued past Election Day to ensure provisional ballots [*104] were cured and counted. Tr. 94:19-95:21 (Livoti). Care in Action directly engaged with voters, diverting resources and volunteer time from typical activities such as immigration matters to undertake provisional ballot training, door-to-door communications, phone banks, text message campaigns, and social media efforts. Tr. 95:9-98:12 (Livoti). To facilitate these efforts, Care in Action paid for the housing, travel, and meal expenses of staff members who stayed in Georgia to assist with the unanticipated post-election activities. See PX. 915; PX. 916; PX. 922; PX. 940; PX. 1006 (receipts and invoices for Care in Action's post-election expenditures,

[39] For the reasons stated above, the Court again overrules Defendants' objections as to this testimony. [*102] See Doc. No. [767-1], 16-17.

[40] The Court overrules Defendants' objections regarding this testimony. See Doc. No. [767-1], 33-34. The witness was testifying as to missions or other activities in which the church would engage if it were not diverting resources to counteract Defendants' challenged practices. That testimony is admissible here.

including transportation, housing, and meals for staff). Similarly, Care in Action spent $107,500 on post-election digital advertisements to reach potentially affected voters who had cast provisional ballots. Tr. 96:4-12 (Livoti); PX. 902.

In 2020, Care in Action expanded its scope of voting work and began voter outreach and education earlier than in prior election cycles. Tr. 108:4-16, 146:10-21 (Livoti). Care in Action incurred additional costs to develop training programs for staff and canvassers, and it devoted more staff time to voting [*105] activities than it had in the past. See Tr. 108:7-16, 115:15-117:22 (Livoti). For example, Care in Action trained its canvassers to educate voters about the Exact Match MIDR and Citizenship policies because the organization serves a population with a high number of immigrants and naturalized citizens who commonly have multiple or hyphenated last names and who thus are likely to encounter issues under these systems. Tr. 114:22-115:10, 131:10-18, 149:10-16, 150:1-4, 158:4-6, 161:21-162:1, 179:1-11, 180:18-25 (Livoti). Also, Care in Action has trained its canvassers to educate voters about challenges they may face due to voter roll inaccuracies, including being registered under the wrong name. Tr. 119:1-17; 130:5-15; 151:4-7; 158:4-6; 175:6-16; 181:1-4 (Livoti); see also Tr. 89:11-12 (Livoti) (discussing voter address issues that domestic workers face as a transient population). Care in Action has also undertaken voter education, including through a new voter hotline, regarding issues with absentee ballots and voter registration inaccuracies. Tr. 118:22-119:17, 141:17-24, 151:1-7, 160:20-25 (Livoti).

Care in Action could have reached out to more voters had it not diverted resources from [*106] its traditional get-out-the-vote work, where conversations with voters are less complex and time consuming. Tr. 115:17-23; 117:12-22 (Livoti). Further, these expanded voting efforts caused Care in Action to divert resources from other programs. Tr. 123:6-124:3 (Livoti). For example, its provisional ballot work in 2018 prevented Care in Action from sending staff to Mexico to work on immigration issues. Tr. 97:13-24 (Livoti). More broadly, voter protection efforts divert Care in Action's resources from its core work of organizing, advocating for, and providing on-the-job training for domestic workers—all of which Care in Action contends it would refocus on if the practices at issue were discontinued. Tr. 123:6-124:11 (Livoti).

The Court finds that Care in Action has demonstrated by a preponderance of the evidence that it has suffered a concrete injury-in-fact by diverting its organizational resources to counteract Defendants' Exact Match MIDR and citizenship policies.

(4) Fair Fight has suffered an injury-in-fact caused by Defendants.

Fair Fight is a nationwide nonprofit with its primary activities in Georgia. Tr. 1383:22-1384:1 (Stewart-Reid). Its mission has long focused on voter education, [*107] voter turnout, and progressive issue research. Tr. 1395:18-20, 1396:5-7 (Stewart-Reid); Tr. 3852:20-3853:5, 3857:20-3858:3 (Groh-Wargo). Fair Fight is particularly focused on supporting marginalized communities, voters of color, young voters, and low-income voters. Tr. 1396:8-13 (Stewart-Reid). But it also commits resources to research on non-voting progressive issues, such as Medicaid expansion and reproductive rights. Tr. 1414:6-15 (Stewart-Reid).

Because of what it observed in the 2018 election, Fair Fight began expending resources to mitigate voter suppression to protect its core missions of educating and mobilizing voters. Tr. 3858:4-3859:5, 3895:20-3896:3, 3930:25-3931:4 (Groh-Wargo). Thus, while Fair Fight was still addressing voting issues, it diverted resources away from core missions to address a new concern—perceived voter suppression. Tr. 1395:25-1398:4, 1459:3-24 (Stewart-Reid); Tr. 3858:4-17, 3930:25-3931:4 (Groh-Wargo). For example, the organization's work to counteract Defendants' acts has caused it to divert resources from other programs, such as get-out-the-vote campaigns and support of other progressive causes. Tr. 1424:16-22, 1459:3-14 (Stewart-Reid) (testifying [*108] that volunteers now have less time to conduct get-out-the-vote calls or have more voter interactions because they are spending time having longer conversations with voters about the challenged practices).

Also, to combat the challenged practices, Fair Fight has devoted substantial staff, volunteer, and financial resources to several new initiatives. Tr. 1399:9-18 (Stewart-Reid); Tr. 1066:6-8 (Conrad); Tr. 3870:21-3871:5 (Groh-Wargo). For example, Fair Fight devoted staff time and financial resources to create the "Fair Fight U" program, which trains college students about voter roll inaccuracies, absentee ballot cancelation, and other voting issues to prepare those students to check their registration status and exercise their right to vote. Tr. 1399:20-1402:18 (Stewart-Reid); Tr. 3870:11-17 (Groh-Wargo). After the 2018 election, Fair Fight

diverted resources to create and run similar programs to address voter registration and absentee ballot cancelation issues, which were more complicated than prior voting projects and consumed more volunteer time. E.g., Tr. 1402:14-1405:8 (Stewart-Reid) (discussing Democracy Warriors program); PX. 1858 (showing $33,711 budget for Atlanta Democracy [*109] Warriors Summit); PX. 1859 (showing $9,256 budget for Macon Democracy Warriors Summit); see Tr. 1059:12-1084:20 (Conrad) (discussing Voter Protection Department that collects stories from voters, addresses voter registration issues arising from citizenship verification, ensures voters' registration information is accurate, and trains poll observers); Tr. 1408:12-1409:12 (Stewart-Reid) (discussing the new Organizing Department, which manages volunteers who conduct voter outreach regarding voter suppression issues).

Beyond the new initiatives, Fair Fight's existing communications and research departments have diverted resources to address new voting issues by drafting and releasing press statements and social media content, creating a website to facilitate voter registration verification, and monitoring media to track relevant issues. Tr. 1069:2-12 (Conrad); Tr. 1411:14-1414:18 (Stewart-Reid); see also Tr. 1425:1-8 (Stewart-Reid) (discussing how the organization's research team has diverted resources to "media monitoring" concerning "issues with absentee ballots or Exact Match or the list inaccuracies" instead of other research for progressive issues such as reproductive health). The [*110] group has also diverted resources from its standard voter education to educate voters about proper absentee ballot cancelation. Tr. 1398:7-19 (Stewart-Reid). Thus, as shown above, Fair Fight's programs and efforts to address new voting issues have diverted attention, staff, and financial resources from the organization's other projects, including voter engagement and education efforts that are central to the organization's mission. Tr. 1404:25-1405:3, 1409:16-18, 1414:12-18, 1426:6-15 (Stewart-Reid); Tr. 3861:19-24 (Groh-Wargo); Tr. 1086:10-1087:15 (Conrad) (discussing civics programming to educate young voters of color that would receive more resources if they were not diverted to address voter registration issues and absentee ballot cancelation issues).

The Court finds that Fair Fight has demonstrated by a preponderance of the evidence that it has suffered a concrete injury-in-fact by diverting its organizational resources from its typical voter turnout and voter education activities to counteract Defendants' challenged practices relating to Exact Match MIDR and citizenship policies, management of the voter rolls, and absentee ballot cancelation training. To that tend, the Court credits [*111] and gives weight to the testimony of Ms. Groh-Wargo, Ms. Stewart-Reid, and Ms. Conrad regarding issues relating to the organization's diversion of resources.

(5) Baconton has suffered an injury-in-fact caused by Defendants.

Baconton, a Georgia church affiliated with the general Missionary Baptist Convention, maintains a deep commitment to civil rights and social justice issues. Tr. 2531:13-17, 2541:18-2542:14 (Scott). Voting issues have been a core part of the church's organizational mission, and it has long promoted voter education, registration, and participation. Tr. 2549:1-2550:24 (Scott). Before 2018, the church's voting efforts focused on encouraging people to vote because the church and its Senior Pastor, Reverend Doctor Hermon Scott, "[took] for granted" that once voters were registered, they were on the rolls and would be able to vote. Tr. 2553:18-2554:4, 2560:13-22 (Scott). But during the 2018 election cycle, the church changed its focus after hearing about issues with voter registration status. Tr. 2553:18-2557:17 (Scott). Pastor Scott was especially concerned about voters being unable to vote due to issues with identification cards not matching with voter registration information. [*112] Tr. 2554:5-2556:5 (Scott).

As a result of the above concerns, Pastor Scott began diverting time during weekly bible studies and sermons to discuss voting issues and the need to verify voting registration information, which took time away from religious and other topics usually discussed. See Tr. 2558:1-2561:2, 2574:7-12 (Scott). The church also diverted resources to host countywide meetings to discuss the importance of voter registration, education, and participation, including a new emphasis on checking voter registration. Tr. 2561:12-2566:12 (Scott); see PX. 634 at 4 (2018 worship bulletin announcing prayer meeting at Baconton). The church provided space, volunteers, and staff and printed materials to help host the countywide meetings. Tr. 2563:17-2564:17 (Scott). Baconton also diverted volunteer time in 2018 for events to help church members verify their voter registration, which differed from prior voter registration efforts. Tr. 2558:7-12, 2575:22-2578:17 (Scott). Pastor Scott continued diverting his and the church's time to efforts regarding voter registration verification in 2022, which the church states will continue to occur unless the

alleged voting practices are ended. See [*113] Tr. 2579:6-2580:3, 2654:14-25 (Scott).

Pastor Scott testified at trial that if the church's volunteers and staff had not diverted resources toward verifying voter registration, they would have been involved in other activities in line with Baconton's mission, such as feeding the hungry, assisting the poor, and visiting prisoners. Tr. 2573:2-17, 2578:3-12, 2587:2-5 (Scott). He also testified that if the challenged voting practices were ended, his church would reduce time spent on voter registration verification to discussing those issues only when the State is removing voters from voting roles, rather than weekly. Tr. 2656:2-24 (Scott).

The Court finds that Baconton has demonstrated by a preponderance of the evidence that it has suffered a concrete injury-in-fact by diverting its organizational resources from the church's core mission to counteract issues relating to Exact Match MIDR policy and voter roll inaccuracies, by educating and assisting voters with respect to voter registration issues and verification. If the Court grants relief to Plaintiffs, Baconton would be able to refocus its diverted resources on its core activities.

(6) Virginia-Highland has suffered an injury-infact caused [*114] by Defendants.

Virginia-Highland is an Atlanta church that is part of the United Church of Christ. Tr. 527:11-528:23 (Laney). Its mission focuses on combatting racism and representing marginalized people. Tr. 530:4-12 (Laney). In 2018, the church diverted resources to address issues with Exact Match MIDR and citizenship status, voter roll accuracy, and absentee ballot cancelation. Tr. 535:13-536:8, 540:4-541:7 (Laney). For example, while the church has had a "Voting Rights Ministry" since 2008 that originally focused only on registering voters, the church expanded the program's reach in 2018 to include voter registration verification. Tr. 532:8-536:8 (Laney). The church then had to spend more time training volunteers. Tr. 536:23-537:1 (Laney). Similarly, volunteers had to devote more time with each voter to address potential issues due to voter roll irregularities and Defendants' policies. Tr. 535:13-537:11 (Laney). Since 2018, the church has continued to divert resources to counteract Defendants' policies by increasing volunteer numbers, devoting significantly more staff time to the Voting Rights Ministry, and adding discussions of Defendants' policies during voter registration drives. [*115] See Tr. 533:22-540:21, 569:11-572:13 (Laney).

To undertake these new or enhanced voting-related activities, Virginia-Highland has had to divert resources from its other projects, such as the church's LGBTQIA ministry. Tr. 543:4-544:15 (Laney). For example, one church volunteer resigned from leadership positions in other ministries so she could devote that time to the voting rights work. Tr. 581:24-582:11 (Laney). Virginia-Highland anticipates that if this Court does not resolve the challenged practices in Plaintiffs' favor, the church will continue to divert resources in future elections, and away from other ministries, due to the challenged practices. Tr. 547:20-548:3, 577:2-9 (Laney).

The Court finds that Virginia-Highland has shown by a preponderance of the evidence that it has suffered a concrete injury-in-fact by diverting its resources from other core church programs to counteract Defendants' Exact Match MIDR and citizenship policies, management of the voter rolls, and training concerning absentee ballot cancelation procedures.

b) Traceability and redressability

"To establish causation [for standing,] a plaintiff need only demonstrate, as a matter of fact, a fairly traceable connection [*116] between the plaintiff's injury and the complained-of conduct of the defendant." Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1352 (11th Cir. 2005) (emphasis in original) (internal quotations omitted). An organizational plaintiff proceeding under a diversion-of-resources theory establishes traceability by showing that resources were diverted to counteract the defendant's allegedly illegal practices. Browning, 522 F.3d at 1166. The traceability requirement is not stringent and can be satisfied even with a showing that the alleged injury is indirectly caused by the defendant. See Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1271 (11th Cir. 2019).

An injury is traceable to an election official responsible for the election administration process or rule that allegedly has caused the plaintiff's injury. Compare Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1116 (finding traceability requirement met with allegations that state election official's failure to provide bilingual voting materials and information caused the organizational plaintiff's diversion of resources) with Jacobson, 974 F.3d at 1253 (finding no traceability to election official who was not responsible for the allegedly injurious policy). Establishing traceability is sufficient to establish causation, but only for purposes of standing.[41] See Ga.

An injury is redressable when "a decision in a plaintiff's favor would significantly increase the likelihood [*117] that she would obtain relief." Lewis v. Gov. of Ala., 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc) (cleaned up). That is true so long as the court's judgment may remedy the plaintiff's injury, "whether directly or indirectly." Id. (quotation marks omitted); see also Ga. Ass'n of Latino Elected Offs., Inc., 36 F.4th at 1116 (stating it must be "likely," not merely "speculative," that the alleged injury will be redressed by a favorable decision). Thus, if a state election official lacks the authority to redress the alleged injury, the court cannot enter a judgment that may remedy the plaintiff's injury, which means the plaintiff lacks standing. See, e.g., Jacobson, 974 F.3d at 1269 (finding the plaintiffs lacked standing because the defendant election official did not control the complained-of ballot-listing injury, which meant she could not redress the alleged injury).

After careful consideration of the evidence adduced at trial, the Court finds that Plaintiffs have standing to pursue their remaining claims because those claims are traceable to and redressable by Defendants.

(1) Exact Match MIDR and Citizenship are traceable to and redressable by Defendants.

The Court finds based on the evidence adduced at trial that Defendants are legally responsible for the Exact Match MIDR and citizenship policies, and that those policies [*118] are traceable to and redressable by Defendants. State law explicitly assigns responsibility for the voter verification and matching processes to the Secretary. See O.C.G.A. § 21-2-50(a)(14) (requiring the Secretary to "maintain the official list of registered voters for this state and the list of inactive voters required by this chapter"); O.C.G.A. § 21-2-50.2(a) (stating that the Secretary is the state's chief election official under HAVA and thus is "responsible for coordinating the obligations of the state under" HAVA); O.C.G.A. § 21-2-216(g)(7) (stating the Secretary "shall establish procedures to match an applicant's voter registration information to the information contained in the data base maintained by the Department of Driver Services for the verification of the accuracy of the information provided on the application for voter registration, including whether the applicant has provided satisfactory evidence of United States citizenship"). Evidence adduced at trial showed that the Secretary directs or is involved in many aspects of the relevant processes. See, e.g., PX. 1900 (letter that is drafted by the Secretary and that is sent by counties to registrants in MIDR status); PX. 2021 at 7, PX. 2022 at 5 (discussing Secretary's citizenship audit). [*119]

Moreover, HAVA does not mandate the precise requirements of Exact Match MIDR in a way that precludes Exact Match from being traceable to or redressable by Defendants. For example, HAVA does not require comparison of a registration applicant's first name, last name, date of birth, or citizenship information. 52 U.S.C. § 21083(a)(5). Nor does it require identifying information to match exactly. Id. Rather, HAVA requires states to compare voter registration applicants' driver's license numbers or the last four digits of their social security numbers against that information in the applicants' DDS or SSA files. 52 U.S.C. § 21083(a)(5); Tr. 358:4-12 (Mayer). HAVA does not require that such identifying information match exactly. 52 U.S.C. § 21083(a)(5); see Tr. 214:6-10 (McCrary); Tr. 357:20-358:8 (Mayer) ("Th[e] method is left up to the state."); Tr. 508:15-510:3 (Mayer). Plaintiffs presented evidence of other, less stringent ways to verify names in voter registration databases that would comply with HAVA. See Tr. 358:16-359:7 (Mayer); PX. 1278 (Mayer Report) at 10. Thus, the Court finds that HAVA is not a bar to finding traceability and redressability here.

Similarly, HAVA is not a bar to finding traceability and redressability with respect to the challenged [*120] citizenship verification process. Evidence in the record showed not only that HAVA itself does not require citizenship verification but also that other states have adopted alternative means of confirming citizenship for purposes of voting. PX. 66 at 2 (citations omitted); see also Tr. 363:24-365:4 (Mayer) (discussing states that rely on registrant's citizenship attestation without otherwise verifying citizenship status). Also, the evidence at trial showed that the Secretary exercises oversight of the citizenship verification process. E.g., PX. 1231, PX. 1779 (citizenship verification letters

drafted by the Secretary).

Finally, state law tasks the SEB and its members with promulgating rules and regulations to obtain uniformity in county practices, O.C.G.A. § 21-2-31(1), and formulate, adopt, and promulgate rules and regulations conducive to the fair, legal, and orderly conduct of elections, O.C.G.A. § 21-2-31(2). The SEB must investigate, or authorize the Secretary to investigate, the administration of election laws. O.C.G.A. § 21-2-31(5); see also Tr. 1742:16-1743:13 (Harvey) &. 4032:7-18 (Sullivan) (discussing SEB in context of complaints concerning election administration). Other statutory duties obligate the SEB to undertake significant oversight [*121] responsibilities regarding the administration of elections and election laws. See O.C.G.A. §§ 21-2-31(10), 21-2-33.1(a). The SEB also has enforcement powers under Georgia law. See O.C.G.A. § 21-2-33.1. And the SEB can have the Secretary of State provide support and assistance to carry out the SEB's duties. O.C.G.A. § 21-2-33.1(h); see also Tr. 4017:18-21 (Sullivan), Tr. 4093:14-17 (Mashburn), & Tr. 1852:1-19 (Harvey) (discussing the SEB's ability to instruct the Secretary of State to issue Official Election Bulletins to provide instructions to the counties). Given this significant oversight authority and based on the evidence adduced at trial, the Court finds that Exact Match MIDR and citizenship policies are traceable to the Board and its members.

For the above reasons, the Court finds that Defendants are sufficiently responsible for the Exact Match MIDR and citizenship policies such that those policies are traceable to and redressable by Defendants.

(2) Some list maintenance practices are traceable to and redressable by Defendants.

At summary judgment, the Court ruled that Plaintiffs' list maintenance claims are fairly traceable to the Secretary of State because "the law itself contemplate[s] [a] role for' the Secretary—i.e., maintaining accurate registration [*122] rolls under HAVA." Doc. No. [612], 43. None of the parties briefing that proceeded the Summary Judgment Order addressed O.C.G.A. §§ 21-2-221, 226, 228, or 231, as support for their traceability arguments. Doc. Nos. [441], [489], [553]. At trial, however, there was extensive testimony and argument regarding these statutes and their relationship to the Secretary of State's list maintenance responsibilities. See, e.g., Tr. 423:22-424:11, 2245:23-2248:1, 3203:10-3209:21, 3350:19-3351:20, 3353:3-7, 3355:8-18, 3580:8-3584:15, 3709:25-3710:10, 3735:25-3736:10, 3737:10-3739:21, 3757:14-3766:6, 3773:24-3776:1, 3796:20-3799:15, 3800:20-3801:15, 3827:18-3831:10. In light of the evidence adduced at trial, the Court now determines whether Plaintiffs' list maintenance claim is fairly traceable to the Secretary of State. "If an action proceeds to trial, the facts necessary to establish standing 'must be supported adequately by the evidence adduced at trial." Jacobson, 974 F.3d at 1245 (quoting Lujan, 504 U.S. at 561).

In Jacobson, the Eleventh Circuit held that the challenged practice was not fairly traceable to the Florida Secretary of State because "Florida law tasks the Supervisors, independently of the Secretary" with conducting the challenged practice. Jacobson, 974 F.3d at 1253. The Eleventh Circuit [*123] reasoned that even though the Florida Secretary of State has general supervision of the administration of election laws, where "Florida law expressly gives a different, independent official control over the order in which candidates appear on the ballot," the challenged practice is not traceable to the Florida Secretary of State. Id. at 1254. Accordingly, the Court will review the relevant statutory authority regarding list maintenance to determine whether the challenged practices are traceable to the Secretary of State or to the counties.

Upon review of the relevant Code sections, the Court construes the duties of the county registrars and the Secretary of State as follows.

(a) List Maintenance statutory overview

State law explicitly assigns responsibility for maintenance of the official list of registered voters to the Secretary. See O.C.G.A. § 21-2-50(a)(14) (requiring the Secretary to "maintain the official list of registered voters for this state and the list of inactive voters required by this chapter"); O.C.G.A. § 21-2-50.2(a) (indicating that the Secretary of State shall be responsible for coordinating the obligations of the state under HAVA); see also 52 U.S.C. § 21083(a)(1), (4) (setting forth each state's duties under HAVA; stating that each state "shall implement [*124] . . . a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State"; and stating that "[t]he State election system shall include provisions to ensure that voter registration records in the State are accurate and updated regularly .

. . ."). Indeed, Chris Harvey testified that the Secretary is the state official in charge of ensuring "that the HAVA requirements [are] met." Tr. 3485:6-11 (Harvey).

When an individual attempts to register to vote, the county registrar has a duty to determine whether the individual is eligible to vote. O.C.G.A. § 21-2-226(a). Once an individual is deemed an eligible elector, the county registrar has the duty of placing the elector in the proper districts. Id. at 226(b). The counties then have the duty to "from time to time [examine] the qualifications of each elector of the county or municipality whose name is entered upon the list of electors." O.C.G.A. § 21-2-228(a). If after notice and an opportunity for a hearing, "the registrars find that the elector is not qualified to remain on the list of electors, the registrars [*125] shall remove the name of such elector from the list of electors." O.C.G.A. § 21-2-228(e).

In addition to the counties' general duty to examine the qualifications, on or before the tenth day of every month, the Secretary of State receives "a complete list of all persons, including dates of birth, Social Security numbers, and other information as prescribed by the Secretary of State or The Council of Superior Court Clerks of Georgia, who were convicted of a felony in this state since the proceeding reporting period." O.C.G.A. § 21-2-231(a). Upon receipt of that list and the list of individuals convicted of felonies in federal court, "the Secretary of State shall transmit the names of such person whose names appear on the lists of electors to the appropriate county board of registrars." O.C.G.A. § 21-2-231(c)(2). The county registrar then "shall mail a notice to the last known address of each such person" stating that the person was listed as having a felony and will be removed from the list of electors thirty days after the notice, unless the individual requests a hearing. Id.

On or before the tenth day of every month, the Secretary of State receives "a complete list of all persons, including addresses, ages, and other identifying information as prescribed [*126] by the Secretary of State, who died during the preceding calendar month in the county." O.C.G.A. § 21-2-231(d). The Secretary of State then has the duty to remove said persons from the list of electors and notify the county registrar about the elector's death. Id. § 21-2-231(e). The County registrar also has a duty to remove individuals from the list of electors, if the county registrar obtains information about the individual's death from obituaries, death certificates, or other verifiable knowledge of the death. Id. § 21-2-231(e.1).

If the county registrar fails to "initiate appropriate action regarding the right of an elector to remain on the list of qualified registered voters" after receiving the felon list or information about an elector's death, "such action may subject the registrars . . . to a fine by the State Election Board." O.C.G.A. § 21-2-231(f).

At trial, Mr. Harvey testified that the process by which the Secretary of State maintains the list of voters, with respect to deceased and felon electors, is by programming eNet with certain criteria; eNet then flags the electors whose information matches the criteria. Tr. 3716:15-3717:9; 3720:13-20.

(b) Traceability for the specific challenged practices

i) vitals matching

With respect to vital records, [*127] the Secretary of State receives information from certain government agencies containing the list of deceased individuals (Tr. 3715:20-3716:7), then the Secretary of State programs eNet to apply certain matching criteria to the list of deceased persons against the electors on the voter registration database (Tr. 3717:1-3), then eNet automatically cancels electors whose information matches that of a deceased person (Tr. 3717:4-13). eNet will cancel an elector only if there is a "tight match," which was defined as match in last name, Social Security number and date of birth. Tr. 3719:7-18.

Mr. Hallman testified that once the Secretary of State cancels an elector, it sends the counties "loose matches." Tr. 886:8-15. Loose matches include: (1) last name and date of birth, and (2) last name and SSN. PX. 800 at 13.

Under both the statutory language and the testimony developed at trial, the Secretary of State is responsible for matching the lists of deceased individuals against the voter roll. The Secretary of State is then responsible for canceling the voters that match. The Secretary of State then sends the name of electors that loosely match the list of deceased electors. The counties then [*128] cancel voters who are loosely matched or if they obtain certain types of proof that the voter is deceased.

ii) felon matching

With respect to felon matching, the Court first reviews the governing statute and then discusses how the Secretary of State and counties undertake the process of attempting to identify felons and remove them from voter rolls.

Under Georgia law, the Secretary of State receives a monthly list from the Georgia Crime Information Center "of all persons, including dates of birth, social security numbers, and other information as prescribed by the Secretary of State . . . who were convicted of a felony in this state since the preceding reporting period." O.C.G.A. § 21-2-231(a). Pursuant to 52 U.S.C. § 20507(g), the Secretary of State also receives "lists of persons convicted of felonies in federal courts." See O.C.G.A. § 21-2-231(c)(2). Upon receiving these lists of felons,

> the Secretary of State shall transmit the names of such persons whose names appear on the lists of electors to the appropriate county board of registrars who shall mail a notice to the last known address of each such person by first-class mail, stating that the board of registrars has received information that such person has been convicted of a felony and will be [*129] removed from the list of electors thirty days after the date of the notice unless such person requests a hearing before the board of registrars on such removal.

Id. (emphasis added).

In practice, the Secretary of State receives from the DOC and the DCS a list containing names of recently convicted felons. Tr. 3719:23-3720:1. The Secretary of State then runs the list through eNet to identify voters whose information matches certain criteria that the Secretary of State has developed for matching purposes. Tr. 862:15-18 (Hallman); Tr. 3567:13-17, 3720:5-9 (Harvey); Tr. 1329:12-20 (Frechette). Specifically, eNet runs six different sets of criteria for felon matching: (1) Last name, first name, last four digits of Social Security number, and date of birth for voters in active, inactive, pending, or reject status; (2) last name, first name, last four digits of Social Security number, and date of birth for voters in canceled status; (3) last name, last four digits of Social Security number, and date of birth; (4) first name, last four digits of Social Security ~~number, and date of birth; (5) la~~st name, first name, and date of birth; and (6) last name, date of birth, race,[3542] and gender. PX. 800 [*130] at 21. These matching criteria are listed in descending order from "tight" matches to "loose" matches. See Tr. 871:8-18, 872:12-18 (Hallman).

Although the governing statute provides that "the Secretary of State shall transmit the names of [felons] whose names appear on the lists of electors to the appropriate county board of registrars," O.C.G.A. § 21-2-231(c)(2), the process unfolds more circuitously in practice.[3643] Namely, once the Secretary of State has run the above criteria and developed lists of potential matches between the felon lists and existing voter registration records, the Secretary of State transmits the list of *potential matches* to the counties by displaying them on the county dashboard for review by the county. Tr. 1329:21-1330:1 (Frechette).

At that point in the process, the governing statute provides that once the county receives from the Secretary of State the names of felons who appear on the county's voter rolls, the county "shall mail a notice to the last known address of each such person by first-class mail" informing such persons that they have been identified as a felon and will removed from the voter rolls absent further action from the person. O.C.G.A. § 21-2-231(c)(2). But the evidence at trial showed that [*131] under the system in place, the counties do more than simply mail notices to those identified by the Secretary of State. Rather, each county must establish its own county-wide policy to apply to each potential match provided by the Secretary of State to determine whether it is a true match. Tr. 3570:5-10 (Harvey); Tr. 1351:16-1352:11 (Frechette). In other words, under current practices intended to comport with O.C.G.A. § 21-2-231, regardless of the criteria used for identifying potential matches, the counties are the ones who ultimately decide whether individuals in their voter rolls are in fact felons. See Tr. 873:3-5 (Hallman). And if the county decides that someone identified as a potential match is indeed a felon, then the county must transmit to that individual the notice letter and follow the remaining, related procedures provided under the governing statute to remove the person identified as a felon from the voter rolls. See O.C.G.A. § 21-2-231(c)(2).

[43] It is important to note that Plaintiffs concede that the question of whether the Secretary's decision to delegate discretionary decision-making about which people on the list of felons are (or are not) on the list of registered voters complies with Georgia law is not at issue in this case. Doc. No. [854], ¶ 694. Plaintiffs state that "their challenge to the felon matching process is not that it violates state law, but that it is a deficient way for the Secretary of State's voters to be constitutionally." Id.

[42] Plaintiffs also bring a claim that the Secretary of State's use of an automatic felon matching process violates the NVRA, but that issue is addressed in a separate section of this Order.

As to traceability, Defendants argue that the counties—not the Secretary of State—are responsible for erroneous felon cancelations. Specifically, Defendants contend that "[t]he state is not making anyone take someone off the roll." Tr. 4437:1-3. Mr. Harvey testified that once [*132] eNet processes the list, the Secretary of State then sends the list of matches to the counties, and the counties decide which electors need to be removed as felons. Tr. 3720:21-3721:6. And, a potential match does "not necessarily [mean] cancellation . . . the county should look at and see if there is information that the person should be canceled." Tr. 3725:1-4. Once the county gets the potential matches, the county determines whether the individual should be removed as a felon; thus, in practice, the Secretary of State does not make that final determination. Tr. 3567:7-3568:1.

For purposes of standing, the Court disagrees that the burdens caused by the felon matching process are not traceable to the Secretary of State because the counties ultimately decide who is a felon.[3744] As Defense Counsel argued, "how does this list accuracy work in terms of felon matching? It's, again, controlled by the statute." Tr. 4435:23-25. And as discussed above, the governing statute provides that the Secretary of State sends the list of felons to the counties, which in practice is sent in the form of "matches." Then, per the governing statute, the counties must send a notice to the impacted voters informing [*133] them that they have been deemed a felon. But in practice, before that step occurs, counties use the information that they receive from the Secretary of State to determine whether matched individuals are indeed felons.

When outlining the duties for the counties and the Secretary of State, O.C.G.A. § 21-2-231 uses the word "shall." The Court acknowledges that there is debate as to the meaning of the word "shall"[3845]; however, in this Circuit "[t]he word 'shall' is ordinarily the language of a command." In re Tennyson, 611 (F.3d 873, 878 (11th Cir. 2010) (quoting Alabama v. Bozeman, 533 U.S. 146, 153, 121 S. Ct. 2079, 150 L. Ed. 2d 188 (2001)); see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998) ("[T]he mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion."); U.S. v. Peters, 783 F.3d 1361, 1364 (11th Cir. 2015) ("Using the verb 'shall in a statute is a command. 'Shall' creates an obligation not subject to judicial discretion.") (internal citations omitted).

Having considered the express terms of O.C.G.A. § 21-2-231(c)(2) and the procedure for felon matching as outlined at trial, the Court finds that the injury is sufficiently traceable to the Secretary of State for purposes of standing. To start, the Secretary of State has developed a system in which it generates lists of potential felon matches that it sends to the counties. Thus, the Secretary of State starts the felon identification [*134] process by identifying "potential" matches and sending those to the counties. At that point, the counties, relying on the potential matches that the Secretary of State sent them, undertake the process of identifying correct matches. And, per O.C.G.A. § 21-2-231(c)(2), the counties "shall" then start the process of removing voters identified as felons. Because counties are required by statute to send notice letters and either conduct a hearing or remove the elector thirty-days after the notice is mailed, the Court finds that under the plain language of the statute, the counties have no discretion over whether to send the notice, and must either hold a hearing or cancel a voter. While the Court acknowledges that in practice the counties do not automatically send the notice letter to the impacted voter, see infra, the Court finds that for purposes of traceability, the Georgia statute does not give the counties discretion over whether to send a notice letter. See Jacobson, 974 F.3d at 1254 (requiring courts to look to the specific language of the statute to determine whether an action is traceable to the secretary of state).

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[44] The Court finds infra that the felon matching claim fails as to liability on causation grounds. The Court's finding here is limited to determining whether the actions of the Secretary of State are sufficiently connected to the alleged constitutional injury for purposes of standing. See Yellow Pages Photos, Inc. v. Ziplocal, LP, 795 F.3d 1255, 1264-65 (11th Cir. 2015) (stating that for standing there must be a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant).

[45] Black's law dictionary defines "shall," as **1**. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. **2**. Should (as often interpreted by courts) <all claimants shall request mediation>. **3**. May <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement. **4**. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>. **5**. Is entitled to <the secretary shall be reimbursed for all expenses>. • Only sense 1 is acceptable under strict standards of drafting. SHALL, Black's Law Dictionary (11th ed. 2019).

Accordingly, certain burdens created by the felon matching process are traceable to the Secretary of State.[39][46] Moreover, [*135] for the reasons discussed supra with respect to the SEB's oversight responsibilities in ensuring fair elections and promulgating rules and regulations in accordance with that responsibility, the Court finds that this matter is also traceable to the SEB.

iii) duplicate matching

The Court finds that the duplicate matching process is not traceable to the Secretary of State. "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560; see also Jacobson, 974 F.3d at 1253-54 (holding that the challenged practices were not traceable to the Florida Secretary of State because state law assigned authority over the challenged practice to the counties). With respect to duplicate matching, the Court finds that the causal link between Defendants and the voters was broken by the counties' actions.

Unlike felon and vital record matches, the Georgia Code does not outline the procedure by which the duplicate matches are evaluated. O.C.G.A. § 21-2-228(a) requires the county registrars to "from time to time" examine "the qualification of [*136] each elector of the county or municipality whose name is entered upon the list of electors." The statute does not expressly dictate the method that the counties must take to re-examine an elector's qualifications.

At trial, Mr. Hallman testified that "[w]hen a voter registration application comes in through either [DDS or OLVR], [e]Net is programmed by the Secretary of State to run automatically a search of existing voter records that are already in [e]Net." Tr. 762:15-19. As with vital records and felon matching, the Secretary of State establishes the criteria for what is determined to be a duplicate match. Tr. 761:2-4. The following is the criteria used to determine a duplicate match: (1) driver's license number; (2) last name, first name, date of birth and Social Security number; and (3) last name, first name, and date of birth. PX. 50, 39. Mr. Hallman testified that once eNet determines that there is a possible duplicate match, the counties would see a list of potential matches based upon the different matching criteria and then would determine whether the voters are in fact a match or two different people. Tr. 765:13-766:1, 766:9-16.

Unlike with vital and felon matching, the statutes [*137] state that when a county deems that an elector does meet the registration requirements, the county "shall remove the name of such elector." O.C.G.A. § 21-2-228(e). As stated above, the use of the word "shall" requires the counties to (1) evaluate whether the voters on the list of electors are qualified to vote and (2) remove any elector who is not qualified to vote. See O.C.G.A. § 21-2-228(a). Under the current statutory framework, the Georgia legislature has expressly delegated the authority to determine the qualifications of electors and remove electors to the counties, with the exception of felons and vitals, where the Georgia legislature reserved certain duties for the Secretary of State. See infra. Although, the Secretary of State has general authority to maintain the list, "[Georgia] law expressly gives a different, independent official [general] control" over determining which electors are qualified to vote and removing electors that are not qualified to vote. Jacobson, 974 F.3d at 1254.[47] As a result, the

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[46] Notably, the origin of the above division of responsibilities between the Secretary of State and the counties distinguishes this case from Jacobson. In Jacobson, the plaintiffs sued the Florida Secretary of State and argued that they were "injured because Republicans, not Democrats, appear first on the ballot in Florida's general elections." Jacobson, 974 F.3d at 1253. The Eleventh Circuit found that there was no traceability because the Florida Secretary of State was not tasked under Florida law "with printing the names of candidates on ballots in the order prescribed by the ballot statute." Id. Rather, a Florida statute explicitly assigned that role to county officials. Id. (citing Fla. Stat. § 99.121). Here, however, no statute explicitly assigns voter eligibility decisions to the counties. Rather, the governing statute provides that the Secretary of State "shall" transmit felon names to the counties, who then "shall" mail notices to those individuals and initiate the process to remove the voter from the rolls. To be sure, the evidence shows that there is now a system in place that delegates certain decision-making responsibilities to the counties. But the statute does not expressly provide for that. Thus, the Court finds that this set of facts is distinguishable from the straightforward statutory responsibilities that created a traceability issue in Jacobson.

By comparison, with respect to vital matches, the counties [*138] are empowered to remove a voter from the voter rolls only if the county has physical proof that the voter is deceased, and with felons the statute requires the counties to send a notice to all voters who are on the Secretary of State's list and either hold a hearing or remove all electors who are on the list. The Georgia legislature abrogated the counties' deliberative autonomous decision-making authority with respect to the cancelation process for electors who appear on the Secretary of State's vitals and felons list. Accordingly, the Court finds that there is not sufficient causation to tie a burden caused by duplicate matching to Defendants. Accordingly, Plaintiffs' First and Fourteenth Amendment claim with respect to the duplicate matching process fails as a matter of law.[4048]

For the above reasons, the Court finds that Plaintiffs' List Maintenance Claim with respect to felon matching and vitals matching are traceable to Defendants. However, Plaintiffs' List Maintenance Claim with respect to Duplicate Matching is not traceable to Defendants.

c) Inadequate training on absentee ballot cancelation is traceable to and redressable by Defendants.

As to training related to provisional and absentee ballots, [*139] state law requires that the Secretary "conduct training sessions at such places as the Secretary of State deems appropriate in each year, for the training of registrars and superintendents of elections." O.C.G.A. § 21-2-50(a)(11). The Secretary must train and select trainings for county election superintendents, registrars, and other county election officials. See O.C.G.A. §§ 21-2-100(a), 101(a). Former Elections Division Director Chris Harvey testified that this training structure is a "train the trainer" scenario because the individuals the Secretary must train then go on to train other county elections officials and personnel. See Tr. 1871:8-22 (Harvey). Mr. Harvey also conceded that if the higher-level county elections officials are not well trained regarding absentee ballot procedures, then they will not be able to adequately train their personnel on those matters. See Tr. 1873:19-25 (Harvey). That inadequate training can in turn implicate uniformity and other concerns in the Secretary's and the Board's province. See Tr. 1830:12-20, 1835:21-23, 1838:17-24, 1865:7-10 (Harvey); O.C.G.A. § 21-2-31.

Given the above-cited authorities and trial evidence, the Court finds that Plaintiffs have standing to pursue their claims regarding the training of superintendents [*140] and registrars given the Secretary's and Board's direct statutory responsibilities. O.C.G.A. §§ 21-2-31, 21-2-50(a)(11). Further, the facts adduced at trial showed that failures by lower-level county officials and poll workers are attributable to inadequate training of their supervisors. In other words, the evidence at trial showed that claims related to the training of lower-level county officials and poll workers are directly traceable to and redressable by Defendants because Defendants' training of superintendents and registrars directly led to the issues complained of. Thus, Plaintiffs have standing for the absentee ballot training claims.

2. Political Question Doctrine

Satisfied that Plaintiffs have standing to bring this action, the Court now turns to the Political Question Doctrine.

As stated above, Defendants have raised the doctrine of political question as an affirmative defense to Plaintiffs' claims. Doc. No. [753-2], 3. More specifically, Defendants state: "Plaintiffs' federal claims against Defendants are barred as they raise political questions that should not be addressed by the Court." Id. Additional political question arguments were raised in Defendants' Rule 52(c) presentation.

Federal courts will generally refuse [*141] to hear a case if they find it presents a "political question." In this context, a political question is generally one that either is best left to the political branches of government or that lacks judicially manageable standards. In Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), the Supreme Court "set out the six indicia of a political question." McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1357 (11th Cir. 2007). Under Baker, any one of the following indicia removes an issue beyond the scope of justiciability:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy

[48] Because duplicate matching is not traceable to the Secretary of State, the Court will not evaluate the duplicate matching process under the Anderson-Burdick framework.

> determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Aktepe v. United States, 105 F.3d 1400, 1402-03 (11th Cir. 1997) (quoting Baker, 369 U.S. at 217).

As the Supreme Court explained in Rucho v. Common Cause, __ U.S. __, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019):

> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department [*142] to say what the law is." Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. Among the political question cases the Court has identified are those that lack judicially discoverable and manageable standards for resolving [them].

Id. at 2494 (internal quotations and citations omitted). The political question doctrine acts as a jurisdictional bar. See McMahon, 502 F.3d at 1365.

After review, the Court agrees with Defendants' general premise that it is not the place of federal courts to decide complex and subtle questions of election administration. However, federal courts are equipped and empowered to address claims that individuals' voting rights are being burdened. At bottom, the case *sub judice* is about individual voting rights and whether Georgia's election laws and policies unduly burden individuals' right to vote. Clearly, there are judicially manageable standards for evaluating [*143] such complaints—the Anderson-Burdick framework exists for precisely this purpose. See Jacobson, 974 F.3d at 1262 ("If the statute burdened voting or associational rights even slightly, we could apply legal standards to determine whether the burden was unconstitutional. Under Anderson and Burdick, we would weigh the burden imposed by the law against the state interests justifying that burden."). Without more, Defendants have not carried their burden of establishing a jurisdictional bar based on a political doctrine affirmative defense.

3. Mootness

As indicated above, "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990).[49] "[T]he doctrine of mootness derives directly from the case-or-controversy limitation because an action that is moot cannot be characterized as an active case or controversy." De La Teja v. United States , 321 F.3d 1357, 1361-62 (11th Cir. 2003) (citations omitted). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496-97, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) (citation omitted). More specifically, "[i]f events that occur subsequent to the filing of a lawsuit . . . deprive the court of the ability to afford the plaintiff . . . meaningful relief, then the case becomes moot and must [*144] be dismissed." De La Teja, 321 F.3d at 1362.

One "event" that may moot a claim is when the governmental defendant ceases the behavior on which a claim is based, through the repeal or amendment of a challenged statute, rule, or policy. Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1328-29 (11th Cir. 2004). The Supreme Court and the Eleventh Circuit "have repeatedly indicated that 'the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur.'" Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1256 (11th Cir. 2017) (citations omitted). It also appears that the Eleventh Circuit has established an exception to the general rule that the burden of proving mootness falls on the party asserting it. Id. "As a result, 'once the repeal of an ordinance has caused [the Court's] jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot.'" Id. "'The key inquiry' is whether the plaintiff has shown a 'reasonable

[49] "The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both [the] standing and . . . mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so [the Court] address[es] them separately." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).

expectation'—or . . . a 'substantial likelihood'—that the government defendant 'will reverse course and reenact' the repealed rule." Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1268 (11th Cir. 2020) (citations omitted).

Three broad factors guide courts conducting this inquiry: (1) whether the government's change in conduct resulted from [*145] substantial deliberation or is merely an attempt to manipulate jurisdiction; (2) whether the government's decision to terminate the challenged conduct was unambiguous; and (3) whether the government has consistently maintained its commitment to the new policy or legislative scheme. Flanigan's Enters., Inc. of Ga., 868 F.3d at 1257. The Eleventh Circuit has also stated:

> When considering a full legislative repeal of a challenged law—or an amendment to remove portions thereof—these factors should not be viewed as exclusive nor should any single factor be viewed as dispositive. Rather, the entirety of the relevant circumstances should be considered and a mootness finding should follow when the totality of those circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged legislation.

Id.

In their Statement of the Case for purposes of the Pretrial Order, Defendants argued that this Court "lacks jurisdiction over Plaintiffs' claim as to training of county election officials on absentee ballot cancellation procedures because this claim is moot." Doc. No. [753-2], 2. As discussed infra, the Court is unable to conclude that the absentee ballot issue is moot.[4250]

B. Count I: Fundamental [*146] Right to Vote Claim[4351]

1. Legal Standard

Count I of Plaintiffs' Second Amended Complaint brings voting rights claims under the First and Fourteenth Amendments. Doc. No. [582], p. 69. Count I claims Defendants'[4452] following conduct imposed the following severe burdens: (a) failing to train adequately county elections officials on laws governing elections; (b) failing to maintain an accurate and secure voter registration list; and (c) removing and preventing voter registrations under the "Exact Match" policy. Id. at 70, ¶ 155. Plaintiffs argue that, due to Defendants' misconduct, "voters in Georgia have suffered and will continue to suffer irreparable harm—including disenfranchisement and severe burdens on the right to vote in any and all elections and disenfranchisement." Id. at 72, ¶ 157.

"The Supreme Court has rejected a litmus-paper test for constitutional challenges to specific provisions of a State's election laws and instead has applied a flexible standard." Common Cause/Ga., 554 F.3d at 1352 (internal quotation marks omitted). Thus, a reviewing court must first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). The Court must then "identify and evaluate [*147] the precise interests put forward by the State as justifications for the burden imposed by its rule." Id. The Court must consider both the "legitimacy and strength of each of [the state] interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." Id. "Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." Id.; see also Burdick v. Takushi, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

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[50] For purposes of perfecting the record, the Court notes that Plaintiffs assert that Defendants presented a "quasi-mootness" argument as to the Exact Match/Citizenship Match challenged practice and the Secretary of State's recent use of the SAVE citizenship verification process (Doc. No. [854], ¶ 521); however, in their proposed findings, Defendants acknowledge that the Exact Match/Citizenship Match challenged practice is not mooted through existing statute or regulation. Doc. No. [855], ¶ 1029. In light of this acknowledgement, the Court declines to render a mootness finding as to the Citizenship Match challenged practice.

[51] "Plaintiffs filed suit under 42 U.S.C. § 1983, which provides them with a federal 'cause of action for constitutional violations committed under color of state law. To prevail, plaintiffs must demonstrate both that the defendants deprived them of a right secured by the Constitution or federal law and that the deprivation occurred under color of state law.' Grider v. City of Auburn, 618 F.3d 1231, 1256 (11th Cir. 2010) (citations omitted). Because the Defendants' instant motion relies solely on the Eleventh Amendment, the Court assumes for purposes of this Order, but does not decide, that the Defendants are state officials and that the challenged practices violate the Constitution. See Ex Parte Young, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (state officials may be sued in their official capacities for prospective injunctive relief to prevent violations of federal law). Sovereign immunity bars the claims against the State, the State Election Board, and the State Ministerial Officers in their official capacities. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) ("[A] suit by citizens of the State against the State or state officials is barred by the Eleventh Amendment unless the State has waived its immunity or Congress has abrogated it."). Because the Defendants' instant motion relies solely on the Eleventh Amendment, the Court assumes for purposes of this Order, but does not decide, that the Defendants are state officials and that the challenged practices violate the Constitution.

[52] With respect to Count I, the Complaint alleges that "Defendants" to encompass the Secretary of State, "State Election Board Members, and State Ministerial Officers." Because the Defendants' instant motion relies solely on the Eleventh Amendment, the Court assumes for purposes of this Order, but does not decide, that the Defendants are state officials and that the challenged practices violate the Constitution. See Ex Parte Young, 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (state officials may be sued in their official capacities for prospective injunctive relief to prevent violations of federal law). Sovereign immunity bars the claims against the State, the State Election Board, and the State Ministerial Officers in their official capacities. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) ("[A] suit by citizens of the State against the State or state officials is barred by the Eleventh Amendment unless the State has waived its immunity or Congress has abrogated it.").

"Ordinary and widespread burdens, such as those requiring nominal effort of everyone, are not severe." Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 205, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (Scalia, J., concurring) (quotation omitted). However, burdens "are severe if they go beyond the merely inconvenient." Id. If a State's election law imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. Burdick, 504 U.S. at 434 (citing Anderson, 460 U.S. at 788). But if a State's election law imposes a "severe" burden, it must be "narrowly drawn to advance a state interest of compelling importance." Id. (citing Norman v. Reed, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992)). "The more a challenged law burdens the right to vote, the stricter the scrutiny to which we subject that law." Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1319 (11th Cir. 2019).[4553] In other words, "lesser burdens [*148] . . . trigger less exacting review." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). Notably, "[t]o establish an undue burden on the right to vote under the Anderson-Burdick test, Plaintiffs need not demonstrate discriminatory intent behind the" challenged practice. Lee, 915 F.3d at 1319.

During closing argument, Defense counsel argued that the "burdens" under Anderson-Burdick are limited to "the impact on the voter[']s rights to vote[,] [n]ot the voter individually." Tr. 4530:19-21. The Court finds that this bright-line rule is not supported by precedent. In Anderson, the Supreme Court found that the early filing deadline for small political parties or independent candidates burdens the rights of voters and candidates to vote for the candidate of their choice. Anderson, 460 U.S. at 792-94. There, the Court looked at the burden on the individual voter's right to vote for their preferred candidate, not the voter's ability to cast a vote. In Burdick, the Supreme Court held that Hawaii's ballot access law did not "interfere with the right of the voters to associate and have candidates of their choice placed on the ballot." Burdick, 504 U.S. at 435. Again, the Court looked at the burden on an individual voter to vote for a particular candidate, not the right to vote generally. In Crawford, the Supreme Court noted, "in neither [*149] Norman nor Burdick did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, *an individual voter*, or a discrete class of voters." Crawford, 553 U.S. at 191 (emphasis added). There, the Court evaluated an individual voter's hardship in obtaining a photo ID and the impact of that burden on the voter's ability to cast a vote. Id. at 197-98. Accordingly, the Court finds that the Anderson-Burdick analysis requires the Court first to evaluate the burden of the challenged practice on the voter individually, and second, to evaluate the impact of that burden on the individual voter's right to vote.

Using this framework, the Court addresses each alleged violation of the right to vote in turn.

2. Issue: Absentee Ballot Cancelation Procedures

a) Challenged practice: lack of training on absentee ballot cancelations

Plaintiffs have not met their burden in establishing an Anderson-Burdick violation for Defendants' training in absentee ballot cancelations. The evidence adduced at trial does not support that Defendants' training of county election superintendents violated the First and Fourteenth Amendments. Plaintiffs have not sufficiently shown that the incorrect information caused a burden on voters. Additionally, [*150] Anderson-Burdick does not apply when the challenged practices are mistakes in election administration. Finally, even if Anderson-Burdick were to apply, the Court finds that Plaintiff has not met its burden in providing the Court with an available remedy.

b) Causation

Plaintiffs have failed to show that the Secretary of State's training on absentee ballot cancelations burdened voters. "[S]ection 1983 requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." Zatler v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986).

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[53] While this Court recognizes that stay-panel opinions are "tentative," "preliminary [in] nature," and are "not a final adjudication of the merits of the appeal," this Court accepts the stay-panel's opinion in Lee as persuasive authority. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d 790, 795 (11th Cir. 2020); cf. E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242, 1265 (9th Cir. 2020) (treating the motions panel's decision as persuasive, but not binding authority).

Plaintiffs argued that in § 1983 voting rights cases, courts do not have to conduct a separate causation analysis after establishing traceability. Doc. No. [888], ¶¶ 37-41. Plaintiffs cite Luckey v. Harris, 860 F.2d 1012, 1015 (11th Cir. 1998) to establish that a lesser level of causation is required when seeking injunctive relief against a state official in their official capacity." Id. ¶ 39. However, Luckey does not stand for that proposition. The portion of Luckey cited is analyzing Ex Parte Young , not causation. "Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is required is that the official be responsible for the challenged action. As the [*151] Young court held, it is sufficient that the state officer sued must, 'by virtue of his office, ha[ve] some connection' with the unconstitutional act or conduct complained of." Luckey, 860 F.2d at 1015-16. This section of Luckey does not mention the level of causation necessary to prove a constitutional challenge.

The Eleventh Circuit has expressly held the opposite. In Williams v. Bennett, 689 F.2d 1370, 1380 (11th Cir. 1982), the Eleventh Circuit confirmed that "Section 1983 imposes additional proof requirements when that statute is used as the vehicle to vindicate substantive constitutional rights." And the statute's "language plainly requires proof of an affirmative causal connection between the actions taken by a particular person "under color of state law" and the constitutional deprivation." Id. at 1381. Williams cites Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) and Sims v. Adams, 537 F.2d 829, 831 (5th Cir. 1976) to support this understanding. Id. "From Rizzo and Sims it is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation." Id. The Supreme Court and Eleventh Circuit have found that Section 1983 causation is required in other constitutional claims. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 344-45, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (Rehnquist, C.J., dissenting) ("We have never addressed the § 1983 causation requirement [*152] in the context of a regulatory takings claim, though language in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978), suggests that ordinary principles of proximate cause govern the causation inquiry for takings claims."); Thomas v. Bryant , 614 F.3d 1288, 1317 n.29 (11th Cir. 2010) ("Additionally, to prevail on an Eighth Amendment claim brought pursuant to § 1983, a plaintiff inmate must also show a causal connection between the constitutional violation and his injuries."); Manzini v. The Fla. Bar, 511 F. App'x 978, 982 (11th Cir. 2013) ("The decision of that state court judge breaks the chain of causation between [defendant's] actions and any alleged constitutional violations.").

Although the Eleventh Circuit has not definitively held in the voting rights context that a plaintiff must establish Section 1983 causation in addition to traceability, no case law states that the Section 1983 causal analysis does not apply. Given that the Supreme Court and the Eleventh Circuit have required plaintiffs to prove Section 1983 causation and traceability in various other contexts, the Court sees no reason to avoid doing so here.

The Court finds that Plaintiffs have not sufficiently proven causation under Section 1983. Plaintiffs provided evidence that the Secretary of State's election certification materials were not updated after the passage of HB 316. Tr. 2118:13-2119:11. First, Chris Harvey testified that certification materials [*153] are reviewed only once when the superintendents obtain their initial certification. Tr. 3534:10-23. These certification materials were not, and could not have been, used statewide for all county superintendents, and each county from which Plaintiffs presented isolated problems with absentee ballot cancelations involved superintendents who were initially certified long before the materials with incorrect information. Tr. 3535:17-3537:11. For example, the county election supervisors for Fulton, DeKalb, and Muscogee—where Deborah Allen, Aaron Karp, and Margaret Whatley voted, respectively—were certified before the 2020 elections and had no reason to see the erroneous materials. Tr. 3535:17-3537:11.

With the exception of Cobb County, the State demonstrated that none of the county election superintendents in the counties where an incident with absentee ballot training occurred would have seen the erroneous certification materials before the 2020 election. Tr. 3535:17-3537:11. Although the Cobb County election supervisor was trained on the outdated election certification materials, there was no testimony regarding the effect that those certification materials had on training poll workers [*154] on absentee ballot cancelation. Plaintiffs did not introduce testimony from anyone who worked on the 2020 election in Cobb County regarding the training that was given on absentee ballot cancelations. Accordingly, there is not

sufficient evidence to state that any difficulty that a voter faced in canceling their absentee ballot was proximately caused by the incorrect certification materials. In other words, there was no connection between the materials and an actual voter issue.

Second, there was no testimony at trial that any poll worker actually received improper training in 2020 due to the content of the certification materials. Plaintiffs presented evidence that Defendants' poll workers' manual was not immediately updated after the passage of HB 316. Tr. 2131:9-28. While this Court acknowledges that the Secretary of State's 2020 poll worker manual contained an error, there was no testimony or other evidence that the manual was actually used in any of the counties where a voter experienced an issue with absentee ballot cancelation. See Tr. 3538:8-14.

Finally, there is testimony that the Secretary of State's Office provided alternate forms of training on absentee ballots. Training [*155] efforts in 2020, after the changes to HB 316, were significant both in terms of frequency and quantity of topics to discuss.

The Court finds that there is not sufficient record evidence to establish that the incorrect training materials proximately caused any injury to a voter.

c) Applicability of *Anderson-Burdick*

As an initial note, the Court is not persuaded that an Anderson-Burdick violation has occurred with respect to absentee-ballot cancelations. At summary judgment, the Court examined whether Plaintiffs' training claims should be analyzed under Anderson-Burdick or 42 U.S.C. § 1983. Doc. No. [617], 18-23. The Court ultimately concluded that Anderson-Burdick is the proper vehicle for analyzing Plaintiffs' training claims because "where, as here, the plaintiff's claims are constitutional challenges alleging a generalized burden on the right to vote, Anderson-Burdick squarely applies." Id. at 22. The Court maintains that Anderson-Burdick is the proper mechanism for evaluating a plaintiff's constitutional challenge to generalized burdens on the right to vote, including when those burdens are caused by the Secretary of State's failure to train county election officials. However, the Court finds that [*156] Anderson-Burdick does not apply when the challenged practice is not the Secretary of State's failure to properly train the counties on a state law, statute, or policy, but rather that the Secretary of State made a mistake in election administration.

Anderson-Burdick applies when a party challenges a state's law, statute, rule, or policy, not a mistake in election administration. "[A] court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." Crawford, 553 U.S. at 190; see also Burdick, 504 U.S. at 433 (applying balancing test to "voting regulations"); Anderson, 460 U.S. at 782-83, (challenging an Ohio statute requiring an Independent Presidential candidate to file a statement of candidacy). The Eleventh Circuit in Jacobson opined that Anderson-Burdick applies "[when] the statute burden[s] voting or associational rights even slightly, [in which case] we could apply legal standards to determine whether the burden was unconstitutional . . . . But [when] the statute does not burden the right to vote, we cannot engage in that kind of review." Jacobson, 974 F.3d at 1262.

Anderson, Burdick, and their progeny do not apply to accidental mistakes on the part of election [*157] officials during the administration of elections. "Unlike systematic discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause." Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980).[54] "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute . . . . [But] Section 1983 . . . did not authorize federal courts to be state election monitors." Id. at 453-454.

Here, Plaintiffs argued that Defendants' absentee-ballot cancelation training materials violated the First and

[54] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Fourteenth Amendments because they contained incorrect information that burdened some voters' right to vote. Tr. 4400:23-4401:14. Mr. Harvey testified that following the passage of HB 316, Plaintiff provided evidence that the Secretary of State's Office did not immediately update the election certification materials or the poll workers' manual to reflect the changes to the cancelations of absentee ballots. Tr. 2118:13-2119:11. This means that a county election superintendent appointed to the position between April 2019 and the January 2021 runoff may have been certified on incorrect materials. Tr. 3538:15-3540:2. Additionally, there was testimony that the poll worker manual developed [*158] by the Secretary of State was not updated to show the changes in absentee ballot cancelation procedures for the 2019 and 2020 elections. Tr. 2131:9-28. The poll workers' manual has since been updated with the correct information. Tr. 2131:9-28.

Plaintiffs' challenge to Defendants' training on absentee ballot cancelations is one of an election irregularity and thus does not violate the First and Fourteenth Amendments. "To hold otherwise would effectively transform any inadvertent error in the administration of state and local elections into a federal equal protection violation." Lecky v. Va. State Bd. of Elections, 285 F. Supp. 3d 908, 919 (E.D. Va. 2018). What Plaintiffs are challenging is Defendants' failure to adequately enforce a Georgia statute, not the constitutionality of the statute itself.[4][55] Plaintiffs also do not assert that the absentee training materials that contained incorrect information exemplified a policy of the Secretary of State.

Therefore, the Secretary of State's failure to update the poll workers' manual and change the election certification materials were mistakes in election administration, not the implementation of a state statute, regulation, or policy. Accordingly, the Court finds that Anderson-Burdick is not applicable.

d) *Anderson-Burdick* [*159] framework

(1) Burdens

Although Anderson-Burdick is not applicable to Plaintiffs' absentee ballot cancelation claim, out of an abundance of caution, the Court will conduct an Anderson-Burdick analysis.[4][56] Assuming *arguendo* that the Anderson-Burdick framework does apply to the absentee-ballot cancelation claim, the Court finds that the burden on voters outweighs Defendants' justifications. The Court begins its analysis by identifying the burden of the absentee ballot cancelation training on the right to vote.

Plaintiffs provided testimony from seven voters who experienced difficulty with in-person absentee ballot cancelations during the 2020 election cycle.[57] Despite

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[55] The Court has been unable to find a Supreme Court or Eleventh Circuit case where Anderson-Burdick was applied to incorrect training materials. See Anderson, 460 U.S. 780 (challenge to Ohio statute regarding independent candidates); Burdick, 504 U.S. 428 (challenge to Hawaii's law prohibiting write-in candidates); Crawford, 553 U.S. at 181 (challenge to Indiana's voter ID law); Clingman v. Beaver, 544 U.S. 581, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (challenge to Oklahoma's law that had invite-only primary system); Timmons, 520 U.S. at 351 (challenge to Minnesota's law prohibiting candidates from appearing on more than one party's ballot); Norman, 502 U.S. at 279 (challenge to Illinois's signature requirement law); Libertarian Party of Ala. v. Merrill, No. 20-13356, 2021 U.S. App. LEXIS 34383, 2021 WL 5407456 (11th Cir. Nov. 19, 2021) (challenge to Alabama law regarding party nominations); New Black Panther Party v. Blackwell, 466 F.3d 353 (6th Cir. 2006) (challenge to Ohio's law regarding abuse of absentee ballots); Dowe v. Governor, 193 F.3d 1277 (11th Cir. 2000) (challenge to Florida's law regarding signature requirements for absentee ballots); Lewis v. Secretary of State, 944 F.3d 1301 (11th Cir. 2019) (challenge to Georgia's law regarding voter registration); Democratic Party of Ga. v. Sec'y of State, 967 F.3d 1227 (11th Cir. 2020) (challenge to Georgia's law regarding signature verification); Anderson v. Bennett, 976 F.3d 1282 (11th Cir. 2020) (challenge to Florida's law regarding signature requirements for absentee ballots); Lewis v. Governor of Ala., 944 F.3d 1301 (11th Cir. 2019) (challenge to Alabama's law regarding signature requirements for absentee ballots); Greer v. Moeller, 973 F.2d 1509 (14th Cir. 1992) (challenge to Florida's law requiring [illegible]); Fla. Democratic Party v. Scott, 215 F. Supp. 3d 1332 (11th Cir. 1998) (challenges to Florida's law requiring [illegible]); Anderson v. Burdick, 504 U.S. 428 (1992) (challenge to Illinois's signature verification law).

[56] Although the Court finds that Plaintiffs' Training Claim is one of an election irregularity and not a challenge to Georgia's law regarding absentee ballots, the Court will conduct an Anderson-Burdick analysis. See Jacobson, 974 F.3d at 1278 (11th Cir. 2020) ("[I]n the Eleventh Circuit, we apply the Anderson-Burdick framework to all challenges to Georgia's laws governing voting, even those that do not implicate the right to vote."); Democratic Party of Ga. v. Sec'y of State, 967 F.3d 1227 (11th Cir. 2020) (challenge to Georgia's law regarding signature verification); Anderson v. Bennett, 976 F.3d 1282 (11th Cir. 2020) (challenge to Florida's law regarding signature requirements for absentee ballots); Lewis v. Governor of Ala., 944 F.3d 1301 (11th Cir. 2019) (challenge to Alabama's law regarding voter registration); Greer v. Moeller, 973 F.2d 1509 (14th Cir. 1992) (challenge to Florida's law requiring [illegible]); Fla. Democratic Party v. Scott, 215 F. Supp. 3d 1332 (11th Cir. 1998) (challenges to Florida's law requiring [illegible]); Anderson v. Burdick, 504 U.S. 428 (1992) ("Challenges to Illinois's signature verification law").

The only voter who was unable to vote was Saundra Brundage of DeKalb County. Tr. 1237:22-24; 1238:23-25. Ms. Brundage testified that she requested an absentee ballot for the first time in the 2018 general election Tr. 1239:16-1240:3. Ms. Brundage never received her absentee ballot. Tr. 1240:7-8. She then went to vote in person by taking the bus to her polling place from her senior living [*161] facility. Tr. 1240:17-21; 1241:1-5. Ms. Brundage testified that a poll worker told her that she had requested an absentee ballot and that the poll worker was not "ready to let [Ms. Brundage] vote" but did not give a reason why.[4959] Tr. 1240:21-25; 1241:8-16; 1241:17-21. The poll worker did not suggest that she cast a provisional ballot at that time but pointed out a man and said Ms. Brundage needed to talk to him.[60] Tr. 1241:22-1242:5. Ms. Brundage waited while the individual walked up and down the aisle talking on the telephone. Tr. 1242:6-14. Ms. Brundage stated that she tried to wait for the man to finish but was never able to talk to him. Tr. 1242:23-1243:2. Unfortunately, Ms. Brundage had to leave the polling location before the man apparently finished his phone call because she had to catch the bus that had taken her to the polling location. Tr. 1250:7-12. Ms. Brundage testified that she was at the polling location for approximately fifteen minutes. Id.

The Court finds that the burden of the Secretary of State's incorrect training materials on absentee-ballot cancelations was at most slight. The Supreme Court in Crawford held that "[b]urdens of that sort arising from life's vagaries, however, [*162] are neither so serious nor so frequent as to raise any question about the constitutionality." Crawford, 553 U.S. at 197.

With the exception of one voter, all of the witnesses were able to vote in the election either in-person by regular ballot, by provisional ballot, or by absentee ballot. These Plaintiffs may have experienced longer wait times; however, this is a burden arising from life's vagaries and does not amount to a substantial burden. "[W]hile the Court understands that a long commute or wait in line can be an inconvenience, courts have routinely rejected these factors as a significant harm to a constitutional right." Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration and Elections, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020); see League of Women Voters of Fla., Inc. v. Detzner, 314 F. Supp. 3d 1205, 1216 (N.D Fla. 2018) ("[S]ome courts have characterized administrative burdens like waiting in line and commuting as not severe."); Common Cause Indiana v. Marion Cty. Election Bd., 311 F. Supp. 3d 949, 957-58 (S.D. Ind.), vacated and remanded, 925 F.3d 928 (7th Cir. 2019) (discussing certain administrative difficulties involved in early voting as "nonsevere, nonsubstantial, or slight burden[s] on the general right to vote as a matter of law"); Jacksonville Coal. For Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) ("While it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of meaningful access to the political process."). While the Court is sympathetic to the inconveniences [*163] resulting from a long wait to vote, the Court finds that the longer wait time was a slight burden.

The Court finds that casting a provisional ballot does not create a severe burden on the right to vote. In Crawford, the Supreme Court found that "the right to cast a provisional ballot provides an adequate remedy for problems" stemming from absentee ballots. Crawford, 553 U.S. at 197-98. Relying on Crawford, other courts have found that casting a provisional ballot does not burden the right to vote. See South Carolina v. U.S., 898 F. Supp. 2d 30, 41 (D.D.C. 2012) ("[C]asting a provisional ballot instead of a regular ballot does not burden the right to vote."); N.C. State Conf. of the NAACP v. McCrory, 156 F. Supp. 3d 683, 701 (M.D.N.C. 2016) (finding that using a provisional ballot does not impose a material burden on the right to vote). Accordingly, the Court finds that the voters casting of a provisional ballot is, at most, a slight burden on voters.

Plaintiffs have presented evidence of one voter who was unable to vote, Ms. Brundage. While Ms. Brundage was unable to vote, her inability to cast her ballot cannot fairly be attributed to Defendants. Ms. Brundage testified that her senior care facility allotted her only fifteen minutes to vote, and she was unable to cancel her absentee ballot during that time. While the denial of the franchise is a severe burden, the evidence [*164] does not indicate that Defendants denied Ms. Brundage the franchise or that her inability to vote was caused by inadequate training on absentee ballot cancelations.

[59] This statement was not admitted for its truth but was admitted for the purpose of showing course of conduct under FRE 803(3).

Accordingly, the Court finds that the burden caused by the Secretary of State's incorrect training materials was slight, and does not exceed the ordinary burdens of voting.

(2) Justifications

Next, the Court turns to the Secretary of State's justification for the burden. The Court finds that the Secretary of State's only asserted justification for the burden was that it made a mistake in failing to update its training materials. Mr. Harvey testified about the incorrect materials stating:

> I can say that as far when we train the counties in person, at conference and at webinars, we were using the new information. I think — and, again, it's not an excuse, but as laws change and there are so many things that need to be updated, forms and procedures and PowerPoints, and trying to get the information out there, that we just — we just dropped the ball on that.

Tr. 2119:16-22. Mr. Harvey also testified,

> And I think when you asked about where I dropped the ball? I think it was because I was more focused on making sure that they got the [*165] newest information in their hands right now, because it was -- it was -- it was necessary. And then just didn't connect the dots and close the loop on the back end. Again, I'm not trying to minimize it or excuse it, but the — it should have been done. There's no question about it.

Tr. 2121:6-12.

Plaintiffs' expert, Mr. Kennedy, concedes that mistakes are common in election administration.

> I think recognizing that you are dealing with a very human-driven process from the millions of voters that show up at -- to cast their ballot either in person or absentee, the thousands of poll workers, that you are going to have misfires, mistakes made both by voters and election officials.

Tr. 2908:15-19.

(3) Weighing the burdens

The third and final step of the Anderson-Burdick balancing test requires the Court to "weigh" the above "factors"—the character and magnitude of the asserted injury to voter's constitutional rights weighed against the state's justifications—"to determine if the Secretary of State violated the First and Fourteenth Amendment." Swanson v. Worley, 490 F.3d 894, 902-03 (11th Cir. 2007). When a state's practice imposes only "reasonable, nondiscriminatory restrictions" upon a plaintiff's First and Fourteenth Amendment rights, a state's "important . . . interests will usually be enough to [*166] justify reasonable, nondiscriminatory restrictions." Timmons, 520 U.S. at 358.

The Court finds that when weighing the burdens caused by the incorrect training materials against the State's justification that this is an example of mistakes in election administration, the Court finds that the burden outweighs the justification. Although the burden to voters was slight, the State does not have an important interest in producing incorrect training materials. Accordingly, under the Anderson-Burdick framework, Plaintiffs have met their burden in establishing that the Secretary of State violated the First and Fourteenth Amendments when training the counties on absentee-voting cancelations.[5161]

e) Remedies

Even if the Court were to find that Anderson-Burdick applied and that Plaintiffs satisfied their burden in establishing a First and Fourteenth Amendment violation, Plaintiffs have not proposed viable remedies. "The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability." Nipper v. Smith, 39 F.3d 1494, 1533 (11th Cir. 1994). Plaintiffs' requested remedies include posting signs in the polling places explaining that voters can cancel their absentee ballots, even if they did not [*167] bring them to the polls (Tr.

[61] As the Court noted above, Plaintiffs have not met their burden for a First and Fourteenth Amendment claim concerning absentee ballot cancelations because Plaintiffs have not sufficiently established causation or that Anderson-Burdick applies to errors in election administration.

3225:18-21); incorporating the procedure for in-person absentee ballot cancelations into mandatory trainings (Tr. 3226:16-21); informing county officials that poll workers need to be trained on absentee ballot cancelation (Tr. 3226:21-24), issuing an Official Election Bulletin regarding absentee ballot cancelation procedures (Tr. 3227:10-15); require county officials to certify that they have a plan in place to train on absentee ballot cancelation procedures (Tr. 3227:16-18).

These are the exact kinds of remedies that the Eleventh Circuit has cautioned against. "Federal judges can have a lot of power—especially when issuing injunctions. And sometimes, we may even have a good idea or two. But the Constitution sets out our sphere of decisionmaking, and that sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules." New Ga. Project v. Raffensperger, 976 F.3d 1278, 1284 (11th Cir. 2020). In Coalition for Good Governance v. Raffensperger, 1:20-cv-1677-TCB, 2020 U.S. Dist. LEXIS 86996, 2020 WL 2509092, at *4 (N.D. Ga. May 14, 2020), Chief Judge Batten stated that ordering defendants to adopt "Plaintiffs' laundry list of so-called 'Pandemic Voting Safety Measures' would require the Court to micromanage the State's election process" and bore "little [*168] resemblance to the type of relief plaintiffs typically seek in election cases."[5262] In Coalition for Good Governance, the plaintiffs requested that the court require the State to implement certain COVID-19 safety procedures, such as adjusting the number of voting stations, expanding early voting, implementing curbside voting and temporary mobile voting centers, streamlining voter check-in, offering state provided PPE, and increasing physical distancing. 2020 U.S. Dist. LEXIS 86996, [WL] at *1.

In the case *sub judice*, like in Coalition for Good Governance, Plaintiffs' proposed remedies include sign placement in polling locations and mandating the form of training the Secretary of State needs to give regarding absentee ballot cancelation. The Court finds that requiring signs in polling places is like the measures sought in Coalition for Good Governance, and thus are non-justiciable. Also, the Court finds that requiring the form of training that the Secretary is required to give is micromanaging the State's election process, which likewise is non-justiciable. Thus, even if the Court were to find that Anderson-Burdick applies, the Court [*169] would find for Defendants because Plaintiffs have not shown a viable remedy for addressing incorrect training on absentee ballot cancelations.

* * * *

In conclusion, the Court finds that Plaintiffs failed to meet their burden in establishing First and Fourteenth Amended violation with respect to absentee ballot cancelation training because (1) there is not sufficient evidence of causation, (2) Anderson-Burdick does not apply to challenges to incorrect training materials, and (3) no viable remedies are available to ameliorate any burden caused by the incorrect training materials.

3. Issue: The Secretary of State's Alleged Mismanagement of the Voter Rolls

"The second practice that [P]laintiffs challenge is the Secretary's affirmative mismanagement of Georgia statewide voter registration lists. Mismanagement that creates barriers to getting and staying on the voter rol[l]s." Tr. 37:16-19. Specifically, Plaintiffs challenge "the Secretary of State's over-inclusive criteria for matching a person's voter registration record to another record, whether a death record, a felony record, a new registration record or just another existing record elsewhere in the database." Tr. 38:20-24. As discussed [*170] above, the duplicate matching process is not traceable to Defendants. Accordingly, the Court will only evaluate whether the vitals and felon matching process violate the First and Fourteenth Amendments.

a) Vitals

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[62] In Coalition for Good Governance, the court ruled that the case itself was a non-justiciable political question. In Coalition for Good Governance, the plaintiffs asked the court to determine the number of COVID-19 procedures that were sufficient. Just as with the question of fairness, see Rucho, 139 S. Ct. at 2494, Jacobson, 974 F.3d at 1262, there are not justiciably manageable standards to determine how many COVID-19 procedures are enough. Coal. for Good Governance, 2020 U.S. Dist. LEXIS 86996, 2020 WL 2509092, at *3. In the case *sub judice*, Plaintiffs are not challenging whether a particular statute or practice is fair; rather Plaintiffs ask the Court to decide whether a particular statute of practice unfairly burdens a voter's right to vote and whether the State has a sufficient justification for said burden. Just as the challenged practices in Anderson, Burdick, and their progeny are justiciable, these claims are justiciable. See supra Section II(A)(2)(c)(2).

(1) Burdens

With respect to vital records, the Court finds that Plaintiffs have failed to produce sufficient evidence of the burdens on voters resulting from vital record matches. Plaintiffs provided evidence of one voter who was incorrectly listed as deceased, Deborah Hall. PX. 490, 3-4. Plaintiffs did not introduce evidence into the record of whether Ms. Hall was ultimately allowed to vote. There is also no evidence about the process that Ms. Hall went through to be reinstated onto the voter rolls. Rather, the evidence suggests that the SEB was investigating Ms. Hall for attempted voter fraud, not the county for incorrectly canceling her. Id. at 3. The Court acknowledges that there may be some burden on a voter who has been erroneously canceled as deceased; however, without more evidence, that burden is pure conjecture. Accordingly, the Court finds that Plaintiffs have not provided sufficient evidence of a burden on voters regarding the vital matches.

(2) Justifications

The Court finds that the State [*171] has an important state interest in removing deceased electors from the voter rolls.

First, the Court finds that the State has a legitimate interest in ensuring that the voter roll does not contain deceased voters or duplicate voters. The State presented evidence that HAVA requires the Secretary of State to ensure that the voter roll does not contain ineligible voters or deceased voters. Tr. 3712:6-3714:16. HAVA requires that "the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . [t]he list maintenance . . . shall be conducted in a manner that ensures that --. . . (ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list, and (iii) duplicate names are eliminated from the computerized list." 52 U.S.C. § 21083(a)(1)(A); (a)(2)(B)(ii)-(iii). HAVA states "each State and jurisdiction shall be required to comply with the requirements of [52 § 21083](a) on and after January 1, 2004." 52 U.S.C. § 21083(d)(1)(A). Also, "[t]he Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive [*172] relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 21081, 21082, and 21083 of this title." 52 U.S.C. § 21111. Because the State is subject to potential legal action by the Attorney General for failure to implement HAVA, the Court finds that State has an important interest in complying with HAVA.

Second, Defendants argue that there is an important state interest in deterring fraud. Tr. 4482:18-24. "A State indisputably has a compelling interest in preserving the integrity of its election process." Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) (internal quotation marks omitted). As the Supreme Court stated in Crawford, "there is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." 128 S. Ct. at 1619. Georgia has an interest in preventing election fraud that "provides a sufficient justification for carefully identifying all voters participating in the election process." Id. When the State provides an important state interest, the Court then looks to "the extent to which those interests make it necessary to burden' voting rights." Lee, 915 F.3d at 1322 (quoting Anderson, 460 U.S. at 789).

Finally, [*173] Defendants have an important interest in preventing vote dilution (Tr. 4483:17-24). As stated above, the State has a compelling state interest in preventing voter fraud. The State also has an important state interest in preventing vote dilution. See Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

(3) Weighing the burdens

The Court finds that the State's justifications for vital matching outweigh the burdens imposed by the vital matching process. Here, the Court found that Plaintiffs did not present sufficient evidence to show that the vital matching process imposes a severe burden on voters. See supra Section II(B)(2)(b)(3). In fact, the evidence adduced at trial does not establish the magnitude, if any, of the burden caused by the vital matching process.

Accordingly, the burden imposed by the vital matching process is slight.

"Because the burden is 'slight,' . . [*174] . the State's important regulatory interests are generally sufficient to justify' the restrictions.'" Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1301 (N.D. Ga. 2020) (quoting Burdick, 504 U.S. at 429, 434). The Court finds that the State's important regulatory interests in complying with HAVA, preventing voter fraud, and preventing vote dilution are sufficient to justify the slight burdens imposed by the vital matching process.

b) Felon Matching

(1) Burdens

The Court finds that the felon matching process severely burdens voters. "Burdens are severe if they go beyond the merely inconvenient," Crawford, 553 U.S. at 205 (Scalia, J., concurring), and Plaintiffs provided evidence that voters who are misidentified as felons face additional burdens when exercising their right to vote that exceed a simple inconvenience. For example, Plaintiffs introduced detailed evidence of the burdens three voters who were incorrectly listed as felons faced as they tried to remedy the felon matching mistake and exercise their right to vote.

On August 3, 2018, Chris Warren received a letter informing him that he had been identified as having a felony conviction and that he could attend a hearing on August 9, 2018, regarding his felony status. PX. 912.[53] [63] The letter contained information for Mr. Girtman, the person to contact regarding [*175] a conflict with the hearing date. Id. During their conversation, Mr. Girtman agreed that Mr. Warren was not a felon and that the person who was a convicted felon lived 100 miles away, had a different driver's license number, and had a different Social Security number. Id.; PX. 2019. Mr. Girtman told Mr. Warren he did not need to do anything further and would be able to vote. PX. 912.

When Mr. Warren went to his polling place to vote, however, he learned that he had been removed from the voter rolls. Id. Mr. Warren was able to vote by provisional ballot. PX. 900. On November 8, 2018, Mr. Warren went to the voter registration office to "cure" his registration and provisional ballot. Id. While at the voter registration office, Mr. Warren was instructed to provide his driver's license. Id. Mr. Warren reached out to the ACLU regarding his experience, and the ACLU, in turn, emailed Mr. Germany about the situation. PX. 912; PX. 900. Ultimately, Mr. Warren's provisional ballot was counted. PX. 2019.

Andre Smith also testified that he was erroneously labeled a felon. In Mr. Smith's case, he was initially canceled as a felon on December 12, 2018. DX. 390. Mr. Smith's eNet records reflect that [*176] a letter was sent to Mr. Smith on December 20, 2018, and the comment reads "FELON." Id.

Mr. Smith testified that in May of 2020, he called the Fulton County registrar's office numerous times, and upon speaking with the Fulton County registrar, Mr. Smith was asked to provide his date of birth and Social Security number. Tr. 2434:21-2435:4; 2435:17-2436:15. Mr. Smith then testified that he was instructed by the Fulton County registrar's office to call the jail or prison where he had been held after being arrested. Tr. 2438:10-14. Mr. Smith testified that he did not know who to call because he had never been convicted of a felony. Tr. 2438:12-16; Tr. 2433:16-24. Mr. Smith then contacted Fair Fight about being listed as a felon. Tr. 2442:12-16. Mr. Smith testified that a representative at Fair Fight called the Fulton County Registrar multiple times and was able to get confirmation that Mr. Smith would be reinstated to the voter rolls. Tr. 2442:21-2443:1. When Mr. Smith arrived at the polls on Election Day in June 2020, he learned that his registration could not be verified. Tr. 2448:1-2. He was eventually allowed to vote by provisional ballot. Tr. 2249:7-8.

On July 16, 2020, Mr. Smith received [*177] a letter informing him that he was flagged as a felon, and if this information proved incorrect, to request a hearing from the Fulton County Voter Registration office. PX. 2088. Mr. Smith's eNet record shows that he was canceled again on August 25, 2020, and the status reason was "FELON." DX. 390. On August 25, 2020, Fulton County sent a letter to Mr. Smith stating that he was reinstated and had been canceled based on an incorrect match with a different Andre Smith. PX. 2089. When Mr. Smith checked his status on MVP immediately before testifying in this case, in April of 2022, his MVP page indicated that he had once again been canceled because of a felony conviction. PX. 2097.

[63] There was significant discussion on the admissibility of PX. 912. The Court ultimately admitted PX. 912 as an adoptive admission. Tr. 1677:12-14. Accordingly, these exhibits will be evaluated for their truth.

Elizabeth Bauer was flagged in eNet numerous times for being a felon. PX. 658.[5464] Ms. Shea Hicks, the Gordon County Board of Elections Chairperson, emailed Mr. Hallman on September 27, 2018, to inform him that a voter who had been previously convicted of a misdemeanor "ke[pt] showing up on [her] dashboard," as a felon even though Ms. Hicks had rejected the voter as a felon match in past. Id. Ms. Hicks confirmed that Ms. Bauer, the voter in question, reappeared on the Secretary of State's list of felons even though [*178] the county had previously removed her as a false match. Id. Ms. Hicks told Mr. Hallman that she was "100% sure" that Ms. Bauer was not a felon; Ms. Hicks had spoken with the county's probation office to confirm as much, and Ms. Bauer brought documentary proof that she was not a felon to the county office herself. Id. Despite the fact Ms. Bauer presented evidence that she was not a felon, that Ms. Hicks investigated and confirmed Ms. Bauer's non-felon status, and that Ms. Hicks marked Ms. Bauer as a false felon match in eNet, the Secretary of State continued to list Ms. Bauer as a felon in the list of matches it sent to the country as part of the felon match process.

Other voters had similar experiences. See, e.g., PX. 89 at 1-2 (Dale Thomas and Jean Duncan, mistakenly canceled as persons convicted of a felony in 2013); PX. 2159 at 83-85 (transcript of SEB Case No. 2013-052 regarding these same voters);[5565] PX. 1715 (Douglas Miller of Stuart County, canceled as a felon match with Robert Miller of Franklin County).[5666] The Court infers that these voters did not receive notice from the counties that they were being removed from the voter rolls as felons, and eventually went through a process of [*179] attempting to remove the felon flag themselves.

The Court finds that felon matching creates a severe burden on voters. The felon matching process forces individual voters erroneously caught by the Secretary's matching criteria to navigate administrative obstacles that are distinctly more burdensome than the obstacles that the Supreme Court and Eleventh Circuit have examined. For example, felon match differs from photo ID laws in several aspects. A voter erroneously listed as a felon will have to remedy that mistake to remain on the voter rolls, whereas photo ID laws apply after the voter is on the voter roll. Once a voter has been flagged as a felon, a voter must do something—i.e. request a hearing or contact the counties or the Secretary of State's Office —in order to remain on the voter roll.

Additionally, the photo ID laws examined in Crawford and Common Cause/ Georgia only applied to in-person voting, whereas the felon matching process touches on all methods of voting in Georgia. See Crawford, 553 U.S. 181 (evaluating a photo ID law that only applied to in-person voters in Indiana); Common Cause/Georgia, 554 F.3d 1340 (evaluating a similar law in Georgia). Furthermore, in Crawford and Common Cause/Georgia, the states were required under state law [*180] to issue a *free* photo ID to any legitimately registered voter. In Georgia, for example, voters were entitled to a free photo ID if they could provide proof that they were registered to vote and swore an oath that they did not have another acceptable form of photo ID. Common Cause/Georgia, 554 F.3d at 1346. This process is far simpler and more navigable than the processes some voters incorrectly identified as felons *sub judice*.

Take, for example, the case of Mr. Smith. While he was ultimately able to vote, Mr. Smith was erroneously listed as a felon; Mr. Smith made calls to the Fulton County Board of Registrars to contest his designation as a felon; Mr. Smith, who was never convicted of a felony,

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[64] At trial the Court took PX. 685 under advisement. Tr. 3104:16-3105:16. On September 22, 2022, the Court ruled that PX. 685 was admitted. The Court finds that the email exchange between Mr. Hallman and Ms. Hicks is evidence of an adoptive admission. Doc. No. [815].

[65] Plaintiffs moved for the admission of PX. 2159. During the trial, the Court took the exhibit under advisement. Tr. 4050:12-4054:21. The document is admissible as a credible government record under FRE 803(8). The Court finds that this document is a public record because it is the direct transcript from the SEB Meeting on August 21, 2019. Mr. Harvey testified that SEB meetings are transcribed. Tr. 3656:15-17. Accordingly, the Court finds that PX.2159 is admissible as a public record because it (1) sets out that it the August 21, 2019 meeting of the SEB and (2) that the meeting were transcribed and placed on the Secretary of State's website. Finally, Defendants did not provide sufficient evidence to show that the official transcription lacks trustworthiness.

[66] PX. 1715 was taken under advisement by the Court. Tr. 3104:16-3105:2. Defendants raised a Rule 401 objection to this document, see id. This document is relevant as an example of a voter whose "record was cancelled in error" based on data from the Department of Community Service and the Department of Community Supervision. PX. 1715 at 1.

was instructed to contact the jail or prison to retrieve paperwork indicating that he was no longer serving a sentence, Fulton County later determined that Mr. Smith was not a felon and reinstated him to the voter rolls; upon arriving at the polls, however, Mr. Smith learned that his registration was canceled; Mr. Smith, then voted provisionally, and that provisional ballot was counted; but, before testifying at this trial, he discovered he was once again listed as a felon. Tr. 2431:12-13; 2432:11-22, 2435:3-7; 2436:7-12; 2437:24-2438:2; [*181] 2442:12-2443:1; 2448:1-2; 2249:7-8; PX.2097.

The burdens that Mr. Smith faced are distinct and more severe than obtaining a free photo ID prior to voting. Once a voter is issued a photo ID, the voter presumably will not experience that burden again prior to the ID's expiration date. But under the felon match process, Mr. Smith had to address administrative errors multiple times, even though he, at no time, was convicted of a felony. The process a duly registered and qualified voter must go through to correct being erroneously flagged as a felon is a far more involved, confusing, and burdensome than going to a state agency with proof of voter registration and swearing an oath.

Consider also that being accused of being a convicted felon is not a common occurrence and does not have an obvious response. There are other contexts in which an individual may be asked to present a form of photo ID. For example, "[b]efore an adult passenger can board an airplane for a commercial flight in the United States, the passenger must present to a federal official an identification card with a photograph of the passenger." Common Cause/Georgia, 554 F.3d at 1345. But it is not every day that a person is asked to provide evidence that he or [*182] she is not a felon. Though the Court found Mr. Harvey's testimony credible and the county bears the burden of proof at a felon match hearing (Tr. 3828:6-12, 3842:12-18), none of the witnesses presented at trial ever attended a hearing, and at least two voters, Mr. Smith, and Mr. Warren stated that they were asked to provide proof that they were not felons when they contacted the county board of registers. Mr. Smith was asked by Fulton County to call the jail where he had been held to prove he had not been there serving a felony sentence. Tr. 2438:10-14. Mr. Warren said he was informed that he "had to either provide proof of [his] eligibility to remain a registered voter or attend a hearing." PX. 912. And the Court agrees with Mr. Warren that "[i]t's hard to provide documentation proving that something did not occur." Id.

Members of the Secretary of State's Office also agree; when asked, "it's not easy to prove you're not a felon?" Mr. Harvey responded, "[n]o. You're trying to prove a negative." Tr. 3739:20-21. Asking an otherwise qualified and properly registered voter to provide documentation proving that he or she is not a felon is far more burdensome than asking a voter to provide [*183] the same kind of documentation he or she must show every time she or she takes a commercial flight.

The burdens resulting from the felon match process also differ those resulting from pre-determined absentee ballot deadlines during COVID. Voters incorrectly identified as a felon do not have "numerous avenues" available to them to "mitigate the administrative burdens placed on them that are more than just inconvenient in order to remedy the error. New Georgia Project, 976 F.3d at 1281. While voters concerned about absentee ballot deadlines during COVID could have "return[ed] their ballots through the mail, hand-delivery, or a drop box," "participate[d] in early in-person voting," or "vote in person on Election Day," there is nothing voters flagged as felons can do "differently" to avoid being burdened by their false felon status. Id. The burden resulting from the felon match process is not being caused by the voter's own failure to take reasonable steps to stop themselves from being burdened. See id. at 1282 ("Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting."); Democratic Nat'l Comm. v. Wisconsin State Legislature, __ U.S. __, 141 S. Ct. 28, 33, 208 L. Ed. 2d 247 (2020) (Kavanaugh, J., concurring in the denial of application to [*184] vacate a stay) ("A deadline is not unconstitutional merely because of voters' 'own failure to take timely steps' to ensure their franchise.") (internal citations omitted). Unlike absentee-ballot deadlines during COVID, being erroneously flagged as a felon is not something the voter has any agency over. There are no options available to voters except to shoulder the burden.

For the above reasons, the Court finds that voters are severely burdened by the felon matching process; the procedural hurdles voters incorrectly flagged as felons must jump through to remedy that error impose a severe burden on the

right to vote.[5767]

(2) Justifications

The Court finds that Defendants have both important and compelling interests in removing felons from the voter rolls.

First, the Court finds that the State has an important interest in keeping felons from voting. Under O.C.G.A. § 21-2-216(b), "no person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence." "[A] State has a significant interest in enforcing its own laws." Cameron v. EMW Women's Surgical Center, P.S.C., __ U.S. __, 142 S. Ct. 1002, 1011 n.4, 212 L. Ed. 2d 114 (2020). The felon matching process allows the Secretary of State to enforce the law that prohibits individuals from registering [*185] to vote when they have been convicted of a felony and who are currently serving their sentence. Accordingly, Defendants' interest in upholding Georgia's ban on felon voting is important.

Second, Defendants have a compelling interest in preventing voter fraud. Defendants argue that the felon matching process deters fraud. Tr. 4482:18-24. "A State indisputably has a compelling interest in preserving the integrity of its election process." Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) (internal quotation marks omitted). As the Supreme Court stated in Crawford, "there is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." 128 S. Ct. at 1619. Georgia has an interest in preventing election fraud that "provides a sufficient justification for carefully identifying all voters participating in the election process." Id.

Finally, Defendants have a compelling interest in preventing vote dilution. Tr. 4483:17-24. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just [*186] as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The felon matching process removes ineligible voters from the voter rolls, thereby preventing the dilution of eligible voters. Accordingly, the State has a compelling interest in preventing vote dilution.

When the State provides an important state interest, the Court then looks to "the extent to which those interests make it necessary to burden' voting rights." Lee, 915 F.3d at 1322 (quoting Anderson, 460 U.S. at 789).

(3) Weighing the burdens

The Court finds that the Defendants' justifications for using "loose matches" do not outweigh the burdens on voters. As stated above, the Court found that voters were severely burdened by the felon matching process. Specifically, the procedural hoops qualified voters must jump through to correct erroneous felon flags severely burdens the right to vote, especially given that some voters, like Mr. Smith and Ms. Bauer, must prove they are not felons multiple times. "[W]hen [a voter's] rights are subject to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" Burdick, 504 U.S. at 434. See also New Georgia Project, 976 F.3d at 1280 ("If a State's rule imposes a severe burden on the right to vote, then the rule may [*187] only survive if it is narrowly tailored and only if the State advances a compelling government interest.").

The Court finds that the felon matching process is not narrowly drawn. The Secretary of State identifies various criteria for determining whether a registered voter is also a felon. PX. 800, 21. Those are: (1) last name, first name, last four digits of Social Security number, and date of birth for voters in active, inactive, pending, or reject status; (2) last name, first name, last four digits of Social Security number, and date of birth for voters in canceled status; (3) last name, last four digits of Social Security number, and date of birth; (4) first name, last four digits of Social Security number, and date of birth; (5) last name, first name, and date of birth; and (6) last name, date of birth, race, and gender. Id.

[67] The Court finds that his burden differs from the burdens resulting from list maintenance/ use it or lose it. The Court awarded summary judgment to Defendants on list maintenance/ use it or lose it because (1) all impacted voters either, made no contact with the Secretary of State for five years, or the postal service database reflected that the elector moved, (2) the voters could always re-register to vote, and (3) the cancellations applied uniformly. Doc. No. [617], 52-55. With respect to felon matching, there is sufficient evidence in the record to show that some of the impacted voters (1) were not felons and (2) were cancelled despite numerous attempts to prove that they were not felons prior to the election.

Plaintiffs challenge the use of the last set of criteria. Doc. No. [854], ¶¶ 730, 973.

With respect to the final criteria, Mr. Hallman recommended removing this set of criteria because it was "pretty loose." PX.1151.

Message

From: Hallman, John [/O=SOS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JHALLMAN]
Sent: 8/1/2019 2:05:18 PM
To: Rayburn, Kevin [/o=SOS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0d20faa4e37c493c884b6ddaaa5b7140-Rayburn, Kevin]
CC: Harvey, Chris [/O=SOS/OU=GASOS/cn=Recipients/cn=wharvey]; Koval, Ted [/o=SOS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=bbb87ff423854556916946 75f2105dd0-Koval, Ted]; Phifer, Brandon [/o=SOS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dceaf7103d2f473988783a819c7a3b26-Phifer, Brandon]; Frechette, Melan [/o=SOS/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f54e4b3f2d7a41798245fc8cea6c110c-Frechette, Melanie]; Simmons, Rach [/o=SOS/ou=GASOS/cn=Recipients/cn=RachelM]
Subject: RE: Felon Process

Kevin,

Correct. I have listed the criteria in order from tightest to loosest matches in the tables you see below. The "LAST NAM DATE OF BIRTH, RACE AND GENDER" category is pretty loose, so I would remove this from any calculations of expecte matches. We had discussions in the past about removing it entirely, but a number of counties express a desire to reta this category because of its usefulness.

Thanks,

John

PX.1151 (excerpted). The email shows that the Secretary of State contemplated removing the criteria altogether. Id. In just one run of the felon [*188] match process in August 2019, the last name, race, gender, and birth date criteria identified roughly 25,000 matches of an approximate 50,000 total felon matches. Id.

Additionally, trial testimony shows that the Secretary of State knew that the final set of criteria—last name, date of birth, race, and gender—would likely result in "a lot" of non-matches.

> Q: That this criteria that the Secretary of State uses in its eNet system to identify potential matches against the felon list includes a criteria that you knew was pretty loose, right, and that would produce matches that would be teed up for all the counties that you are aware would likely -- would likely include a lot of non-matches, right?
> A: Correct.

Tr. 878:3-9.

"Narrow tailoring requires the government to employ the least restrictive alternative to further its interests." In re Georgia Senate Bill 202, __ F.Supp.3d __, __, 2022 U.S. Dist. LEXIS 148357, 2022 WL 3573076, *15 (N.D. Ga.) (citing United States v. Playboy Ent. Grp. Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)). Relying on the matching criteria examining only last name, date of birth, race, and gender is not the least restrictive means available to the government to further their interest in monitoring voters' felon status; the State already employs five less restrictive matching criteria to check felon status. By a member of the Secretary's Office's own admission, [*189] the last name, date of birth, race, and gender criterion could—and even should—be removed from the felon matching process. PX. 1151. What's more, there is direct testimony from an individual who works in the Secretary of State's Office

that shows that the felon matching criterion is not narrowly drawn, but is in fact, "pretty loose." Mr. Hallman's testimony and the email to Mr. Rayburn illustrate that the Secretary of State's Office knows that the felon matching process would likely result in "a lot" of non-matches. Tr. 878:3-9.

Because the loose match criteria catch "a lot" individuals who are not felons during the match process and thereby increase the likelihood that voters will be erroneously labeled as felons and suffer the resulting administrative burdens, the final matching criteria are not narrowly tailored.[58][68] Tr. 878:3-9; PX. 1151.

Although the Court finds that the State has a compelling interest in restricting the list of electors to eligible voters and in preventing eligible voters' votes from being diluted by non-eligible voters being permitted to participate in the electoral process, the Court finds that the process by which voters are determined to be felons is not narrowly [*190] drawn to address that interest. Accordingly, the Court finds that the felon matching process violates the First and Fourteenth Amendments.

(4) Causation

Despite the Court's holding that the felon matching process violates the First and Fourteenth Amendment right to vote, the Court also finds that the various burdens resulting from the felon matching process are caused by the counties and not Defendant Secretary of State. "[S]ection 1983 requires proof of an affirmative causal connection between the official's acts or omissions and the alleged constitutional deprivation." Zatler v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986). As stated supra Section II(B)(2)(b), Plaintiffs have the burden of proving not only that felon matching is traceable to Defendants but also that Defendants' actions concerning felon matching *caused* the First and Fourteenth Amendment violation under Anderson-Burdick. Plaintiffs have not carried their burden of proof as to causation.

The Court finds that the causal link between the burdens of felon matching and Defendants is broken. Although O.C.G.A. § 21-2-231 requires the Secretary of State to send the counties the list of electors who have been flagged as felons, and the counties are then required to transmit a notice to all electors who appear on that list, in practice, that is not how the felon matching occurs.[59] [69] Employees [*191] of the Secretary of State testified, and the evidence shows, that eNet uses certain matching criteria to match the list of electors against the list of felons; once there is a match, eNet sends the counties a list of electors who are potentially felons; the county is then tasked with determining whether an elector is, in fact, a felon; and if the county determines either that an elector is a felon or that more information is needed, the county sends a notice to the elector that he or she was flagged as a felon. Tr. 899:10-12, 899:23-900:4; PX. 1878, at 30-31; PX. 800. Thus, once the Secretary of State, by way of eNet, sends the counties the list of potential electors who are felons, the counties take certain investigative steps to determine whether an elector is a felon before sending the notice that he or she has been flagged as a felon. Tr. 3570:7-11. These steps include, but are not limited to, comparing the voter record information on one side of an eNet screen with the felon record information on the other side of the screen. Id.; PX. 800 at 25.

The Court finds that the independent actions of the counties in investigating whether an elector is a felon and then canceling the [*192] elector are independent actions that break the causal chain to the Secretary of State. "The causal relation does not exist when the continuum between Defendant[s'] action and the ultimate harm is occupied by the conduct of deliberative autonomous decision-makers." Dixon v. Burke Cty., 303 F.3d 1271, 1275 (11th Cir. 2002). One way to determine if the causal link is destroyed is whether the defendant "exercised extraordinary influence over" the third party or whether the third party exercised "individual freedom of rational choice." Id. Here, the burdens a voter faces in attempting to correct a false felon match are caused by the county's deliberative autonomous decisions, not the Secretary of State's. Mr. Harvey testified that the counties investigate and ultimately decide whether an elector is a felon, not the Secretary of State. Tr. 3569:12-3570:10. The counties, not the Secretary of State, actually cancel voters. And testimony from voters

[68] The Court acknowledges that Plaintiffs contend that the Secretary's decision to provide the list of felons to the counties, because the Court has determined that the (or another) voter registration process complies with Georgia law, is not at issue in the felon match. Doc. No. [854], ¶ 694. Plaintiffs state that "their challenge to the felon matching process is not that it violates state law, but that it is carried out in a way that burdens Georgia's voters unconstitutionally." Id.

flagged as felons at trial also showed that it is the counties, not the Secretary of State, that required voters like Mr. Smith and Mr. Warren to produce evidence proving they are not felons. Tr. 2438:10-14 (Mr. Smith testifying that a county official asked him to contact the jail or prison where he had [*193] been detained to sort out his felon status); PX. 912 (Mr. Warren writing to the ACLU that the letter he received from the county told him to "provide proof of [his] eligibility to remain a registered voter"). Thus, the counties, not the Secretary of State, cause the voters' burdens.

Additionally, no witness testified that an error with the statewide voter database is proximately caused by the Secretary of State's criteria for felon matching. Plaintiffs never presented a county election official or other witness to substantiate Plaintiffs' assertions that the issues experienced by voters were caused by the Secretary of State's selection of certain criteria or other management efforts of the voter registration database.

For example, with regard to Mr. Smith, Plaintiffs were unable to identify or explain—through a county official, a voter, other testimony, or other evidence—that any action or inaction caused the cancelation of Mr. Smith's record by the Secretary of State. Indeed, in one exhibit letter, Fulton County admitted that it was responsible for the error and that the error occurred because it had misidentified him with another voter who had the same "first name, last name and date [*194] of birth." PX. 2089.

The evidence shows that in practice, the counties decide which voters to send a notice to, the counties conduct the hearings, the counties determine which voters need to be removed from the voter rolls, and the counties remove the felons from the voter roll. The voter is entirely unaware that the Secretary of State flagged him or her as a potential felon until after the county takes the initial step of determining whether the flagged elector is a "true match" for a felon. Tr. 3570:5-10; 1351:16-1352:11. Thus, the burdens caused by the felon matching process are caused not by the Secretary of State but by the counties.

The Court finds that Plaintiffs have not met their burden in proving a First and Fourteenth Amendment violation because Plaintiffs have not proven that the Secretary of State caused the burden on voters who are mislabeled and/or canceled by the felon matching process. Although the Court is finding for Defendants, the Court notes that it would be a better practice for the Secretary of State to do away with the final matching criterion—last name, date of birth, gender, and race. This statement is given as a recommendation and should not be construed as a remedy. Accordingly, [*195] Plaintiffs have not proven causation; therefore, Plaintiffs' First and Fourteenth Amendment claims ultimately fail as to the felon matching process.

4. Issue: Exact Match

Plaintiffs argue "this Secretary of State's 'exact match' policy creates unnecessary and discriminatory obstacles for eligible voters to get registered." Tr. 23:22-24. Plaintiffs challenged two different aspects of Exact Match. First, Plaintiffs challenged MIDR status that resulted from discrepancies between a voter's registration form and DDS or the SSA records. Tr. 32:12-34:3. Plaintiffs also challenged the Secretary of State's Office's citizenship matching process. Tr. 29:7-17. The Court will first evaluate whether MIDR is a constitutional violation under Anderson-Burdick. The Court will then evaluate whether citizenship matching violates Anderson-Burdick.

a) Challenged Practice: MIDR

(1) Burdens

Exact Match is the process by which the Secretary of State verifies a voter's registration. In Georgia, when an individual registers to vote, he or she is required to provide a valid Georgia Driver's License or Georgia ID Number. PX. 6; O.C.G.A. § 21-2-220.1(a). When an applicant provides a Georgia driver's license number or state identification number, it is matched against [*196] his or her information in the DDS database: driver's license number, first twenty characters of the last name, first initial of the first name, and date of birth. PX. 1753 at 1; Tr. 1197:24-1198:23; Tr. 1936:1-24. For an applicant who did not provide his or her Georgia driver's license or state identification numbers but did provide the last four digits of his or her Social Security number, the following information on his or her voter registration application is matched against his or her information in the SSA database: the last four digits of his or her Social Security number, first twenty characters of the last name, first initial of the first name, and date of birth. Id. An applicant who does not provide his or her Georgia driver's license number, state identification card number, or last four digits of their Social Security number will not have his or her information matched against any database. Failure to provide said information, however,

does not prevent an applicant from being registered to vote. Tr. 1943:6-25; 1946:2-1947:22.

Since HB 316 was passed, a registrant who fails the verification process is added to the active voter rolls and flagged as MIDR. O.C.G.A. § 21-2-220.1 (providing that in [*197] cases of an inexact match, "the applicant shall nevertheless be registered to vote but shall be required to produce proof of his or her identity . . . at or before the time that such applicant requests a ballot for the first time"). When a registrant is placed into MIDR status, county officials send the voter a form letter drafted by the Secretary of State and generated through eNet, the Secretary of State's voter registration database. PX. 1900.

An applicant may be placed in MIDR status due to typographical errors, changes in the way people spell their names, and minor changes in characters between the two databases. Tr. 408:17-409:6; PX. 1278, 6. A transposed letter or number (Tr. 1956:14-1957:2), the presence of a hyphen (Tr. 1957:3-6), or the presence of an apostrophe (Tr. 1957:7-12) can cause a match failure. See PX. 1182 (Secretary of State employee Kevin Rayburn acknowledging an applicant was in MIDR because of a missing letter at the end of the applicant's last name). Therefore, if an "applicant's last name is hyphenated on the voter registration application but not on the applicant's driver's license," he or she could fail verification. Tr. 1957:3-6. For paper applications, [*198] the Exact Match MIDR process can occur only after county election personnel type the information into eNet. Tr. 1950:7-22. The Secretary of State's Office has admitted that failures to verify "could be caused by erratic handwriting on a voter registration application or by a clerk committing a typing error when entering information." PX. 1119; Tr. 1957:15-1958:8.

At trial, Plaintiffs did not present any testimonial evidence of burdens that individual voters experienced regarding being placed in MIDR status. Dr. Carlos del Rio did testify about a difficult experience he had at the polls during the November 2018 election, which was presumably caused by discrepancies in the spelling of his last name on the voter rolls and on his driver's license. Tr. 473:8-475:19. However, Dr. del Rio's experience was not based on MIDR because it occurred prior to the passage of HB 316.[6070] Accordingly, the burdens that Dr. del Rio faced are not attributable to MIDR.

Plaintiffs did provide expert testimony from Dr. Mayer that an MIDR flag at the polls could result in a burden to voters. Dr. Mayer was qualified as an expert on election management as it relates to statistical analysis. Tr. 342:25-343:2. Dr. Mayer [*199] testified that "it is certainly plausible, if not likely, that the simple fact that there is an MIDR flag, there is something in the voter's registration record that is different than most registrants, that it could easily trigger a poll worker into thinking that they have to subject or should subject or must subject this registrant to a higher level of scrutiny than they do other voters." Tr. 403:18-24. Dr. Mayer also testified that the letter that informs voters of their MIDR status carries the impression that the voter is not registered to vote, the letter does not clearly tell a voter what form of identification is needed to clear the MIDR status. Tr. 401:15-403:3. On cross-examination Dr. Mayer conceded that he did not conduct any research in Georgia after the passage of HB 316 to determine if any voters were in fact confused about MIDR status. Tr. 458:11-14.

Without any direct testimony from a voter who experienced being in MIDR status or testimony from a poll worker about how they treat individuals in MIDR status, the Court finds that the burden on voters is relatively low. Here, Plaintiffs have not provided direct evidence of a voter who was unable to vote, experienced longer [*200] wait times, was confused about voter registration status by being in MIDR status, or experienced heightened scrutiny at the polls due to MIDR status. Also, there is no testimony about how a voter is treated by a poll worker because of the MIDR flag.

Dr. Mayer's testimony at best states that there is a statistical probability that individuals in MIDR status face these burdens. However, Dr. Mayer's testimony is based upon nationwide statistics and are not specific to Georgia's voting systems. Thus, if a burden does exist, it is minimal. Because the burden is minimal, it "may be warranted by 'the State's important regulatory interests.'" Common Cause, 554 F.3d at 1352.

(2) Justifications

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[70] HB 316 was enacted on April 2, 2019 (Doc. No. [68]), and Dr. del Rio's experience occurred in November of 2018. Tr. 473:8-475:19. The placement of registrants in Active-MIDR status represents a change pursuant to HB 316. Tr. 3576:24-3577:17.

Defendants advanced two justifications for MIDR. First, Defendants argued that MIDR is important to ensuring that voters are able to vote using the additional forms of identification under HAVA for first-time voters. Under Georgia law, voters, except for first-time voters who registered by mail, must provide a photo ID in order to vote. O.C.G.A. § 21-2-417(a). The Eleventh Circuit has already held that Georgia's voter ID law is constitutional. Common Cause, 554 F.3d at 1355. Pursuant to HAVA, first-time voters who registered by mail may prove their residency by providing valid photo identification [*201] or an official copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter. 52 U.S.C. § 21083(b)(2). Defendants asserted that MIDR status informs poll workers of who can present any of the HAVA-approved forms of identification and are not limited to showing a photo ID. Tr. 4145:15-18. Mr. Germany testified that MIDR status alerts poll workers that "this person has to comply with HAVA. And the way they do so, they can provide one of those IDs, either the photo ID or the kind of broader set of non-photo ID allowed under HAVA." Tr. 4145:15-18.

As stated above, the Court finds that complying with HAVA is an important state interest. See supra Section II(B)(2)(b)(2).

Second, Defendants introduced testimony that MIDR prevents fraud. As stated above, the State has a compelling interest in preventing voter fraud. See supra Section II(B)(2)(b)(2). Mr. Harvey testified, "MIDR is, my understanding of it is, because you didn't verify. You have to show something that shows you're the actual person. And that's the — I guess protection from registering a bunch of alias people and then just showing up and saying, Oh, yeah, I'm John Smith, [*202] or I'm Chris Harvey. And by showing the I.D., you're verifying that, okay, for whatever reason they couldn't match it, you're still a bona fide person." Tr. 3604:11-19. Thus, Defendants have demonstrated that the State's compelling interest in preventing voter fraud is tied to the challenged practice.

(3) Weighing the burdens

The Court finds that the State's justifications outweigh any potential burdens on voters. First, without an actual showing that a voter was in fact burdened by his or her status on MIDR, the Court finds that the burden on voters by being in MIDR status is minimal. Because MIDR imposes only a "reasonable, nondiscriminatory restriction" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are . . . sufficient to justify" the restrictions. Burdick, 540 U.S. at 434.

The Court finds that Defendants have provided one important interest and one compelling interest that justify MIDR. First, Defendants have provided testimony that MIDR status is necessary because it prevents voter fraud. "[D]eterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." Greater Birmingham Ministries, 992 F.3d at 1334. Thus, the Court finds that the State's interest [*203] in deterring voter fraud outweighs the burden caused by MIDR.

Additionally, compliance with HAVA is an important state interest. If a State fails to comply with HAVA, "[t]he Attorney General may bring a civil action against [the] State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief . . . to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 21081, 21082, and 21083 of this title." 52 U.S.C. § 21111. Accordingly, the State has an important State interest in complying with HAVA and avoiding suit by the Attorney General.

The Court finds that Plaintiffs have failed to prove that the burdens imposed by MIDR outweigh the State's interests in preventing fraud and complying with HAVA. Accordingly, MIDR does not violate the First and Fourteenth Amendments.

b) Challenged practice: Exact Match Citizenship

(1) Burdens

The Court finds that the burdens imposed by Exact Match Citizenship are limited. Each voter in Georgia must demonstrate citizenship at the time of registration. Tr. 3585:12-21. When a registrant provides his or her driver's license information as a part of the registration process, the data will be processed through DDS's database. Tr. [*204] 359:19-23. If the registrant is flagged as needing to provide evidence of citizenship, the registrant is placed in pending status. Tr. 364:5-23. If the registrant can submit proof of citizenship to an election official, the election official is supposed to override the DDS flag and put the registrant into active status. Tr. 386:13-19.

To prove his or her citizenship, a registrant may provide an acceptable form of photo identification, including (1) a Georgia driver's license, (2) a valid state or federal government-issued photo ID, (3) a valid U.S. passport, (4) a valid employee photo identification issued by either the federal government, the state, county, or other entity of this state, (5) a valid United States military photo identification card, or (6) a valid tribal identification card. PX. 1231. The registrant must also provide proof of citizenship by using one of fifteen acceptable documents; examples include (1) a birth certificate issued by the U.S., (2) a U.S. Passport, (3) a certificate of citizenship, or (4) a naturalization certificate. Id. If a registrant cannot provide sufficient proof of citizenship before an election day or at the polls, the registrant can vote provisionally [*205] and verify his or her citizenship afterward. Tr. 1724:22; 1735:1-2.

Plaintiffs provided evidence of three voters who did not vote due to the citizenship matching process and two voters who faced hurdles when voting. Two registrants testified that they did not vote because they chose not to. Ms. Hamalanian testified that she had her citizenship verification paperwork readily available. PX. 2048, Tr. 18:20-25. Still, she did not submit it to the county election official because she felt "disappointed and a little bit angry with the case." Id. Of the other witnesses, the testimony shows that they were ultimately able to vote.

As was the case in Crawford, the record is virtually silent on the difficulty a naturalized citizen will face in obtaining proof of citizenship documents. In Crawford, the Supreme Court was unable to find that Indiana's photo ID laws severely burdened elderly voters because the affected voters "have not indicated how difficult it would be for them to obtain a birth certificate." Crawford, 553 U.S. at 201. In the case *sub judice*, Ms. Hamalanian testified that her citizenship documentation was readily available to her, and she had access to the means to submit said information to the appropriate election officials. [*206] PX. 2048, Tr. 30:12-25. Ms. Hamalanian testified that she did not send the information because she was disappointed by an election official's statement that even if Ms. Hamalanian faxed her information that day, "it would have been too late to vote in that year's election." PX. 18:15-19. Dr. Ansa testified that he did not attempt to vote in the 2016 election because he "didn't have that kind of luxury of time" to provide the citizenship verification documents before Election Day. PX. 2096, Tr. 21:21-22:3.

Finally, concerning Ms. Ozgunes, the Court finds that her inability to vote was caused by a county's failure to provide her with a provisional ballot. Ms. Ozgunes was asked to verify her citizenship in multiple elections, and after giving said proof, she continued to be identified as a noncitizen in the voter registration database. PX. 89, 1-2.[6171] However, the Court already awarded judgment to Defendants on the issue of failure to train counties on provisional ballots. "Plaintiffs have not shown" that a county's failure to provide an absentee ballot is "factually traceable to Defendants' training." Doc. No. [617], 41. While it is regrettable that Ms. Ozgunes was denied the right to vote, [*207] it cannot reasonably be said that her inability to vote was traceable to Defendants. Further, Mr. Harvey testified that in 2019, the Secretary of State updated eNet to override DDS's attempts to flag a registrant as a noncitizen if a voter application is received with a naturalization form or provides some other form of proof of citizenship. Tr. 3590:6-3591:5.

The remaining voters were all able to vote. Dr. Kefeli verified his citizenship by sending an email (PX. 2049, Tr. 33:20-23), and Ms. Tran provided her naturalization documents to a poll worker (Tr. 316:913).

The Court agrees with Plaintiffs that naturalized citizens face more significant burdens than native-born citizens when registering to vote. Naturalized citizens must provide additional forms of proof of citizenship, a hurdle that most voters do not face. See Tr. 2036:9-23 (explaining that the DDS citizenship flags result from newly naturalized citizens with limited-term licenses; however, native-born citizens should never be issued limited-term licenses). Thus, the Court finds that the Exact Match citizenship verification process imposes a special burden on naturalized citizens.

Just as in Crawford, the Court recognizes that naturalized [*208] citizens face a special burden; however, the Court "cannot conclude that the statute imposes

[71] Although PX. 89 was initially taken under advisement, it was eventually admitted in its entirety. Tr. 2271:11.

'excessively burdensome requirements' on any class of voters." Crawford, 553 U.S. at 203. The Court finds that Plaintiffs have not shown that the Exact Match Citizenship verification process severely burdens voters. In Crawford, the Supreme Court held that even if a law "imposed a special burden" on a "limited number of persons['] . . . right to vote[,] . . . [t]he severity of that burden is, of course mitigated by the fact that, if eligible, voters . . . may cast provisional ballots that will ultimately be counted." Crawford, 553 U.S. at 199.

Mr. Germany testified that registrants flagged as noncitizens are provided with notice of their pending status and informed of the documents they need to show that they are citizens. Tr. 1724:22; 1735:1-2. At a minimum, the registrants are supposed to be issued a provisional ballot. Id. The testimony also shows that in 2019, the Secretary of State updated eNet to avoid registrants consistently being flagged as noncitizens. Tr. 3590:6-3591:5. Finally, the record shows that all of the voters who provided citizenship verification documents were able to vote. Thus, "consider[ing] the statute's broad application to [*209] all [Georgia] voters[,] [the Court] conclude[s] that it 'imposes only a limited burden on voters' rights.'" Crawford, 553 U.S. at 202-03 (citation omitted).

(2) Justifications

Defendants argued that the State has compelling state interest. Under Georgia law, noncitizens are not allowed to vote in elections for public office. Ga. Const. Art. 2, § 1, ¶ II; O.C.G.A. § 21-2-216(a)(2). Federal law also prohibits noncitizens from voting. See Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1344 (11th Cir. 2014) ("The National Voter Registration Act (NVRA) is premised on the assumption that citizenship is one of the requirements for eligibility to vote. See, e.g., [52 U.S.C. §§ 20504, 20506, 20508] (requiring certain voter registration forms to state or specify 'each eligibility requirement (*including citizenship*) . . . ."). Plaintiffs conceded that they were not challenging this policy and agreed that pursuing this goal was a legitimate state interest. Tr. 4330:7-10 ("We are not asking that noncitizens be allowed to vote. I know this Court knows that. We have only ever agreed that Georgia has a legitimate interest in preventing noncitizens from voting.").

Defendants also asserted a compelling state interest in ensuring compliance with HAVA and limiting voter fraud. The Supreme Court has noted that preventing voter fraud is a compelling state interest. "There is no denying the abstract importance, [*210] the compelling nature, of combating voter fraud. See Purcell, 549 U.S. at 4 (acknowledging "the State's compelling interest in preventing voter fraud"); cf. Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); Crawford, 553 U.S. at 225 (Souter, J., dissenting).

(3) Weighing burdens

The Court finds that Defendants' important justifications for preventing voter fraud and complying with HAVA outweigh the limited burden caused by the citizenship matching process. "[W]hen a state election law provision imposes only 'reasonable nondiscriminatory restrictions' upon the First and Fourteenth Amendment right of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." Burdick, 504 U.S. at 434. "When evaluating a neutral, nondiscriminatory regulation of voting procedure, [the Court] 'must keep in mind that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" Crawford, 553 U.S. at 203 (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)). The Court found that the citizenship matching process creates a limited burden on voters. Therefore, the Court must determine whether Defendants provided important regulatory interests to justify the law.

The Court finds that Defendants have shown that compliance with HAVA [*211] is an important state interest. As stated above, if a State fails to comply with HAVA, the Attorney General may bring a civil action against the State. 52 U.S.C. § 21111. Thus, Defendants have an important interest in complying with HAVA.

Also, Defendants have a compelling interest in preventing voter fraud. "[D]eterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." Greater Birmingham Ministries, 992 F.3d at 1334. Even though the evidence adduced at trial shows that relatively few noncitizens attempt to vote,[6272] Defendants were not required to show instances of voter

[6272] "[T]he empirical evidence makes clear that fraud committed by voters either in registering to vote or at the polls on Election Day is exceedingly rare . . . both nationally and in Georgia." Tr. 2346:3-6. Additionally, Mr. Harvey testified that voter fraud "was not a -- not a significant problem that [he is] aware of." Tr. 2041:10-16.

fraud to justify these election laws. Id. Accordingly, the Court finds that Defendants have a compelling interest in preventing voter fraud.

The Court finds that the limited burdens placed on voters by Exact Match citizen verification are justified by the State's compelling interest in fraud and important interest in complying with HAVA. Accordingly, the Court finds that Plaintiffs have not satisfied their burden in proving that Exact Match citizenship verification violates the First and Fourteenth Amendments.

(4) Remedies

Even if the Court were to find for Plaintiffs, the Court finds that it is prudent to abstain from awarding Plaintiffs' [*212] proposed remedy. Plaintiffs asked the Court to order the Secretary of State to implement the SAVE verification process (Tr. 3193:6-20) and maintain records of the citizenship verification conducted by SAVE (Tr. 3195:2-4). However, Mr. Germany testified that the Secretary of State is in the process of implementing SAVE. Tr. 1709:20-1711:20.

Defendants argued that the Secretary of State's implementation of SAVE meant that there was no injury to Plaintiffs. See Tr. 4459:20-22 ("If we are using SAVE, the injury is not there. Because that's what[] they are saying they want as a remedy.") Also, Defendants argue that SAVE is not an appropriate remedy because "[t]he testimony is that we want to continue doing this[,] [t]here is already a statute that says to do that[,] [t]here is a regulation that says to do that[,] [t]here is no indication that that's going to change."[6373] Tr. 4460:1-4. The Court agrees that ordering the implementation of SAVE is not an appropriate remedy.

As an initial note, the Defendants' planned implementation of SAVE does not moot the issue, and the Court recognizes that absent a judicial order, things may change. But, SAVE is not dispositive of the Court's decision, and the [*213] Court has no doubt that if the State changes its policy, this Court or another will hear about it, and the issue can be addressed on another day.

First, Georgia has a regulation that requires the Secretary of State to verify an applicant's citizenship using SAVE. See Ga. Comp. R. & Regs. 590-8-1-.02(2)(a)(2) ("If the Department of Driver Services records indicate that the applicant is not a United States citizen in the Department of Driver Services database, the Secretary of State shall attempt to verify the applicant's United States citizenship status with the United States Citizenship and Immigration Services utilizing the Systematic Alien Verification for Entitlements program. Such verification will indicate whether the applicant is designated as a citizen of the United States within the Verification Information System database.").

Second, sufficient testimony and evidence establish that the Secretary of State is in the process of implementing SAVE. On August 17, 2020, the Secretary of State entered into a memorandum of understanding with the Department of Homeland Security authorizing the Secretary to implement SAVE. PX. 2022.

In 2021, the Secretary of State's Office used SAVE to audit the voter rolls and records from DDS. [*214] Tr. 1680:15-16; 1680:20-22. The range of dates for the registrations that the Secretary of State's Office identified during the audit was from 1997 until February 24, 2022. Tr. 1728:1-2. During that audit, the Secretary of State's Office looked at the entire voter roll. Tr. 1682:3-5. As of the trial, Mr. Germany testified that the Secretary of State is discussing the process for implementing more frequent uses of SAVE to verify voters' citizenship. Tr. 1710:2-5. It is a goal of the Secretary of State to be able to run voter applicants' alien registration numbers through the SAVE system in real-time. Tr. 1694:6-21.

The Court notes that Mr. Germany testified that the Secretary of State had no defined timeline for implementing SAVE. Tr. 1710:2-5, 1711:4-11, 15-20. However, Mr. Germany also testified that "I would hope that we could get it up and running within a month to three months, but I'm hesitant to say that because you know, when you start dealing with data transfers and data formatting, we can run into things that we then have to resolve. But I mean in my mind, I do think it's a one-month-to-three-month project." Tr. 1711:15-20. Given that the Secretary of State is in the process [*215] of implementing SAVE, the Court declines to order the Secretary of State to implement SAVE.[74]

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[73] The Statute referenced by Defendants, O.C.G.A. § 21-2-216, does not discuss the Secretary of State's use of SAVE to verify an applicant's citizenship. Additionally, the regulation cited by Defendants was adopted in 2010 and the Secretary of State did not receive the MOU from the DHS authorizing it to use SAVE until August 2020.

The Eleventh Circuit cautioned federal judges on using injunctions with respect to election laws. See New Ga. Project, 976 F.3d at 1284. Here, Plaintiffs ask the Court to issue an Order requiring the Secretary of State to implement SAVE even though an MOU authorizes the Secretary of State to use SAVE, a regulation requires the Secretary of State to use SAVE, and officials in the Secretary of State's Office testified that they are in the process of implementing SAVE. Accordingly, the Court finds that issuing said injunction would be "second-guessing or interfering with [the] State's reasonable, nondiscriminatory election rules." New Ga. Project, 976 F.3d at 1284. Specifically, it would require the Court to second-guess the Secretary of State's timeline for implementing SAVE.[64][75] Thus, the Court finds that ordering the Secretary of State to implement SAVE is the type of remedy that district courts are cautioned against awarding.

The Court finds that Plaintiffs have not carried their burden in establishing that Exact Match Citizenship violates the First and Fourteenth Amendments.

C. Count II: Fifteenth Amendment

In Count II of their Second Amended Complaint, Plaintiffs allege that "[a]cting under color of state [*216] law, Defendants deprived Georgians of the right to vote —as secured by the Fifteenth Amendment—by administering an election plagued with irregularities that disproportionally affected voters of color." Doc. No. [582], ¶ 167. More specifically, in their Statement of the Case for purposes of the Pretrial Order, Plaintiffs allege that "[t]he Exact Match policy and its application . . . racially discriminate against Georgians of color in violation of the Fifteenth Amendment." Doc. No. [753-1], 1-2. As stated above, the challenged practices here are Exact Match MIDR and Exact Match Citizenship.[65][76]

1. Legal Standard

The Fifteenth Amendment provides in relevant part that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV. "The Amendment bans racial discrimination in voting by both state and nation. It thus establishes a national policy . . . not to be discriminated against as voters in elections to determine public governmental policies or to select public officials, national, state, or local." Terry v. Adams, 345 U.S. 461, 467, 73 S. Ct. 809, 97 L. Ed. 1152 (1953). "The design of the Amendment is to reaffirm the equality of races at the most basic level of the democratic process, the [*217] exercise of the voting franchise." Rice v. Cayetano, 528 U.S. 495, 512, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000).

"[T]he Supreme Court has long recognized that evidence of a racially discriminatory motivation is required for Plaintiffs to prevail on a Fifteenth Amendment claim.'" Greater Birmingham Ministries v. Sec'y of State for Ala., 992 F.3d 1299, 1321 (11th Cir. 2021) (citing City of Mobile v. Bolden, 446 U.S. 55, 62, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), superseded by statute on other grounds as stated in Thornburg v. Gingles, 478 U.S. 30, 35, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). There are two prongs to an abridgment analysis under the Fifteenth Amendment. Greater Birmingham Ministries, 992 F.3d at 1321 (citations omitted). Plaintiffs must first show that the State's "decision or act had a discriminatory purpose and effect." Id. (citing Burton v. City of Belle Glade, 178 F.3d 1175, 1188-89 (11th Cir. 1999)).[66][77] "If Plaintiffs are

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[77] The Supreme Court has explained that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1349 (11th Cir. 2005) (citing Hernandez v. New York, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). This Court recognizes that Holton was a Fourteenth Amendment/Equal Protection case; however, the Eleventh Circuit has indicated that the standard is the same for Fifteenth Amendment and Equal Protection/Fourteenth Amendment claims in the voting rights context. See Greater Birmingham Ministries, 992 F.3d at 1328 ("[i]n order 'to establish a violation of either the Equal Protection Clause of the Fourteenth Amendment or the Fifteenth Amendment, the plaintiffs must show that the state's decision or act had a discriminatory purpose and effect.") (citing Holton, 425 F.3d at 1349).

[75] The Court's determination that SAVE is not an available remedy depends on the Secretary of State's affirmative testimony to the Court that SAVE is in the process of being implemented and expects that SAVE will be fully operational in 2023.

[76] As previously noted, Plaintiffs' Exact Match MIDR challenge relates to the plaintiffs' claim that the state's information and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs' second policy challenge, the Exact Match Citizenship, relates to the voter registration applicants' citizenship information.

unable to establish both intent and effect, their constitutional claims fail." Id. (emphasis omitted). "Once discriminatory intent and effect are established, the second prong provides that 'the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor.'" Id.

The Eleventh Circuit has held that "the fluid concept of discriminatory intent is sometimes subtle and difficult to apply." Dowdell v. City of Apopka, 698 F.2d 1181, 1185 (11th Cir. 1983). The Court must "evaluate all available direct and circumstantial evidence of intent in determining whether a discriminatory purpose was a motivating factor in a particular decision." Burton, 178 F.3d at 1189. In addition, in Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), the Supreme Court suggested that relevant evidentiary factors include: [*218] (1) the impact of the challenged law; (2) the historical background;[67][78] (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; and (5) the contemporary statements and actions of key legislators. [79]Greater Birmingham Ministries, 992 F.3d at 1322 (citing Arlington Heights, 429 U.S. at 267-68). The Eleventh Circuit has supplemented the Arlington Heights list to include the following additional factors: (6) the foreseeability of the disparate impact; (7) knowledge of that impact; and (8) the availability of less discriminatory alternatives. Id. (citing Jean v. Nelson, 711 F.2d 1455, 1485-86 (11th Cir. 1983), on reh'g, 727 F.2d 957 (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985)).

2. Issue and Challenged Practices: Exact Match (MIDR and Citizenship Match)

The Court must now undertake a sensitive inquiry and determine whether Plaintiffs have met their burden of showing that the Secretary of State's decision or act had a discriminatory purpose and effect. See Arlington Heights, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

a) Impact of the challenged policy

In turning to the first prong, the Court is required "to start by determining whether the challenged law has a discriminatory impact and 'whether [*219] it bears more heavily on one race than another.'" Greater Birmingham Ministries, 992 F.3d at 1321 (citing Arlington Heights, 429 U.S. at 266). The Court notes that the Supreme Court has "cautioned that it would be rare to find a case involving 'a clear pattern, unexplainable on grounds other than race' and that, '[a]bsent a pattern as stark as that, . . . [discriminatory] impact alone is not determinative, and the Court must look to other evidence.'" Id. at 1322 (citing Arlington Heights, 429 U.S. at 266).

In the case *sub judice*, Plaintiffs have presented evidence of discriminatory impact of the Exact Match policy and application of the MIDR and Citizenship Match challenged practices through the testimony of their expert, Dr. Mayer. See PX. 1278, PX. 2030, Tr. 398:2-10, Tr. 412:11-414:9. The Court finds Dr. Mayer's methodology of analyzing the state's voter files to be sound and credits his conclusion that, as an empirical matter, "voters of color are overwhelmingly and disproportionately in MIDR status compared to their overall composition of the voter file." Tr. 413:7-9 (Mayer). The evidence at trial also showed that in 2018, the Secretary of State's Office undertook an internal review of the voter files and concluded that approximately 70% of applicants in pending status for failed verification at DDS or [*220] SSA were Black. PX. 1887, Tr. 1993:14-1994:18 (Harvey).

As for citizenship match, the Court again credits the methodology used by Dr. Mayer in analyzing the state's voter files. Dr. Mayer's testimony showed that non-Hispanic white registrants are far less likely to be flagged as noncitizens, as compared to their overall representation in the voter file, whereas voters of color are far more likely to be flagged as noncitizens than their overall representation in the voter file reflects. PX. 2027, Tr. 388:12-390:23 (Mayer). The Court credits Dr. Mayer's conclusion that the citizenship verification process overwhelmingly applies to voters of color. Tr. 398:7-10 (Mayer).

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[78] The Eleventh Circuit has also "repeatedly recognized that evidence of [t]he historical background of the decision is relevant to the issue of discriminatory intent." Burton, 178 F.3d at 1189 (citing Williams v. City of Dothan, 745 F.2d 1406, 1415 (11th Cir. 1984) (quoting Arlington Heights, 429 U.S. at 267) (internal quotations omitted)).

However, there is no clear pattern that would be determinative, i.e., Plaintiffs' evidence, standing alone, does not establish a "pattern, unexplainable on grounds other than race." Arlington Heights, 429 U.S. at 266. Plaintiffs' own expert testified that there was substantial variation in the MIDR match numbers among counties that could not be explained by race, and he suggested "different administrative practices in different counties, even with the same overall demographics." PX. 2031, Tr. 416:9-19 (Mayer). Dr. Mayer further testified that for Citizenship [*221] Match, the numbers "are suggestive of and consistent with inconsistent administrative practices around and in different jurisdictions around the state." Tr. 418:6-13.

After review of Dr. Mayer's testimony, the Court concludes that the discriminatory impact factor is not determinative and the Court must consider the remaining Arlington Heights factors to determine if Defendants intended to discriminate when instituting Exact Match (MIDR and citizenship) practices.

b) Historical background

The Court now considers the historical background Arlington Heights factor.

A stay-panel of the Eleventh Circuit recently cautioned that the "Arlington Heights's 'historical background' factor should be 'focus[ed] . . . on the 'specific sequence of events leading up to the challenged decision' rather than 'providing an unlimited lookback to past discrimination.'"[6980] League of Women Voters of Fla., Inc. v. Fla. Sec'y of State, 32 F.4th 1363, 1373 (11th Cir. 2022) (citation omitted).

Tracing the specific sequence leading up to implementation of the Exact Match MIDR and Citizenship Verification challenged practices is difficult because those policies are not contained in a single law or

Nevertheless, the Court credits the expert testimony of Dr. McCrary,[7183] who provided a history of voter registration and a historical account of Exact Match MIDR, beginning in 2002 with the adoption of HAVA by Congress and its implementation by the fifty states. Tr. 213:2-4 (McCrary).

Dr. McCrary testified that the State of Georgia did not begin to comply with the voter verification provisions of HAVA[7284] until "between 2007 and 2008"; it was his understanding "from court rulings at the time . . . that Georgia believed that because it required a full Social Security number" when registering to vote "rather than just the last four digits of the Social Security number, it was not required to comply with HAVA." Tr. 216:6-14.[73][85]

The rulings that Dr. McCrary referenced were: (1) Schwier v. Cox, 412 F. Supp. 2d 1266 (N.D. Ga. 2005) (holding that the Secretary of State's use of an applicant's full Social Security number violated both the Privacy Act and the Voting Rights Act) and (2) Morales v. Handel, No. 08-cv-3172, 2008 U.S.

[83] While the Court credits Dr. McCrary's expert history testimony, which includes some discussion of race and political parties, the Court notes that Dr. McCrary specifically affirmed that he was not opining that any portion of Georgia's voter registration practices and systems were adopted with a discriminatory intent. Tr. 266:1-11.

[82] For example, DDS recently switched from matching the whole first name to matching only the first letter of the first name "because [the Secretary of State] requested that." Tr. 1202:13-19 (McClendon); see also Tr. 1936:9-11 (Harvey). Also, when Plaintiffs first brought this lawsuit, Exact Match MIDR prevented voter registration applicants from being registered voters until they had taken certain steps to address the match failures generated by the Exact Match MIDR process. If the applicant did not

[85] Tr. 216:6-14. Dr. McCrary testified that HAVA required states to create a statewide voter registration database. Tr. 213:5-10 (McCrary). He further testified that there was a HAVA "requirement . . . both to establish a person's eligibility as to their place of residence and to establish their eligibility by way of establishing whether they were or were not United States citizens." Tr. 214:2-5 (McCrary). He testified that HAVA did not require states to use a particular matching methodology such as the Exact Match employed by the State of Georgia in this case. Tr. 214:6-10 (McCrary).

Dist. LEXIS 124182, 2008 WL 9401054, at *8 (N.D. Ga. Oct. 27, 2008) (holding that the State's voter verification policy required preclearance [*223] under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c).[7486]

In 2007 and 2008, Georgia "followed the procedure apparently required by HAVA, which was to have the voter registration database, which the state had created by that time, compared with the driver[']s license database operated by the Department of Driver Services, or DDS, through a database matching procedure." Tr. 216:19-217:2 (McCrary). Secretary of State Handel "participated in a memorandum of understanding with DDS to carry out that function." PX. 1751, Tr. 217:3-5 (McCrary). Dr. McCrary further testified that the State of Georgia sought individual citizenship status from the SSA, through a verification program called "HAVV."[7587] Tr. 221:7-14 (McCrary). Dr. McCrary testified that there was an inspector general's report from within the SSA that was "sharply critical of" HAVV's "exact match" methodology for which many of the "non-matches were in fact citizens." Tr. 221:19-24, 222:9 (McCrary). Dr. McCrary, however, had no evidence that the State of Georgia received the inspector general's report. Tr. 284:11-13 (McCrary).

Dr. McCrary testified that Georgia continued to use the same methodology after the inspector general's report until 2009, when the United States Department [*224] of Justice ("DOJ"), reviewing the State's preclearance application, objected to the "exact match" system of voter verification. Tr. 222:10-23; see also PX. 66.[7688] In the objection letter, the DOJ laid out its reasons for rejecting the application as follows:

- The State's process "[did] not produce accurate and reliable information" such that "thousands of citizens who [were] in fact eligible to vote under Georgia law were flagged." PX. 66 at 3.
- The impact of the errors in the State's process fell "disproportionately on minority voters." PX. 66 at 4.
- Applicants who were "Hispanic, Asian, or African American [were] more likely than white applicants, to statistically significant degrees, to be flagged for additional scrutiny." PX. 66 at 4.

The DOJ also found the process for verifying voter registration information to be "seriously flawed" in a manner that "subject[ed] a disproportionate number of African American, Asian, and/or Hispanic voters to additional and, more importantly erroneous burdens on the right to register to vote." PX. 66 at 4. The DOJ concluded "[t]hese burdens are real, are substantial, and are retrogressive for minority voters." PX. 66 at 4.

Dr. McCrary testified that [*225] Georgia later developed a revised version of its voter verification procedures that "proposed daily monitoring of all the decisions . . . in which individuals were evaluated for eligibility to vote, and to provide quick notification to any individuals who were ruled to be ineligible to vote." Tr. 249:12-17 (McCrary); Tr. 1595:14-1596:2 (Germany); PX. 76 at STATE-DEFENDANTS-00078199 ("Board of registrars should check the SSVRZ791R1 report on a daily basis").[7789]

Dr. McCrary testified that in 2010, Georgia sought preclearance through both administrative review and a Section 5 declaratory judgment action in the District of Columbia of the revised version of its voter verification procedures, which the DOJ "informed the court it did not find objectionable in light of the changes the State had purportedly made, and, therefore, that new version of the State's voter verification procedure was precleared." Tr. 249:4-11.[7890]

Dr. McCrary testified that there was another court case, NAACP v. Kemp, involving Exact Match that the State of Georgia agreed to settle in February of 2017. Tr. 257:2-15 (McCrary).[7991] In that settlement agreement, "the State agreed to have an unlimited time period for curing

[89] The exhibit defines the SSVRZ791R1 report as an "exceptions report." PX. 76 at STATE-DEFENDANTS-00078197. This report and a second exceptions report, "display, by county, the results of the verification process and identify those applicants whose information was not successfully verified in its entirety." Id. at STATE-DEFENDANTS-00078198.

[90] Prior to 2013 and the United States Supreme Court's decision in Shelby County v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), certain states, including Georgia, needed to seek preclearance from the DOJ for new voting changes.

[91] Dr. McCrary testified that the 2010 version is not used in Georgia today and the process has been changed several times since 2016. Tr. 279:5-8. Dr. McCrary also described how experts subsequently found the state's assurances of close, daily monitoring proved inaccurate in the years that followed preclearance. Tr. 250:2-254:17 (McCrary), PX. 1289, ¶ 84

[92] Dr. McCrary could not recall the full name of the program at trial. Tr. 221:14 (McCrary). His report states that the full title of the program is "Help America Vote Verification." PX. 1289, ¶ 72.

[93] This McCrary report contained all citations for Exact Match Citizenship, see the SOL case, NAACP v. Kemp, No. 2:16-cv-00219 (N.D. Ga.), Exact Match Citizenship.

[94] Dr. McCrary provided the full citation for the case in his report as "Georgia State Conf. NAACP v. Kemp, No. 2:16-cv-00219 (N.D. Ga.)." PX. 1289, at 77 n. 231.

a finding of non-eligibility [*226] to register under the voting verification procedures." Tr. 257:19-23 (McCrary).[92] Later, the Georgia legislature passed HB 268, which "essentially left in place the 'exact match' methodology that had been employed in the past, but [the State] agreed to run the records of persons found to be ineligible through the HAVA Match again." Tr. 258:12-15.[8193]

In 2018, there was a legal challenge to HB 268 that resulted in the Honorable Eleanor Ross, United States District Judge, issuing a preliminary injunction finding that plaintiffs showed "a substantial likelihood of success on the merits of their claim that" the State had "violated the right to vote for individuals placed in pending [registration] status due to citizenship." PX. 1289, ¶¶ 100, 110 (citing Ga. Coal. for the People's Agenda v. Kemp, 347 F. Supp. 3d 1251 (N.D. Ga. 2018)). Judge Ross ordered the state "to allow county officials to permit individuals flagged and placed in pending status due to citizenship to vote a regular ballot by furnishing proof of citizenship to poll managers or deputy registrars." PX. 1289, ¶ 110.

Dr. McCrary was aware that the 2018 case remains pending and that the State of Georgia has changed its process since the preliminary injunction. Tr. 285:18-20.

Dr. [*227] McCrary states in his report that according to former elections director Harvey, "the state responded to the changes required by Judge Ross's injunction by adopting HB 316 (2019)." PX. 1289, ¶ 112. As stated in the Court's prior orders:

> HB 316, which was signed into law by the Governor on April 2, 2019, amends the Georgia Election Code to, among other things, provide for more notice under Georgia's voter-list-maintenance process; to provide that a voter registration is not automatically rejected under the Exact Match policy; to provide for the implementation of new voting machines; to prohibit the superintendent of a county from changing a polling place less than thirty days before a general primary or general election; to authorize the Secretary of State to become a member of a nongovernmental entity whose purpose is to share and exchange information in order to improve the accuracy and efficiency of voter registration systems; and to change the way which provisional ballots and absentee ballots are counted.

Doc. No. [68], 23-24; see also Doc. No. [612], 58-64. Dr. McCrary's expert testimony ended with the enactment of HB 316.

Plaintiffs also ask the Court to consider their evidence [*228] concerning the 2014 and 2018 campaign statements of then-Secretary Kemp, the 2014 New Georgia Project investigation, and the 2010 Dr. Dennard investigation as further historical background evidence of discriminatory purpose. However, the Court has determined that the focus of its Fifteenth Amendment historical background analysis is 2002, with the adoption of HAVA by Congress and Georgia's implementation process in 2007 to 2008, as well as the revised policies. Plaintiffs have not linked how the 2010 and 2014-2018 events tie in for consideration.[8294] In essence, Plaintiffs' position is weakened significantly by the fact that the Dr. Dennard investigation (concerning absentee ballots), the New Georgia Project investigation (concerning forgeries in voter registrations), and the campaign statements evidence presented in this case are largely unconnected to the passage of the laws and actual policies in question. See Greater Birmingham Ministries, 992 F.3d at 1324 (indicating that the plaintiffs' "position is weakened significantly by the fact that the evidence presented" in the case at hand was "largely unconnected to the passage of the actual law in question").

To this regard, the Court has given no consideration to Plaintiffs' evidence concerning Dr. Dennard [*229] and the New Georgia Project in this section of the Opinion, as said evidence does not concern the specific sequence of events leading up to the creation, implementation, and revision of the laws and policies at issue.[8395] The Court will consider the campaign statements in detail in the "[c]ontemporary statements of key officials" section of this Opinion.

After considering the historical background of Exact Match MIDR and Citizenship Verification, the Court finds that this factor is neutral. The historical background does not reveal "a series of official actions taken for

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[93] While Dr. McCrary testified and indicated in his report that "the administrative implementation of HB 268 in 2017 would likely have been objectionable" were preclearance review still in place based upon discriminatory effect, the Court gives little weight to this evidence in light of the subsequent litigation and enactment of HB 316 concerning voter verification procedures. PX. 1289, ¶ 99; Tr. 258:16-259:17.

[94] The Court notes that 2010 is the same year that the DOJ did not object to Georgia's revised Exact Match plan, leading to preclearance.

[95] Even if the Court were to consider this evidence, the Court's ruling remains the same.

invidious purposes." Arlington Heights, 429 U.S. at 267. Further even if the initial actions of the State of Georgia could be viewed as showing invidious intent (or purpose) based on the DOJ's preclearance objection, the Court notes that the DOJ eventually found a revised matching policy unobjectionable, and the DOJ thus precleared Georgia's matching policy. Thus, this Court hesitates to find invidious purpose for a policy precleared by the DOJ. The fact that Exact Match MIDR and Citizenship Verification continue to evolve following litigation, settlement agreements, and additional legislative action does not change this historical background conclusion. [*230] Further, to the extent that it is proper to consider the State's interests in its Exact Match MIDR and Citizenship Verification policies as a part of the historical background factor,[8496] the Court notes that the evidence at trial demonstrated legitimate state interests in proving that the registered voter is an actual person, weeding out false registrations, effectuating the HAVA permissible forms of identification requirement for certain first-time voters, and preventing noncitizens from voting.[8597] Tr. 3581:1-3, 3604:11-19, 3606:14-24, 3605:20-3606:8 (Harvey), Tr. 4165:7-11, 4146:13-17 (Germany).

c) Specific sequence of events, and substantive departures

Next, the Court considers the specific sequence of events and substantive departures factors. There is nothing in the record to show a sudden change in the sequences of events leading up to the Exact Match policy "that would spark suspicion" and the record shows no substantive departures from "usual procedures." Arlington Heights, 429 U.S. at 269. Accordingly, this factor weighs in favor of Defendants and against a discriminatory purpose finding.

d) Contemporary statements of key officials

While not considered for the historical background factor, the Court will consider [*231] Plaintiffs' evidence concerning the 2014 and 2018 campaign statements of then-Secretary Kemp in the contemporary statements category as follows.

As noted above, Plaintiffs offer two campaign statements of then-Secretary Kemp to demonstrate a discriminatory motivation. These statements are from 2014 and 2018. In these statements, then-Secretary Kemp urged his supporters to register voters that would vote for Republican candidates and encourage them to vote in the same way that Democrats had previously done with minority voters. DX. 740, PX. 2051, Tr. 86:9-17, 88:9-17, 92:18-22 (Kemp Dep.). At a 2018 campaign fundraiser, then-Secretary Kemp expressed concern about early voters primarily voting for Democrats and the number of absentee ballot requests. PX. 2051, Tr. 108:2-8, 109:14-1, 110:1-4, 110:11-15 (Kemp. Dep.). These statements were not contemporaneous with the adoption of the challenged MIDR and Citizenship Match practices. See Greater Birmingham Ministries, 992 F.3d at 1321 (citing Arlington Heights, 429 U.S. at 267-68).

The Court recognizes that Defendants objected to the evidentiary admission of Governor Kemp's deposition testimony concerning the speeches at issue on the ground that "[c]ampaign speech is not relevant." Doc. No. [755-7], 12.[8698] In opposition, Plaintiffs [*232] assert that "as the Secretary of State and Chair of the State Election Board, Governor Kemp was chiefly responsible for the administration of Georgia's elections during the relevant time period. Therefore, statements he made throughout that same time period in his capacity as a candidate for office are certainly relevant to the constitutionality of his actions." Doc. No. [755-7], 12.

There does not appear to be a case on point that addresses the exact context that is presented in the case *sub judice*. The Court also recognizes that in the non-voting rights class of cases/discrimination context, the Supreme Court has noted disagreement among the Justices as to whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, __ U.S. __, 138 S. Ct. 1719, 1730, 201 L. Ed. 2d 35 (2018) (considering religious discrimination);[99] see

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[96] While not specifically enumerated as a factor in the Greater Birmingham Ministries case, the Court notes that the Eleventh Circuit did consider the state's interest in its Fifteenth Amendment analysis concerning the law at issue. See 992 F.3d at 1328 ("[W]hen we weigh the burden on a voter to obtain and present a photo ID against Alabama's interests underlying the voter ID law, we find the law to be a neutral, nondiscriminatory regulation of voting procedure.").

[97] Defendants raised a dispute as to the State's interest in the voter ID law. Doc. No. [755-7], 12. In their Opinion, the Court concludes that the Defendants' asserted interests are sufficiently supported by the evidence, but Plaintiffs' argument for the statement was not presented at trial to the asserted state interests insufficient.

[98] Defendants also argued that the State's interest in the voter ID law is "[c]ontrolling the rules of the Senate." Doc. No. [755-7], 12. In their Opinion, the Court concludes that upholding Plaintiffs' argument for the statement was not presented at trial to the asserted state interests insufficient.

In reviewing the limited authority concerning campaign speech and the Supreme Court Justices' noted disagreements concerning lawmaker statements in the Masterpiece Cakeshop case, the Court perceives that the law is unsettled on consideration of statements, such as the ones at issue involving campaign speech.

In the absence of binding authority, the Court deems it proper to overrule Defendants' objection as to consideration of the 2014 and 2018 campaign statements. To the extent that it is proper to consider the campaign statements at issue, the Court after weighing the evidence and considering credibility, does not find that the speeches support a finding of "a wholesale intent" by then-Secretary Kemp to discriminate against minority voters as it relates to the Exact Match policy. Greater Birmingham Ministries, 992 F.3d at 1323. This Court is "confined to an analysis of discriminatory intent as it relates to" the Exact Match Policy and the statements Plaintiffs identify were not made about the matching policies at issue in this case, nor are they temporally connected to any of the periods when the policies were implemented or revised. See Greater Birmingham Ministries, 992 F.3d at 1323 ("Plaintiffs provide no evidence that [the senator's] comment [*234] was made at the same time, or even during the same session, as the passage of [law at issue].").

The stay-panel in the recent League of Women Voters of Florida case also indicated that it is improper to fail to "properly account for what might be called the presumption of legislative good faith" in a Fifteenth Amendment analysis. League of Women Voters of Fla., 32 F.4th at 1373. In support of the presumption of good faith statement, the stay-panel cited case law that dealt with state legislatures. Id. (citing Abbott v. Perez, __ U.S. __, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018)). Plaintiffs in the case *sub judice* object to applying such a presumption. Plaintiffs assert that the presumption of good faith is restricted to the intent of the legislature (Doc. No. [854], ¶ 63) and is irrelevant to this case that involves an uncodified policy. However, this Court's independent research shows that courts have held that the good faith presumption extends to non-legislative public officials, such as the Secretary of State. See, e.g., Thompson v. Hous. Auth. of City of Miami., 251 F. Supp. 121, 124 (S.D. Fla. 1966) ("The presumption that public officials will in good faith discharge their duties and observe the law is a very strong presumption, and will prevail until overcome by clear and convincing evidence to the contrary.") (citing Barnes v. City of Gadsden, 174 F. Supp. 64 (N.D. Ala. 1958)). Accordingly, the Court will extend a good faith presumption in considering [*235] then-Secretary Kemp's statements. Said presumption has not been rebutted or overcome by Plaintiffs' evidence.[87][100] Accordingly, the contemporary statements factor weighs in favor of Defendants.

e) Foreseeability and knowledge of the disparate impact

Next, the Court considers the foreseeability and knowledge of the disparate impact factors. The evidence at trial showed that the Secretary of State's Office is aware that its DDS citizenship verification process affects recently naturalized citizens rather than native-born citizens. Tr. 2036:9-2040:14 (Harvey). Georgia was put on notice of the problems with its voter verification procedure as early as 2009, when the Department of Justice objected to Georgia's adoption of an "exact match" methodology for voter verification in implementing HAVA. PX. 66 at 4.[88][101] The Secretary of State's own internal review in 2018 showed that 70% of applicants in pending for failed verification at DDS or SSA were Black. Tr. 1993:14-1994:18 (Harvey); PX. 1887. This factor weighs in favor of Plaintiffs and constitutes circumstantial evidence of intent.

f) Availability of less discriminatory alternatives

Last, the Court considers the availability of less discriminatory [*236] alternatives. Dr. Mayer's unrebutted testimony was that states have other options to implement HAVA verification for identity that do not require an exact match. The most common alternative is typically referred to as contextual or probabilistic matching, which accounts for the possibility of differences in a small number of characters between the databases without it being a different person. PX. 1278 at 10, Tr. 358:16-359:7 (Mayer). The Court also credits Dr. Mayer's unrebutted testimony that at least three states (California, Massachusetts, and Wisconsin) rely exclusively on a registrant's attestation of citizenship, without verifying citizenship status. Tr. 363:24-364:4 (Mayer). This factor weighs in favor of Plaintiffs and constitutes circumstantial evidence of intent.

[100] The Court has considered the entirety of the evidence that Plaintiffs offered in support of their Fifteenth Amendment claim in reaching this conclusion.

[101] The Court gives this notification limited weight because the DOJ later precleared a revised version of Georgia's policy.

* * * *

In sum, after evaluating available direct and circumstantial evidence of intent and weighing the evidence and making credibility determinations, the Court finds that while some Arlington Heights factors weigh in Plaintiffs' favor, the majority of the factors weigh against Plaintiffs or are neutral—or not determinative of whether a discriminatory purpose was a motivating factor in the decision to institute [*237] Exact Match MIDR and Citizenship Verification laws and policies. In addition, there are legitimate State interests in Exact Match MIDR and Citizenship Verification laws and policies. Accordingly, the Court finds that Plaintiffs have failed to show that the Exact Match MIDR and Citizenship Verification laws and policies were enacted with a racially discriminatory intent or purpose. As such, this Court does not reach the second prong of the Fifteenth Amendment analysis to consider whether Defendants have demonstrated that the laws would have been enacted without the racial discrimination factor. "[W]ithout proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional." Crawford v. Marion Cnty Election Bd., 553 U.S. 181, 207, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (Scalia, J., concurring) (internal citation omitted). The Court finds against Plaintiffs and in favor of Defendants on Plaintiffs' Fifteenth Amendment claims.

D. Count III: Equal Protection

In their Complaint and Statement of Claim for purposes of the Pretrial Order, Plaintiffs raise two different equal protection claims. The first claim challenges the same procedures as Counts I and II of their Second Amended Complaint. More specifically, Plaintiffs allege that "[a]cting under color of state law, Defendants[89102] deprived [*238] Georgians of the right to vote on an equal basis, as secured by the Equal Protection Clause, by administering an election plagued with irregularities that disproportionately affected voters of color." Doc. No. [582], ¶¶ 181-182; see also Doc. No. [753-1], 1-2 ("The Exact Match Policy and its application . . . racially discriminate against Georgians of color in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment."). Plaintiffs' second equal protection challenge concerns uniformity and residency (or geographic discrimination). More specifically, Plaintiffs allege that "Georgia's voting system . . . violates Equal Protection because voters are subject to arbitrary and inconsistent differences in rules, processes, and burdens depending on where voters happen to reside"—resulting in "different elections systems in different counties in Georgia." Doc. No. [582], ¶¶ 186-187; see also Doc. No. [753-1], 2 ("The Exact Match Policy and its application . . . discriminate against Georgians based on where they live and based on naturalized citizenship status in violation of the Equal Protection Clause of the Fourteenth Amendment . . . . The non-uniform and improper practices regarding in-person cancellation of absentee ballots . . . discriminate against Georgians based on where they live, in [*239] violation of the Equal Protection Clause of the Fourteenth Amendment.").

1. Legal Standard

The Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. "[T]he Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters." Bolden, 446 U.S. at 62.

2. Racial Discrimination

"A successful equal protection claim under the Fourteenth Amendment requires proof of *both* an intent to discriminate and actual discriminatory effect." Greater Birmingham Ministries, 966 F.3d at 1224 (citing Davis v. Bandemer, 478 U.S. 109, 127, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986)). "Once discriminatory intent and effect are established, the second prong provides that "'the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this [racial discrimination] factor.'" Id. at 1225 (citations omitted).

Plaintiffs' equal protection claim (racial discrimination allegations) concerning the procedures challenged in Count II of the Second Amended Complaint is subsumed in the same analysis that the Court applied to the Fifteenth Amendment claim pertaining to Count II of this Opinion. Cf. NAACP v. Austin, 857 F. Supp. 560, 572 (E.D. Mich. 1994) ("[W]e believe that the Fifteenth Amendment's prohibition against purposeful

[102] With respect to Count III, the Court uses the term "Defendants" to encompass the Secretary of State, Sarah Tindall Ghazal, Janice Johnston, Edward Lindsey, and Matthew Mashburn. "Defendants" in this section will not include the SEB because the SEB enjoys sovereign immunity for the claims in Count III.

discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude is subsumed in the analysis required [*240] under the Fourteenth Amendment's equal protection clause." (internal quotations omitted)); cf. also Thompson v. Merrill, 505 F. Supp. 3d 1239, 2020 WL 7080308, at *9 (M.D. Ala. 2020) ("Both a Fourteenth Amendment Equal Protection Clause claim and a Fifteenth Amendment discrimination claim require proof of intent to discriminate. Therefore, the Court applies the same analysis to both claims."). Accordingly, for the reasons set forth in the Court's analysis concerning Count II, Plaintiffs' Count III equal protection (racial discrimination) claim concerning voting procedures (specifically, "Exact Match") fails.

3. Geographic Discrimination

As indicated above, Plaintiffs allege that "Georgia's voting system . . . violates [the] Equal Protection [Clause] because voters are subject to arbitrary and inconsistent differences in rules, processes, and burdens depending on where voters happen to reside," resulting in "different elections systems in different counties in Georgia." Doc. No. [582], ¶¶ 186-187. Plaintiffs further allege that "Defendants have allowed the voting processes in the 159 counties in Georgia to devolve into an arbitrary and inconsistent web of actual laws, erroneous interpretations of laws, and local rules that are often unannounced until applied to a voter." Id. ¶ 188. The specific systems that Plaintiffs allege violate the Equal Protection Clause are absentee ballot cancelations [*241] and Exact Match.

There does not appear to be binding Supreme Court or Eleventh Circuit precedent that provides an applicable standard; however, the Sixth Circuit has held that "[a] plaintiff may state an equal-protection claim by alleging that lack of statewide standards results in a system that deprives citizens of the right to vote based on where they live." Husted, 837 F.3d at 635; see also Bush, 531 U.S. at 104-05 ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").[103]

The central question in a lack-of-uniform standards claim appears to be whether the state lacks "adequate statewide standards" when implementing its voting laws, practices, or procedures. Cf. Husted, 837 F.3d at 635 (citations omitted).

In addition, as stated in Husted, "[a]rguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected, just as judges in sentencing-guidelines cases apply uniform standards [*242] with arguably different results." Id. at 636.

In the case *sub judice*, the geographical differences in applying Exact Match and absentee ballot cancelations policies are more akin to the innumerable permutations of ballot irregularities as opposed to a lack in state-wide standards.

a) Absentee ballot cancelations

First, there is very little record evidence that there were geographic differences in the cancelation procedures for absentee ballots. Plaintiffs presented direct evidence of seven voters who experienced irregularities in canceling their absentee ballots at the polls. See supra Section II(B)(1)(c)(1). These seven instances occurred in six out of Georgia's 159 counties. Id.[90104] Given the relatively few occurrences of these issues in a relatively small number of counties, the Court finds that they are not illustrative of a lack of uniform standards. Accordingly, Plaintiffs failed to carry their burden in establishing that the training on absentee ballot cancelation violated the Equal Protection Clause.

Secondly, Mr. Harvey testified that "we did a lot of training on the current law at the time. And I think that's where 95 percent of their focus was on, is making sure that they received the latest information,
because [*243] we're having to do -- in 2020, we had to adjust and make so many changes." Tr. 2122:12-17. With respect to the types of training, Mr. Harvey testified that "I can say that as far as when we train counties in person, at conference and at webinars, we were using the new information" from HB 316. Tr. 2119:16-22.

[104] Those six counties are: Clayton County, Cobb County, DeKalb County, Fulton County, Muscogee County, and Webster County.

Additionally, "[t]he webinars that we do, the presentation at the conferences, the election bulletins [] have updated information." Tr. 2121:4-5.

Mr. Harvey did admit that he was aware counties in Georgia were using several different procedures or practices with respect to canceling absentee ballot. Tr. 2109:22-25. However, when he was asked to clarify what he knew about the different practices that were being used, Mr. Harvey only discussed county practices that preceded HB 316. Tr. 2110:6-18. Mr. Harvey did not testify to being aware of differing practices post-HB 316. Other than the poll workers' manual and the certification materials that contained the incorrect information, Plaintiffs have provided no evidence that the Secretary of State knowingly allowed counties to implement different practices and procedures for canceling absentee ballots following the passage of HB 316. [*244] To the contrary, there is evidence that the Secretary of State conducted webinars, presentations, conferences, phone calls, and issued election bulletins in 2020. See, e.g., Tr. 2119:16-22, 2121:4-5. When asked specifically about whether that training included information about absentee ballots, Mr. Harvey testified that he did not recall issuing an election bulletin regarding absentee ballot cancelation procedures following the passage of HB 316 (Tr. 2124:13-20), and the Secretary of State did not track which counties attended webinars or reviewed the presentations regarding absentee ballot cancelation procedures (Tr. 1889:3-1890:23).

The evidence also shows that at least two 2019 trainings run by the Secretary of State's Office—one headed by Mr. Rayburn and another by Ms. Frechette—were explicitly dedicated to the changes to election administration in the wake of HB 316's passage. PX. 1076; PX. 1189. Though Plaintiffs argue that these optional trainings address absentee ballot cancelation only in a "cursory manner" (Doc. No. [854], ¶ 888), this Court cannot agree. Ms. Frechette's 2019 presentation in particular appears to dedicate sufficient space to proper absentee ballot cancelation [*245] procedures in various scenarios. PX. 1189 at 23-25. Mr. Harvey's testimony in regard to providing information on the "current law" throughout 2020 and the two 2019 trainings on election administration post-HB 316 demonstrate that the Secretary of State, rather than deliberately turning a blind-eye to inconsistent procedures among different counties, took steps to ensure that there were uniform standards for absentee ballot cancelations after the passage of HB 316. Tr. 2122:12-2123:22.

The Court finds that the relatively few incidents in the record of voters who experienced difficulties in canceling their absentee ballots, coupled with the evidence regarding the Secretary of State's training evidence that the Secretary of State does promulgate uniform standards regarding the cancelation of absentee ballots.

b) Exact Match

With respect to Exact Match, the Court also finds that there is not sufficient evidence of a lack of uniform standards. At summary judgment, the Court found that Plaintiffs' geographic equal protection claim survived because the evidence was unclear as to whether "county officials [were] guided by clear rules." Doc. No. [617], 83. However, the evidence adduced at trial [*246] established that there were sufficient standards for implementing Exact Match. Tr. 3574:4-19; Tr. 1192:2-3.

As stated supra, the process for Exact Match is as follows. First, an applicant's information is uploaded to eNet. Tr. 1190:23-1191:7. Second, the information is transmitted to DDS, which determines whether it has information for the applicant or if the applicant's information needs to be sent to SSA. Tr. 1194:20-1196:18. Third, if a record has certain uncurable defects, such as an invalid date of birth or non-numeric characters in the last four digits of the applicant's social security number, DDS will stop the verification process, flag, and return the application to the Secretary of State. Tr. 1196:19-1197:15; PX. 1753. Fourth, for records that it can process for verification, DDS checks certain criteria in the record against the information it has on file to determine if it is a match. PX. 1753 at 1; see also Tr. 1197:16-1199:18. Finally, after it has performed the verification process, DDS transmits the voter information back to the Secretary of State with a determination of whether the information was verified or not and, if not, the reasons therefor. Tr. 1191:11-21; 1199:19-1200:7; [*247] 3574:4-19; see also PX. 1751; DX. 42 (O.C.G.A. § 21-2-220.1(b) (revised version of HAVA Match policy enacted by HB 316).

Dr. Mayer testified that, with respect to MIDR, "as a county has fewer voters of color, registrants of color, that the pending rate tends to go down. But it also shows that even for counties with very similar demographics . . . you actually see huge differences in the pending rate, often differences that exceed a factor of ten that, again, are suggestive of and consistent with inconsistent administrative practices around and in

different jurisdictions around the state." Tr. 418:3-13. Similarly, with respect to citizenship matching, Dr. Mayer opined that there is "a relationship between the racial composition of a county and the rate of pending registrations," which shows "the rate of pending registrations increases as the percentage of African American registrants goes up. PX. 1278, 31. Dr. Mayer concluded that these differences were caused by "either a lack of data validity checking protocols or the fact that those protocols were not effectively implemented." Tr. 418:21-23.

On cross-examination, however, Dr. Mayer acknowledged that the actual matching is conducted by the DDS, and Dr. Mayer [*248] did not speak with any individuals at DDS when preparing his report. Tr. 427:15-21. Additionally, Dr. Mayer agreed that he did not know what caused any individual to be flagged by the MIDR matching process. Tr. 503:9-12. Dr. Mayer conceded that the error rate could be due to the concentration of voters who registered by mail. Tr. 489:1-490:4. When an individual submits a voter registration application either in person or via mail, an election official is responsible for inputting that information into eNet. Tr. 1957:17-1958:3.

Similarly, Mr. Harvey testified that some of the causes of MIDR could be due to a typing error by an election official. Id. Mr. Harvey also testified that when an application is flagged by DDS for a matching failure, the counties are trained to doublecheck their data entry. Tr. 1958:9-1960:2. Mr. Harvey specifically stated that training documents list doublechecking the data entry as a best practice. 1959:5-1960:2.

The Court finds that Plaintiffs have not established that the error rate in the Exact Match process is caused by the Secretary of State's failure to promulgate uniform standards.[91105] On cross-examination, Dr. Mayer conceded that the error rate could be attributed [*249] to the number of mail-in registration applications received by the counties. Tr. 489:1-490:4. However, the Court finds that Defendants have provided uniform training documents aimed at minimizing these errors. Additionally, Dr. Mayer conceded that DDS conducts the actual match against its database. Tr. 427:15-21. DDS is a statewide agency, and it is unclear from the record how its matching process would result in disparities in different counties throughout the state. Accordingly, the Court finds that Plaintiffs have not established a lack of uniform standards concerning MIDR.

Accordingly, the Court finds that Plaintiffs have not carried their burden in establishing that Exact Match violates the Equal Protection Clause because there is insufficient evidence to show that the Secretary of State failed to promulgate uniform standards for matching registrants.

E. Count V: Section 2 of the Voting Rights Act

Plaintiffs raise a vote-denial claim in Count V of their Second Amended Complaint concerning Section 2 of the Voting Rights Act. Doc. No. [582], ¶ 204.[92106]

Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political [*250] subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this

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[105] Plaintiffs' geographic uniformity claim differs from its Anderson-Burdick claim. A geographic uniformity claim examines the differences in the implementations of Exact Match, whereas the Anderson-Burdick claim examines the burdens imposed by Exact Match to establish a geographic uniformity claim, the Court must determine whether the differences in voter's ability to exercise the right to vote as a result of Exact Match itself had on voters.

[106] "Vote denial" claims are a type of uniformity claim, the Court must determine whether the challenged practice, procedure, or standard results in a denial or abridgement of the right to vote on account of race or color." Burton v. City of Belle Glade, 178 F.3d 1175, 1197-98 (11th Cir. 1999) (citing 42 U.S.C. § 1973(a)).

> section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301 (emphasis in statute). "The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be 'equally open' to minority and non-minority groups alike." [*251] Brnovich, 141 S. Ct. at 2337. Because § 2(b) defines what is needed to show a violation of § 2(a), as the Supreme Court recently clarified, "equal openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness." Id. at 2337-38.

Thus, the Court proceeds with a totality of the circumstances analysis of Plaintiffs' Exact Match claim under the relevant Brnovich guideposts and Gingles Senate factors. The Court notes that neither Brnovich nor Gingles is directly applicable to the challenged practices in this case. In Brnovich, the Supreme Court was addressing regulations that impacted the counting and collection of votes. Id. at 2330. And in Gingles, the Supreme Court was addressing reapportionment of votes. Gingles, 478 U.S. 30. The case *sub judice* addresses qualifications of voting. Because neither case is directly on point, out of an abundance of caution, the Court will address both the Brnovich guideposts and the Gingles Senate factors.

When applying the relevant factors, the Court will give greater weight to the Brnovich guideposts than the Gingles Senate factors. "Brnovich called into question the usefulness of some of the Gingles factors in evaluating a vote denial claim under § 2 of the VRA and offered alternate factors that a court may consider." United States v. Georgia, 574 F. Supp. 3d 1245, 1252 n.5 (N.D. Ga. 2021); see also Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1277 (N.D. Ga. 2021) (including a similar discussion about [*252] Brnovich's greater relevance to vote denial claims under Section 2 of the VRA). Regulating voter registration and poll access is more akin to counting and collecting votes in Brnovich than to reapportionment and voter dilution in Gingles. See Sixth Dist. of Afr. Methodist Episcopal Church, 574 F. Supp. 3d at 1276-77 & n.16 (stating that when a court considers vote denial claims, the Brnovich guideposts generally are more relevant than the Gingles factors because Brnovich was a vote denial case and Gingles was a vote dilution case).

The Court will first discuss each of the Brnovich guideposts: (1) the size of the burden imposed; (2) the deviation from standard practice in 1982; (3) the size of the disparity of the burden; (4) other available means of voting; and (5) the strength of the state interest. The Court will then discuss the following relevant Gingles Senate factors: (1) the history of official discrimination in Georgia; (2) whether there is racially polarized voting in Georgia; (3) voting practices and procedures in Georgia; (4) discrimination outside the voting context in Georgia; (5) racial appeals in campaigns in Georgia; and (6) minority candidate success in Georgia. With the benefit of Brnovich's guidance, the Court's analysis remains focused on the "touchstone" of Section 2 claims: "equal openness" to voting. Brnovich, 141 S. Ct. at 2338.

*1. Analysis of the Applicable [*253] Factors and Guideposts*

a) *Brnovich* guideposts

(1) Size of the burden imposed

In Brnovich, the Supreme Court recognized that "every voting rule imposes a burden of some sort." 141 S. Ct. at 2338. The Supreme Court also stated: "because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is 'equally open' and that furnishes an equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.'" Id. (citation omitted). Although the Supreme Court did not enumerate what acts constitute "usual burdens of voting," it did state that having to identify one's own polling place and then having to travel there to vote are "unremarkable burdens" that do not exceed the usual burdens of voting. Id. at 2344. The Court further stated that "[m]ere inconvenience cannot be enough to demonstrate a violation of § 2." Id. at 2338.[93] 107

Finally, the Court notes that in conducting its burden analysis in Brnovich, the Supreme Court reviewed evidence that showed that the state "made extensive

93 Similarly, in the voter identification law jurisprudence (which Defendants in the case *sub judice* rely upon by analogy), the Supreme Court stated that: "[f]or most voters who need [identification cards], the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." Crawford, 553 U.S. at 198.

efforts to reduce [the burden's] impact on the number of valid votes ultimately cast," such that the identified burdens were "moderate" when considering the process as a whole. Brnovich, 141 S. Ct. at 2344.

(a) MIDR

The Court finds that [*254] the size of the burden imposed by MIDR is slight. See supra, Section II(B)(4)(a)(1). With respect to MIDR, the Court finds that this guidepost weighs against a Section 2 violation.

(b) Exact Match Citizenship

The Court finds that the size of the burden imposed by citizenship matching is limited. See supra Section II(B)(4)(b)(1). With respect to citizenship matching, the Court finds that this guidepost weighs against a Section 2 violation.

(2) Deviation from standard practice in 1982

Second, Brnovich suggests examination of the "degree to which a [challenged] voting rule departs from what was standard practice when § 2 was amended in 1982" since, after all, it is doubtful "that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States." Brnovich, 141 S. Ct. at 2339.

(a) MIDR

The Court finds that Exact Match, with respect to MIDR, is a substantial departure from the law at the time of the 1982 congressional amendment to Section 2 of the Voting Rights Act. In 1982, Georgia law required registrants provide their local registrar or deputy registrar "proper identification" at the time of registration. 1981 Ga. L. p. 1719 (H.B. 405).[94108] Such "proper identification" could be satisfied [*255] by "exhibiting a valid driver's license, birth certificate, or any other document as will reasonably reflect the true identity of the applicant." Id.

In 2002, some twenty years following congressional amendment of Section 2 in 1982, Congress enacted HAVA. 52 U.S.C. § 21083. HAVA requires the secretaries of state to conduct an electronic comparison of voter rolls to information held by DDS, 52 U.S.C. § 21083(a)(5)(B)(i), and indicates the types of proof a first-time registrant can use to vote, 52 U.S.C. § 21083(b)(2)(A).

Georgia's verification requirements under Exact Match are narrower and more exacting than the 1982 Georgia law and HAVA. Neither the 1982 Georgia law nor HAVA requires comparison of a registration applicant's first name, last name, date of birth, or citizenship information. 52 U.S.C. § 21083(a)(5); 1981 Ga. L. p. 1719 (H.B. 405). Neither law requires the identifying information to match exactly. Id. Additionally, neither law specifies the consequences for failure to match. Id.

With respect to MIDR, Exact Match as it exists today, cannot be fairly characterized as an extension of the 1982 Georgia law, HAVA, or longstanding general verification requirements. Accordingly, this guidepost weighs in favor of finding a Section 2 violation.

(b) Exact Match Citizenship

The Court finds that [*256] there is not a substantial deviation in Georgia's practice of matching noncitizens since 1982. The Georgia Constitution makes United States citizenship a requirement of voter registration. See Ga. Const. art. 2, sec. 1, par. 2. This requirement existed in the 1976 Constitution. Ga. Const. art. II, sec. I, par. II (1976). The use of a birth certificate as a means of establishing identification—and citizenship—speaks to the State's policy of trying to enforce the citizenship requirement prior to 1982. Accordingly, the Court finds that this guidepost weighs against finding a Section 2 violation.

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[108] This session law is available through the University of Georgia at: http://neptune3.galib.uga.edu/ssp/cgi-bin/legis-iDX..pl?sessionid=7f000001&type=law&byte=420472739.

(3) Disparate impact

In Brnovich, the Supreme Court stated that "[t]he *size* of any disparities in a rule's impact on members of different racial or ethnic groups is . . . an important factor to consider." 141 S. Ct. at 2339 (emphasis added). It cautioned that small disparities may not necessarily show "that a system is not equally open or that it does not give everyone an equal opportunity to vote." Id. The Supreme Court further advised that "[w]hat are at bottom very small differences should not be artificially magnified." Id. And it criticized the practice of "dividing one percentage by another," which can create a "distorted picture." Id. at 2345 (citing Frank v. Walker, 768 F.3d 744, 752 n.3 (7th Cir. 2014)).[95][109]

(a) MIDR

The Court finds that the disparate impact [*257] of MIDR is relatively small. Dr. Mayer's report indicates that 60,477 registrants were in MIDR status as of January 2020. PX. 1278, 18. The report also indicates that as of December 2019, Georgia had 6,798,488 registered voters. Id. at 17. Thus, roughly 0.89% of registered Georgia voters are in MIDR status. Of those in MIDR status, 69.4% were Black, 11.4% were white non-Hispanic, 5.7% were Hispanic, and 3.3% were Asian or Pacific Islander. Id. at 18. These numbers account for 2.03% of Black registered voters, 0.19% of white non-Hispanic registered voters, 1.50% of Hispanic registered voters, and 1.19% of Asian or Pacific Islander registered voters. Id. at 20. The Court finds that the disparate impact of MIDR on voters is de minimis.

In Brnovich, there was evidence in the record that the challenged practice impacted 0.15% of voters. Id. at 2334. Additionally, in Brnovich, a little over 1% of Black voters, 1% of Hispanic voters, 1% of Native American voters, and 0.5% of non-Hispanic white voters were impacted by Arizona's law. Id. at 2344. In Brnovich, the Supreme Court held that the disparate impact of Arizona's law did not lead to a finding that voting was not equally open to all. Brnovich, 141 S. Ct. at 2340-41.

The Supreme Court stated, "[a] policy that appears [*258] to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open." Id. at 2345. The percentages of voters impacted by the Arizona law in Brnovich are analogous to those in the case *sub judice*. Ninety-eight percent or fewer voters are impacted by MIDR, with the exception of Black voters where 97.97% of Black voters were not impacted. The Court finds that the impact of MIDR is like the impact of the Arizona law and does not render the election system unequally open. Accordingly, the Court finds that this guidepost weighs against finding a Section 2 violation with respect to MIDR.

(b) Exact Match Citizenship

The Court also finds that the disparate impact of citizenship matching is small. Dr. Mayer's report indicates that 3,037 registrants were placed in pending status because of a citizenship flag. PX. 2178, 22. This number accounts for roughly 0.045% of registered Georgia voters. Id. Of those in citizenship verification pending status, 31.6% were Black, 13.0% were white non-Hispanic, 20.9% were Hispanic, and 23.2% were Asian or Pacific Islander. Id. These numbers account for approximately 0.048% of Black registered voters, 0.011% of white non-Hispanic [*259] registered voters, 0.29% of Hispanic registered voters, and 0.44% of Asian or Pacific Islander registered voters.[96][110] Id. at 17, 22. Dr. Mayer reports that in January of 2022, roughly 3,073 Georgia registrants were placed in pending status for being noncitizens. Under the 2014-2018 American Community Survey 457,179 naturalized foreign-born citizens were living in the State of Georgia. Id. Assuming that all individuals flagged as noncitizens were naturalized foreign born citizens, were eligible to vote, and the overall population has not increased between 2014-2018, 0.67% of all naturalized citizens are in pending MIDR status. Id. at 22.

Under the Supreme Court's analysis in Brnovich, a challenged practice that impacts 0.045% of the total population, less than one percent of any minority group, and less than one percent of naturalized citizens, does not show that that voting system is not equally open. Accordingly, the Court finds that this guidepost weighs against finding a Section 2 violation.

[109] In Frank, the court gave the following example: "If 99.9% of whites had photo IDs, and 99.7% of blacks did, the same approach would yield the statement 'blacks are three times as likely as whites to lack qualifying ID' (0.3 ÷ 0.1 = 3), but such a statement would mask the fact that the proportions were effectively identical." 768 F.3d at 753.

[110] These numbers are reflected in Table 76 and Table 75 of Dr. Mayer's Expert Report.

(4) Other available means

Next, the Court looks to Georgia's election system "as a whole." Brnovich, 141 S. Ct. at 2339. Brnovich explained that "where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available [*260] options cannot be evaluated without also taking into account the other available means." Id. Unlike the policies challenged in Brnovich, Exact Match does not affect only one method of voting among several; there are no alternative means of registering to vote that avoid Exact Match. While the State provides multiple identification options for clearing both the citizenship pending and MIDR statuses, under the current law, there is no means of avoiding those statuses if a voter's registration does not exactly match DDS or SSA records or incorrectly lists them as a noncitizen. All registration applications are subject to the policy. Thus, the Court finds that this guidepost weighs in favor of finding a Section 2 violation.

(5) Strength of state interest

"[I]n determining 'based on the totality of circumstances' whether a rule goes too far, it is important to consider the reason for the rule." Brnovich, 141 S. Ct. at 2339-40. Defendants presented evidence that both MIDR and citizenship verification are used to prevent fraud in the registration process.

Both the Supreme Court and the Eleventh Circuit have held that preventing fraud in the registration process is a legitimate state interest. "One strong and entirely legitimate state interest [*261] is the prevention of fraud." Brnovich, 141 S. Ct. at 2340. "[D]eterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." Greater Birmingham Ministries, 922 F.3d at 1334; see also Purcell, 549 U.S. at 4 (internal quotation marks omitted) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); Crawford, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); Eu, 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 ("A State indisputably has a compelling interest in preserving the integrity of its election process.").

At trial, Defendants presented evidence that tied the legitimate interest in preventing fraud to the challenged practices. The Supreme Court stated that "Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives." Brnovich, 141 S. Ct. at 2345-46.[97][111] With respect to MIDR, Mr. Harvey testified "MIDR is, my understanding of it is, because you didn't verify. You have to show something that shows you're the actual person. And that's the - I guess protection from registering a bunch of alias people and then just showing up and saying, Oh, yeah, I'm John Smith, or [*262] I'm Chris Harvey. And by showing the I.D., you're verifying that, okay, for whatever reason they couldn't match it, you're still a bona fide person." Tr. 3604:11-19. With respect to citizenship matching, Plaintiffs conceded "[w]e have only ever agreed that Georgia has a legitimate interest in preventing non-citizens from voting." Tr. 4330:7-10. Additionally, Mr. Harvey testified that the pending citizenship flag was triggered "if somebody was sort of a positive non-citizen, if that's the term. And the -- when somebody gets a Georgia driver license, obviously, non-citizens can get driver's licenses. They get a different driver's license, a limited term driver's license versus one showing that you're a citizen." Tr. 3581:21-25. In other words, the citizenship flag is supposed to attach when there is affirmative evidence that someone who registered has a noncitizen driver's license. The Court finds that Defendants have provided evidence that ties the prevention of voter fraud with both MIDR and citizenship flags.

Accordingly, the Court finds that this guidepost weighs against finding a Section 2 violation.

* * * *

The Court finds that under the Brnovich guidepost analysis [*263] neither MIDR nor the citizenship matching flags violate Section 2 of the Voting Rights Act. With respect to MIDR, the Court finds that the burden on voters, disparate impact, and strength of the State's interest weigh against finding a Section 2 violation. In Brnovich, the Supreme Court found that Arizona's law did not violate Section 2 of the Voting Rights Act because "of the modest burdens allegedly imposed by [the law], the small size of its disparate impact, and the State's justifications." Brnovich, 141 S. Ct. at 2346. The burden, disparate impact, and the

[111] This differs from the standard applied under Anderson-Burdick. Under Anderson-Burdick, when a practice severely burdens voting, the Court must find that the practice is narrowly drawn to achieve the State's purpose. Burdick, 504 U.S. at 434. Accordingly, it is entirely consistent that the Court could find a challenged practice is unconstitutional under the First and Fourteenth Amendments while also finding that the same practice does not violate Section 2 of the VRA.

State's justifications are virtually identical between MIDR and the challenged practice in Brnovich; accordingly, the Court finds that under Brnovich, MIDR does not violate Section 2 of the VRA.

With respect to citizenship matching, the Court finds that after weighing the Brnovich guideposts, citizenship matching also does not violate Section 2 of the VRA. The Court finds that the other available means guideposts weigh in favor of finding a Section 2 violation, but the size of the burden, disparate impact, deviation from practice in 1982 and State's justifications weigh against finding a Section 2 violation. The Court finds that Georgia's system of voting is equally open. Roughly 0.045% of Georgia voters are impacted by the citizenship pending flag. Less than one percent of any minority group [*264] was impacted by the citizenship flagging, and approximately only 0.67%[98112] of naturalized citizens are impacted by the citizenship flag. As Mr. Harvey testified, the matching process is structured so that individuals are flagged as noncitizens only where "something in the DDS system . . . says that this person is not a citizen." Tr. 2034:1-9. Thus, the Court finds that citizenship matching does not render an election system unequally open; therefore, it does not create a Section 2 violation.

b) *Gingles Senate factors*

The Court now turns to the relevant Gingles Senate factors. Those include: (1) the history of official discrimination in Georgia; (2) whether there is racially polarized voting in Georgia; (3) voting practices and procedures in Georgia; (4) discrimination outside the voting context in Georgia; (5) racial appeals in campaigns in Georgia; and (6) minority candidate success in Georgia.

(1) History of past discrimination

As the Court noted in its previous orders, Defendants do not contest that "prior to the 1990s, Georgia had a long sad history of racist policies in a number of areas including voting." Doc. No. [617], 70-71 (citing Doc. No. [450-1], 50 n.38). The Court takes judicial notice of this [*265] fact. See Wright v. Sumter Cty. Bd. of Elections & Registration, 301 F. Supp. 3d 1297, 1310 (M.D. Ga. 2018), aff'd, 979 F.3d 1282 (11th Cir. 2020) ("Georgia has a history chocked full of racial discrimination at all levels. This discrimination was ratified into state constitutions, enacted into state statutes, and promulgated in state policy.") (citations omitted).

The history of past discrimination factor weighs in favor of a Section 2 violation. In Shelby County v. Holder, 570 U.S. 529, 552-53, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), the Supreme Court found that the coverage formula found in Section 5 of the VRA was unconstitutional because the justification largely ignored the changes that State's made in voting since 1965. The Eleventh Circuit likewise "caution[s] against allowing the old, outdated intentions of previous generations to taint [Georgia]'s ability to enact voting legislation." Greater Birmingham Ministries, 992 F.3d at 1332. The Court finds that Plaintiffs presented evidence at trial showing that Georgia's history of past discrimination is not simply resigned to the annals of history, but still exists today.

Between 1965 and the Supreme Court's decision in Shelby County, the Department of Justice objected to 177 proposed changes to election law by Georgia and its counties and municipalities (2013). Tr. 210:22-211:6 (McCrary); PX. 1289, ¶ 26 (McCrary Report).

In 2014, HB 836 changed the school board district maps in Sumpter County to dilute the strength of Black [*266] voters, a change that federal courts found to violate Section 2 of the Voting Rights Act. See Wright.

Plaintiffs also introduced evidence about Dr. Dennard's election to the Quitman School Board, her subsequent arrest, and the ensuing legal proceedings as evidence of discrimination. Tr. 683:7-684:12, 676:1-728:7, 745:8-755:3. The Court finds that Dr. Dennard's experience of being photographed in a jumpsuit on the date of her arrest and the ensuing media coverage of the incident does provide some evidence of racial animus that persists in Georgia. Tr. 696:2-8; 702:2-4; PX. 2000; PX. 2003. However, the Court also notes that this evidence is tempered by Judge Vines's legal proceedings for the same charges. Tr. 3496:5-21; 3497:2-8; 3693:18-24; 3698:14-18. While the Court is sympathetic to Dr. Dennard regarding her treatment, the Court also finds that this evidence does not carry great weight when determining whether racial discrimination persists in

[112] As stated above, this number is derived from the 2014-2018 American Community Survey's calculation of foreign-born naturalized citizens who are living in Georgia and the registrants marked as pending noncitizens in January 2020. The Court notes that Dr. Mayer's report does not state whether all of the individuals in that American Community Survey were eligible to vote. Additionally, the January 2020 numbers do not state whether all of the individuals were in fact naturalized citizens.

present-day Georgia.

Thus, the Court finds based on evidence in the record and relevant case law that Georgia's history of discrimination, at a minimum, existed within the last decade. Thus, this factor weighs in favor of finding a Section 2 violation.

***(2) Racially polarized voting** [*267]*

Under Gingles, racially polarized voting exists when there is "a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not prove causation or intent to prove a prima facie case of racial bloc voting, and defendants may not rebut that case with evidence of cause or intent." Gingles, 478 U.S. at 74.

Plaintiffs argue that voting in Georgia is—and has long been—polarized along racial lines. Their evidence at trial was that from Reconstruction through the passage of the Voting Rights Act in 1965, white Georgians overwhelmingly supported the Democratic Party, which defended racial discrimination in registration and voting and official racial segregation in all aspects of public life. PX. 1289, ¶¶ 11, 124; see also Tr. 230:4-14.

Plaintiffs provide the following evidence of racial appeals in campaigns. "In the 1990s African American congressional candidates running as Democrats enjoyed between 77 and 100 percent of black votes, but only 18-54 percent of white votes. Between 30 and 45 percent of white voters in the state supported Democratic candidates in the 1990s, but only about a quarter of whites voted Democratic beginning in 2002. Black voters favored Democratic candidates by 85 to 92 percent." [*268] [99][113] PX. 1289, ¶ 41; see also Tr. 229:6-232:15. "Exit polls in statewide elections for federal office from 1992 through 2006 show that African Americans supported the Democratic candidate at rates between 81 and 92 percent, whereas whites voted Democratic at rates between 23 and 45 percent." PX. 1289, ¶ 42. In a 2014 survey, 25 percent of white Georgia voters report themselves as Democrats, 59 percent as Republicans, and 17 percent as Independents. Id. ¶ 46. Whereas 73 percent of Black Georgia voters report themselves as Democrats, 12 percent as Republicans, and 15 percent as Independents. Id.

Accordingly, the Court finds that there is racial polarization in Georgia voting. Senate Factors 2 and 8 weigh in favor of finding a Section 2 violation.

(3) Practices and procedures

The third Gingles factor is effectively the same as the Brnovich third guidepost. This Gingles factor concerns "the extent to which the state or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group," Gingles, 478 U.S. at 37, and the Brnovich guidepost analyzes "the size of any disparities in a rule's impact on members of different racial or ethnic groups," Brnovich, 141 S. Ct. at 2339. Because the Brnovich decision is more recent [*269] than Gingles and evaluated Arizona's voting procedures in light of today's election procedures, the Court evaluates this Gingles factor using the standards set forth in Brnovich. As the Court discussed in depth in the disparate impact section, this Senate Factor weighs against finding a Section 2 violation.

(4) Discrimination in other areas

The district court in Gingles found that historic discrimination of minorities in housing, education, employment, and healthcare led to many minorities being in a lower socioeconomic class. Gingles, 478 U.S. at 39. The district court concluded that this "gives rise to special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice." Id. The Supreme Court did not discuss or disrupt the district court's finding.

Here, Plaintiffs provide evidence of similar statistics as follows: twice as many Black Georgians as white Georgians live below the poverty line PX. 1289, ¶ 94; Tr. 255:25-256:20; Black Georgians are less likely to attain a high school or college degree (id. ¶ 93; Tr. 255:13-25); and Black Georgians die of cancer, heart disease and diabetes at a higher rate than white Georgians (PX. 2127; PX. 2128). Plaintiffs' evidence [*270] of the impact of past discrimination on Georgia's current socioeconomic demographics is similar to the evidence that the district court discussed in Gingles. Gingles, 478 U.S. at 39. Accordingly, this factor weighs in favor of

[113] The Court notes that Plaintiffs' expert Dr. Minnite also provided testimony regarding the history of race discrimination in Georgia. However, the Court finds that this history was primarily focused on voting following Reconstruction and has little relevance to the more recent history of discrimination in Georgia. PX. 1038, 3-4.

finding a Section 2 violation.

(5) Racial appeals in campaigns

Plaintiffs have provided evidence that racial appeals were made in recent Georgia elections. In Gingles, the district court found, and the Supreme Court did not discuss or disturb, that "white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice." Gingles, 478 U.S. at 40. The district court further held that "the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice." Id.

Here, Plaintiffs presented evidence of examples of racial appeals used in recent Georgia elections. For example, Plaintiffs point to the 2018 Republican gubernatorial primary, during which candidate (and then-State Senator) Michael Williams conducted a "deportation bus" tour with a school bus emblazoned with the words "Fill this [*271] bus with illegals." The back of the bus read: "Danger! Murderers, rapists, kidnappers, child molesters, and other criminals on board." PX. 1653. In September 2016, a Douglas County commissioner was recorded making disparaging statements to voters about Black candidates in local races, stating that a government run by African American leadership would "bankrupt you." PX. 1651. He also warned voters that a Black sheriff candidate would put unqualified Black people in high-ranking positions if elected. Id. In 2018, Georgia governor candidate Brian Kemp's campaign issued a campaign video that showed violent imagery—Kemp blowing up items, Kemp cocking a gun, and Kemp using a chainsaw—before he revs his truck and states "I got a big truck—just in case I need to round up criminal illegals and take 'em home myself. Yup I just said that." PX. 1669.[100114]

The most recent Georgia elections also use racial appeals in campaigns. In June 2020, then-Republican candidate for Georgia's 14th U.S. congressional district Marjorie Taylor Greene received national criticism for racist, Islamophobic, and anti-Semitic views expressed in a series of Facebook videos. PX. 1207. Greene suggested [*272] that Muslims do not belong in government; that Black people "are held slaves to the Democratic Party"; that George Soros is a Nazi; and that Black people should feel "proud" to see a Confederate monument because it symbolizes progress made since the Civil War. Id. In April 2020, former U.S. congressman Paul Broun, Jr., running to reclaim his former seat, posted a campaign ad in which he offered to give away an assault rifle, stating that such guns were needed to protect against the "looting hordes from Atlanta." PX. 1655.

In April 2022, Kandiss Taylor—candidate for Georgia governor—posted a graphic reflecting her endorsement by the Georgia Proud Boys, commenting that she was "proud to be the first candidate to receive an endorsement from the Georgia Chapter. Thank you for serving as I plan to serve." PX. 2165.In May 2022, when running in the Republican primary for Georgia governor, former Senator David Perdue accused Stacey Abrams of "demeaning her own race." PX. 2172. In June 2022, candidate for the U.S. House of Representatives in Georgia's Third Congressional District Rhonda Simpson posted a photo on Facebook that falsely imagines Stacey Abrams saying "I ain't even stole the election [*273] yet and people be congratulatin' me like crazy" and President Obama responding, "It's because they think you're pregnant." PX. 2164.

The Court finds that Plaintiffs provided evidence of racial appeals in recent Georgia elections and have carried their burden. Accordingly, this factor weighs in favor of finding a Section 2 violation.

(6) Minority candidate success

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[114] As discussed supra, with respect to the Fifteenth Amendment, Governor Kemp's campaign speech cannot be used as evidence of the historical background Arlington Heights factor because the statements are not tied to the sequence events leading to the enactment of Exact Match. See League of Women Voters of Fla., Inc., 32 F.4th at 1373 (stating that the "'historical background' factor should be 'focus[ed] . . . on the 'specific sequence of events leading up to the challenged decision' rather than 'providing an unlimited lookback to past discrimination'"). The Gingles Senate factor regarding the use of racial appeals in political campaigns requires the Court to look at historic as well as present day campaign rhetoric. See Gingles, 478 U.S. at 40, 80 (affirming the district court's finding that the existence of racial appeals in North Carolina's campaigns that dated from 1890 to 1984 weighed in favor of finding a Section 2 violation). Accordingly, the Court finds that while Governor Kemp's campaign speech is not evidence of historical background under the Fifteenth Amendment, Governor Kemp's campaign speech is evidence of racial appeals in campaigns under Section 2 of the VRA.

The Supreme Court held that the success of some Black candidates does not dispose of a Section 2 claim. Gingles, 478 U.S. at 76. However, courts must consider the sustained success of Black candidates. Id. at 77. Only four Black candidates have ever been elected to non-judicial statewide offices in Georgia: (1) Former Public Service Commissioner David Burgess, in 2000; (2) former Labor Commissioner Mike Thurmond, in 2002 and 2006; (3) former Attorney General Thurbert Baker, in 1998, 2002, and 2006; and (4) U.S. Senator Raphael Warnock, in 2020. See Shahar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997) (the Court can take judicial notice of these "matters of 'political history,'" which are "not subject to reasonable dispute" (quoting Fed. R. Evid. 201(b)). The Court also observes that as of the May 24, 2022, primary election, Herschel Walker received the Republican nomination for U.S. Senate and Senator Raphael Warnock received the Democratic nomination [*274] for the same office. The Court finds that the election of four Black candidates to statewide non-judicial office is the exact situation referenced by the Supreme Court when discussing the success of a select few Black candidate as not dispositive of this issue. Gingles, 478 U.S. at 76. Accordingly, the Court finds that this factor weighs in favor of finding a Section 2 violation.

* * * *

The Court finds that the Senate Factors weigh in favor of finding a Section 2 violation. History of discrimination, racially polarized voting, discrimination in other areas, racial appeals in campaigns, and success of minority candidates all weigh in favor of finding a Section 2 violation. Although these factors weigh in favor of a violation, the Court finds that these factors are more generalized indicators of the status of minority life in Georgia as opposed to the indicators of whether Exact Match results in fewer opportunities for minority voters. While the Court acknowledges the importance of the Gingles Senate factors in determining whether a State's practices have resulted in discrimination for minority voters, they do not sufficiently relate to the challenged practices in this case. Conversely, the Gingles Senate factor dealing with practices and procedures, [*275] which more directly relates to Exact Match, weighs against finding a Section 2 violation.

Under the totality of the circumstances, the Court finds that Exact Match is permissible under Section 2 of the VRA. The Brnovich factors largely weigh in favor of finding that Exact Match is permissible under Section 2 of the VRA. Although the Senate Factors overwhelmingly weigh in favor of finding a Section 2 violation, the Court finds that the one factor that is expressly tied to Exact Match, and not Georgia's entire voting schema, weighs against finding a violation.

In sum, this Court finds Plaintiffs have not met their burden under Section 2 of the VRA to demonstrate that the Exact Match or citizenship verification processes renders Georgia's elections not "equally open" when considering the totality of the circumstances as required by VRA Section 2(b). 52 U.S.C. § 10301; see also Brnovich, 141 S. Ct. at 2338. As a result, there has been no showing that the election system is not "equally open" by Georgia's compliance with federal law regarding matching processes. Brnovich, 141 S. Ct. at 2337.

F. Remaining Affirmative Defenses

As stated above, Defendants presented the following affirmative defenses in its Statement of the Case for purposes of the Pretrial Order: (1) failure to state a claim upon which relief can be granted; (2) failure to name necessary and indispensable [*276] parties; (3) lack of standing; (4) mootness; (5) Eleventh Amendment bar; and (5) Political Question Doctrine. Doc. No. [753], 2-3.

A number of these defenses have been addressed in the context of the Court's foregoing analysis of Plaintiffs' case-in-chief. No additional rulings will issue on the remaining affirmative defenses based on Plaintiffs' failure to meet their initial burden of proof as to their claims at trial.

* * * *

As discussed above, the Court finds for Defendants on all counts. However, this Order should not be construed to mean that Georgia's election procedures are flawless. The former Chief Elections Officer for the State testified that "you are going to have misfires [and] mistakes made both by voters and election officials." Tr. 2908:18-19. And the current Chief

Operating Officer for the Secretary of State testified: "have I ever seen a perfect election? No, because it simply doesn't exist . . . . There is no perfect system by which you can make it perfect in such a way that the system still functions. You will always have to balance accessibility with security." Tr. 4198:7-14. Plaintiffs' expert Mr. Kennedy also testified that "I think recognizing that you are dealing with a very human-driven [*277] process from the millions of voters that show up at -- to cast their ballot either in person or absentee, the thousands of poll workers, that you are going to have misfires, mistakes made both by voters and election officials." Tr. 2908:15-19.

Although Georgia's election system is not perfect, the challenged practices violate neither the constitution nor the VRA. As the Eleventh Circuit notes, federal courts are not "the arbiter[s] of disputes' which arise in elections; it [is] not the federal court's role to 'oversee the administrative details of a local election.'" Curry v. Baker, 802 F.2d 1302, 1306 (11th Cir. 1986).

III. CONCLUSION

Having held a non-jury trial and considered the evidence and arguments of the parties, for the foregoing reasons, the Court finds **IN FAVOR** of Defendants and against Plaintiffs on all remaining Counts of Plaintiffs' Second Amended Complaint.[101][115]

Pursuant to Federal Rule of Civil Procedure 58, the Clerk is **DIRECTED** to enter judgment and close this case.

IT IS SO ORDERED this 30th day of September, 2022.

/s/ Steve C. Jones

HONORABLE STEVE C. JONES

UNITED STATES DISTRICT JUDGE

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[115] For ease of reference, the Court cites to the Second Amended Complaint in its conclusion. As stated in the Court's April 29, 2022 "governing issues" order (Doc. No. [816]), the Second Amended Complaint has been conformed to the issues and claims presented in the Amended-Final Pretrial Order (Doc. No. [753]). In addition, as previously noted, on May 30, 2019, the Court granted Defendants' Motion to Dismiss based on sovereign immunity as to the SEB and only the Count V (Section 2 of the Voting Rights Act of 1965) remained pending at trial against said Defendant. Doc. No. [68], 84.

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Issues	Challenged Practices
Absentee Ballot Cancellations	▪ Lack of proper training on absentee ballot

Issues	Challenged Practices
	cancellations
Exact Match	▪ Missing Identification Required ("MIDR") Match ▪ Citizenship Match
The Secretary of State's Mismanagement of Voter Rolls	▪ Removal of eligible voters in the felon match process ▪ Removal and changes to the information of eligible voters in the duplicate match process ▪ Removal of eligible voters in the "vitals" process

Table2 (Return to related document text)

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