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

COAKLEY PENDERGRASS; TRIANA ARNOLD JAMES; ELLIOTT HENNINGTON; ROBERT RICHARDS; JENS RUECKERT; and OJUAN GLAZE,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State; WILLIAM S. DUFFEY, JR., in his official capacity as chair of the State Election Board; MATTHEW MASHBURN, in his official capacity as a member of the State Election Board; SARA TINDALL GHAZAL, in her official capacity as a member of the State Election Board; EDWARD LINDSEY, in his official capacity as a member of the State Election Board; and JANICE W. JOHNSTON, in her official capacity as a member of the State Election Board,

Defendants.

CIVIL ACTION FILE
NO. 1:21-CV-05339-SCJ

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

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INTRODUCTION

There's an old saying: Never let the truth get in the way of a good story. Defendants have taken that chestnut and run with it, deciding not to let the evidence get in the way of the legal narrative they crafted at the very outset of this case. The first thread of Defendants' story is that Plaintiffs' illustrative congressional plan necessarily constitutes an impermissible racial gerrymander—and thus Plaintiffs cannot satisfy the first *Gingles* precondition. The second thread is the belief that party, not race, explains Georgia's electoral polarization—and thus Plaintiffs cannot prove racially polarized voting. So committed are Defendants to these arguments that, even though the Court already *rejected both* in its preliminary injunction ruling, they now reappear on summary judgment.

But Defendants' story just doesn't hold water. Plaintiffs' illustrative congressional plan was drawn in compliance with traditional redistricting principles and unites voters with shared interest in the Atlanta suburbs. Defendants can point to nothing in the record—not even their own expert's testimony—to suggest that race impermissibly predominated in the map's creation. As for racially polarized voting, not only do Defendants have the legal standard backwards, but they also wholly disregard Plaintiffs' unrebutted evidence that race drives polarization in

Georgia's electorate. In short, the undisputed facts have disproved Defendants' preferred narrative.

Defendants' other contentions are no more availing. Given their statutory responsibility for ensuring fair and lawful elections, the members of the State Election Board are proper defendants in this matter. And proportionality does not weigh against Plaintiffs' claim—and certainly does not bar the relief they seek.

Defendants' motion proves nothing other than their dogged devotion to the same failed arguments they advanced over a year ago. Neither the law nor the facts are on their side, and their summary judgment motion should be denied.

ARGUMENT

I. The members of the State Election Board are proper defendants.

The members of the State Election Board ("SEB") are proper defendants in this action because they, along with the Secretary of State, have the legal responsibility to ensure the fair and lawful administration of Georgia's elections.

Among the SEB's statutorily enumerated responsibilities are "formulat[ing], adopt[ing], and promulgat[ing] such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). Given that Plaintiffs seek an order from this Court enjoining use of the enacted congressional map in future elections administered in part by the

SEB, *see* ECF No. 120 at 29–30, Plaintiffs' injury is fairly traceable to the SEB's conduct, and an injunction against the SEB's ability to conduct congressional elections under the enacted map will redress that injury. This case is therefore distinguishable from *Jacobson v. Florida Secretary of State*, where the plaintiffs' ballot-order injury was not fairly traceable to the secretary of state because county officials maintained sole and independent responsibility for placing candidates on the ballot. *See* 974 F.3d 1236, 1253–54 (11th Cir. 2020). Nor does *Lewis v. Governor of Alabama*, 944 F.3d 1287 (11th Cir. 2019) (en banc), help Defendants' argument. There, the court determined that the Alabama "Attorney General's litigating and opinion-giving authority" was insufficient to confer standing because he had no affirmative legal duty to actually do anything, and the speculative link between the plaintiffs' injury and the relief they sought against him vitiated Article III's traceability and redressability requirements. *Id.* at 1296–1306.

Here, by contrast, the SEB maintains broad powers and responsibilities in coordination with the Secretary of State—and an affirmative legal duty—to ensure the fair and orderly administration of elections. *See* O.C.G.A. §§ 21-2-31, 21-2-50. Accordingly, both the Secretary of State *and* the SEB are proper defendants.

That "Plaintiffs have not located any evidence that the named members of the SEB had any say in the design of the maps," ECF No. 175-1 ("Defs.' Mot.") at 13,

is of little moment—Plaintiffs seek to enjoin *use* of the maps, making election administrators (as opposed to map-drawers) the appropriate defendants, *see*, *e.g.*, *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284–85 (D. Mont. 2022) (three-judge court); *La. State Conf. of NAACP v. Louisiana*, 490 F. Supp. 3d 982, 1030–31 (M.D. La. 2020). Nor does it matter that "Plaintiffs have produced no evidence in discovery that any of the individually named SEB members . . . implement the maps in any substantive way," Defs.' Mot. 14, since, "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties," *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926). Given their statutory obligation to oversee Georgia's elections, the SEB's role in implementing the congressional map can be assumed.

II. Plaintiffs have readily satisfied the first *Gingles* precondition.

Plaintiffs have satisfied the first *Gingles* precondition because the illustrative congressional plan prepared by their mapping expert, William Cooper, complies with traditional redistricting principles and was not drawn based predominantly on race.

A. Race did not predominate in Mr. Cooper's illustrative plan.

Although Defendants claim that "[t]he evidence demonstrates that Plaintiffs have gone beyond" the limited consideration of race acceptable under Section 2, Defs.' Mot. 14, they provide *no* actual evidence that makes this demonstration.

Defendants' predominance argument hinges primarily on Mr. Cooper's alleged "use[of] racial shading and other" unspecified "techniques" to draw a new majority-Black congressional district, *id.* at 15, but the purportedly supporting citation they point to earlier in their brief does not substantiate this claim. Far from admitting that he used racial shading as the predominant tool to draw his illustrative plan, Mr. Cooper explained only that he "*sometimes*" observed "little dots showing where the minority population is concentrated" and thus was "*aware*" of racial information. Pls.' Statement of Additional Material Facts ("SAMF") ¶ 1; Ex. 7 ("Cooper Dep.") at 24:12–25:6 (emphases added).[1]

Mr. Cooper's awareness of demographic information is a far cry from the use of race in *Miller v. Johnson*, 515 U.S. 900 (1995), which Defendants invoke using a misleading parenthetical, *see* Defs.' Mot. 15. There, the federal government "was driven by its policy of maximizing majority-black districts" when preclearing

[1] All exhibits are attached to the Declaration of Jonathan P. Hawley, filed concurrently with this response.

Georgia's congressional plan, with one lawyer explaining that "what we did and what I did specifically was to take a map of the State of Georgia shaded for race, shaded by minority concentration, and overlay the districts that were drawn by the State of Georgia and see how well those lines adequately reflected black voting strength." *Miller*, 515 U.S. at 924–25 (cleaned up). Mr. Cooper did *not* attempt to maximize the number of majority-Black districts in his illustrative plan. SAMF ¶ 2; Cooper Dep. 18:18–19:18. Instead, he was asked to "determine whether the African American population in Georgia is 'sufficiently large and geographically compact' to allow for the creation of *an* additional majority-Black congressional district in the Atlanta metropolitan area," and concluded that this was the case. SAMF ¶¶ 3–4; Ex. 1 ("Cooper Report") ¶¶ 8, 10 (emphasis added). Mr. Cooper attested that neither race nor any other single factor predominated in the drawing of his illustrative plan, SAMF ¶ 5; Cooper Report ¶ 50, and Defendants have adduced no evidence to the contrary.

The expert report prepared by Defendants' mapping expert, John Morgan, certainly provides no compelling analysis to suggest that race predominated in the creation of Mr. Cooper's illustrative plan, *see* ECF No. 173-1 ("Pls.' Mot.") at 13–16—which might explain why neither his report nor even his name appears in Defendants' summary judgment brief. Notably, while Mr. Morgan opined that the

illustrative state legislative plans prepared by Mr. Cooper and Blake Esselstyn in related cases "are focused on race, prioritizing race to the detriment of traditional redistricting factors," Expert Report of John B. Morgan ¶ 6, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-05337-SCJ (N.D. Ga. Mar. 20, 2023), ECF No. 231-6; Expert Report of John B. Morgan ¶ 6, *Grant v. Raffensperger*, No. 1:22-CV-00122-SCJ (N.D. Ga. Mar. 20, 2023), ECF No. 192-3, no such opinion appears in Mr. Morgan's report in *this* case. It is telling, to say the least, that Defendants' own expert apparently does not support the racial predominance argument they advance here.

At most, the evidence suggests that Mr. Cooper was *aware* of race when he drew his illustrative congressional plan. Mere consciousness of race is neither comparable to *Miller*'s admitted racial predominance nor otherwise suspect. To the contrary, the U.S. Supreme Court has acknowledged that a "legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

At any rate, the Eleventh Circuit has expressly rejected "apply[ing] authorities such as *Miller* to [a] Section Two case . . . because the *Miller* and *Gingles*[] lines

address very different contexts." *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998); *see also, e.g., Robinson v. Ardoin*, 37 F.4th 208, 223 (5th Cir. 2022) (per curiam) ("[W]e have rejected the proposition that a plaintiff's attempt to satisfy the first *Gingles* precondition is invalid if the plaintiff acts with a racial purpose."). Section 2 "*require[s]* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate." *Davis*, 139 F.3d at 1425; *see also Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion) (applying "objective, numerical" requirement that "minorities make up more than 50 percent of the voting-age population in the relevant geographic area"). The gambit that Defendants have once again adopted—dismissing any illustrative plan as an impermissible gerrymander—is neither supported nor justifiable; "[t]o penalize [plaintiffs] for attempting to make the very showing that *Gingles*[and its progeny] demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Davis*, 139 F.3d at 1425. Defendants' position is not the law—nor should it be.

B. Mr. Cooper's illustrative plan adheres to traditional redistricting principles.

Even if Defendants had mustered more compelling direct evidence of racial predominance, there is no indication that Mr. Cooper "subordinate[d] other factors,

such as compactness or respect for political subdivisions, to racial considerations." ECF No. 97 ("PI Order") at 87. Far from it, his illustrative congressional plan complies with traditional redistricting principles such as "compactness, contiguity, and respect for political subdivisions," which "serve[s] to defeat a claim that a district has been gerrymandered on racial lines." *Shaw*, 509 U.S. at 647.

As discussed at greater length in Plaintiffs' summary judgment brief, *see* Pls.' Mot. 8–16, Mr. Cooper's illustrative plan indisputably complies with neutral redistricting criteria such as population equality, contiguity, compactness, and minimization of political subdivision splits; indeed, Defendants do not contend otherwise. As in the enacted plan, population deviations in Mr. Cooper's illustrative plan are limited to plus-or-minus one person from the ideal district population, and his districts are contiguous. SAMF ¶¶ 6–8; Cooper Report ¶¶ 52–53, fig.11; Ex. 9 ("Morgan Dep.") at 62:4–7, 62:14–17. The mean and lowest compactness scores of Mr. Cooper's illustrative plan are similar or identical to the corresponding scores for the enacted plan and Georgia's prior congressional plan. SAMF ¶¶ 9–10; Cooper Report ¶¶ 78–79 & n.12, fig.13; Ex. 5 ("Morgan Report") ¶ 22; Morgan Dep. 55:18–57:5. Mr. Cooper's additional majority-Black district, illustrative Congressional District 6, is as compact as the average for the enacted plan on the Polsby-Popper scale, more compact than the enacted plan's average on the Reock scale, and more

compact than the enacted Congressional District 6 on both measures. SAMF ¶¶ 11–12; Cooper Report Exs. L-1 & L-3; Morgan Dep. 57:15–60:2. And although both Mr. Cooper's illustrative plan and the enacted plan split 15 counties, the illustrative plan scores better in terms of county splits (unique county/district combinations), split municipalities, municipality splits (unique municipality/district combinations), and voting district splits. SAMF ¶¶ 13–15; Cooper Report ¶¶ 81–82, fig.14; Morgan Report ¶ 20; Morgan Dep. 44:6–46:16, 54:7–11, 54:18–55:6.

Defendants' primary criticism of Plaintiffs' illustrative plan—that Mr. Cooper "was unable to identify factors that connected areas of his new majority-Black district beyond the common community of interest shared by all Black individuals," Defs.' Mot. 15—ignores that illustrative Congressional District 6 unites Atlanta-area urban and suburban voters in Cobb, Douglas, Fulton, and Fayette counties, all of which are core metro counties under the Atlanta Regional Commission. SAMF ¶¶ 16–18; Cooper Report ¶¶ 60, 65, 68, 73; Exs. G & H-1; *see also* PI Order 79–85 (finding that "Mr. Cooper's Illustrative Congressional Plan sufficiently respects communities of interest in the western Atlanta metropolitan area" given "the relative geographic proximity . . . of the proposed district" and "that the areas constituting illustrative Congressional District 6 are developed and suburban in nature and generally face the same infrastructure, medical care, educational, and other critical

needs"). As Mr. Cooper explained in his report, his illustrative Congressional District 6 is "drawn in a compact fashion that keeps Atlanta-area urban/suburban/exurban voters together. In sharp contrast, the [enacted plan] . . . inexplicably mixes Appalachian North Georgia with urban/suburban Metro Atlanta." SAMF ¶ 19; Cooper Report ¶ 68. Defendants disregard not only illustrative Congressional District 6's undeniably suburban character, but also Mr. Cooper's testimony describing this commonality.

In short, this is not a case where an illustrative district combines "disparate communities of interest" with "differences in socio-economic status, education, employment, health, and other characteristics" across an "enormous geographical distance." *LULAC v. Perry*, 548 U.S. 399, 435 (2006) (plurality opinion) (cleaned up). Mr. Cooper's illustrative Congressional District 6 is not only compact as measured by traditional redistricting principles—it also unites "nonracial communities of interest" in the western Atlanta metropolitan area. *Id.* at 433.[2]

[2] Defendants cite excerpts from Mr. Cooper's deposition transcript that supposedly show a lack of connection between various Black populations, *see* Defs.' Mot. 16–17, but significantly, none of that testimony involves illustrative Congressional District 6.

C. Mr. Cooper's illustrative plan is a permissible remedy.

While "[a] district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system," *Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994) (en banc) (opinion of Tjoflat, C.J.), Defendants have identified no meaningful deficiencies with Mr. Cooper's illustrative plan that would render it an impermissible remedy.

Defendants fault Mr. Cooper's purported inability to identify the common interests of Black voters in different parts of congressional districts *other* than the new majority-Black district. *See* Defs.' Mot. 16–17. But the Section 2 compactness inquiry relates to the "compactness of the minority population" whose voting strength is improperly diluted. *LULAC*, 548 U.S. at 433. Because the compactness of the minority group is used to assess "the opportunity that § 2 requires [and] that the first *Gingles* condition contemplates," *id.*, there is neither a requirement nor a reason for Plaintiffs to demonstrate the shared interests of communities outside of the geographic area where they have alleged vote dilution. And here, as discussed above, *see supra* at 10–11, Mr. Cooper's illustrative Congressional District 6 satisfies the relevant compactness requirement by combining communities with shared interests in the western Atlanta suburbs. Ultimately, Defendants' criticisms

are not only practically unfounded—homogeneity is neither a desirable nor a feasible outcome when drawing congressional districts—but legally misguided as well.

Any other isolated critiques of Mr. Cooper's illustrative congressional plan are not dispositive or even revealing. The U.S. Supreme Court has explained that the "impossibly stringent" standard of perfect districting is "unattainable" and not required under the Voting Rights Act. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). Just as Section 2 requires only an illustrative majority-minority district "that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries," so it follows that an illustrative plan as a whole need not "defeat rival[s] . . . in endless 'beauty contests.'" *Id.* After all, "[i]llustrative maps are just that—illustrative. The Legislature need not enact any of them." *Robinson*, 37 F.4th at 223. To the extent Defendants might prefer a different remedial map, they can take that up with the Georgia General Assembly after a liability ruling, since "states retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996). The State of Georgia (or, if needed, this Court)

would be free to adopt an alternative map so long as it remedies the unlawful dilution of Black voting strength in the western Atlanta metropolitan area.[3]

III. Plaintiffs have proved legally significant racially polarized voting.

Just as the Court concluded following the preliminary injunction proceedings, *see* PI Order 209–10, Plaintiffs have satisfied the applicable test for racially polarized voting.

At the outset, Defendants contend that the causes of racially polarized voting are properly considered as part of the first two *Gingles* preconditions, as opposed to the second Senate Factor. Although they acknowledge that "courts disagree on" this point, they casually conclude that "this minor disagreement does not matter much." Defs.' Mot. 24–25. This is simply disingenuous: The distinction matters a great deal, since while "there is no requirement that any particular number of [Senate F]actors be proved, or that a majority of them point one way or the other," the *Gingles* preconditions are "*necessary*" to prove unlawful vote dilution under Section 2.

[3] Moreover, even if the racial-gerrymandering doctrine could be mechanically applied to the first *Gingles* precondition—it cannot, *see supra* at 7–8—and even if race predominated over other factors in the illustrative plan—it did not, *see supra* at 5–11—Mr. Cooper's illustrative Congressional District 6 would be permissible because it would survive strict scrutiny, *see Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1305 (N.D. Ga. 2013), *aff'd in part, rev'd in part on other grounds*, 775 F.3d 1336 (11th Cir. 2015).

Thornburg v. Gingles, 478 U.S. 30, 45, 50 (1986) (emphasis added) (quoting S. Rep. No. 97-417, pt. 1, at 29 (1982)).

While the second and third *Gingles* preconditions provide the *quantitative* basis to assess "whether voting is racially polarized and, if so, whether the white majority is usually able to defeat the minority bloc's candidates," *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998), the *qualitative* underpinnings of that polarization are properly understood as part of the totality-of-circumstances analysis, *see, e.g.*, *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG, 2022 WL 3135915, at *12 (N.D. Ga. Aug. 5, 2022), *appeal docketed*, No. 22-12593 (11th Cir. Aug. 8, 2022). As the Eleventh Circuit has explained, satisfaction of the *Gingles* preconditions creates an inference of racial bias, since "[t]he surest indication of race-conscious politics is a pattern of racially polarized voting." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984); *see also Nipper*, 39 F.3d at 1525–26; *Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996) (*Gingles* preconditions "create[] the inference the challenged practice is discriminatory"). *After* a Section 2 plaintiff has established the requisite minority cohesion and bloc voting under *Gingles*, "[t]he weight that should be placed on the extent of such polarization—and any link to partisanship—must necessarily be part of the totality-of-the-circumstances analysis under the second Senate Factor." PI Order 174–75;

see also, e.g., *Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996) ("We think the best reading of the several opinions in *Gingles* . . . is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of circumstances inquiry." (citations omitted)). But this is not an inquiry required as part of the threshold *Gingles* preconditions.[4]

A. Plaintiffs have satisfied their burden as to racially polarized voting.

Under circuit precedent, Plaintiffs have proved the existence of legally significant racially polarized voting.

As discussed at length in Plaintiffs' summary judgment brief, *see* Pls.' Mot. 16–19, 25–28, Dr. Maxwell Palmer demonstrated that, in the area where they have proposed a new majority-Black congressional district, Black voters overwhelmingly support their candidates of choice and white voters consistently and cohesively vote in opposition to Black-preferred candidates, SAMF ¶¶ 20–28; Ex. 2 ("Palmer Report") ¶¶ 7, 16–17, 19–20, figs.2, 3 & 4, tbls.1, 2, 3, 4, 5, & 6; Ex. 3 ¶¶ 4–5, fig.1, tbl.1; Ex. 6 ("Alford Report") at 3; Ex. 10 ("Alford Dep.") at 37:13–15, 38:20–39:8, 44:8–16, 45:10–12. Far from disputing this polarization, Defendants' quantitative

[4] Considering racially polarized voting as part of the totality-of-circumstances inquiry also makes logical sense: If that analysis were already subsumed in the *Gingles* preconditions, then the second Senate Factor would be superfluous.

expert, Dr. John Alford, *confirmed* it, both in his expert report, *see* Alford Report 3 ("As evident in Dr. Palmer's [reports], the pattern of polarization is quite striking."), and in his deposition, *see* Alford Dep. 44:8–16, 45:10–12 ("This is clearly polarized voting, and the stability of it across time and across office and across geography is really pretty remarkable."). Voting in this area of Georgia is undeniably polarized along racial lines, thus creating an "inference that racial bias is at work." *Nipper*, 39 F.3d at 1525. This showing satisfies Plaintiffs' burden.

Defendants assert that "Plaintiffs must . . . *prove*" that "*race*, not *party*, is the cause of" polarization, Defs.' Mot. 28, but the Eleventh Circuit has never held that Section 2 requires an affirmative showing that voters are motivated by race when evaluating the existence of racially polarized voting as part of the totality of circumstances. In fact, it has indicated the *opposite*, reversing a district court's insistence that a Section 2 plaintiff "indicate that race was an overriding or primary consideration in the election of a candidate." *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1556 (11th Cir. 1987). In so doing, the court reiterated the *Gingles* plurality position on this issue: "[R]acially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates." *Id.* at 1557 (quoting *Gingles*, 478 U.S. at 74). Thus, "Plaintiffs need not prove causation or intent in order to prove

a prima facie case of racial bloc voting." *Id.* at 1557–58 (quoting *Gingles*, 478 U.S. at 74); *see also, e.g.*, *Rose*, 2022 WL 3135915, at *12 ("The Secretary cannot point to a single case establishing that, even if [the *Gingles* preconditions and Senate Factors] are satisfied, a plaintiff must still prove that race independent of partisanship explains the discriminatory effect. That is not the law, and this Court will not impose such a requirement.").

To the extent that courts consider potential causes of polarization, moreover, it is *Defendants'* burden to *dis*prove racial motivation among the electorate. It is possible, as the Eleventh Circuit has noted, that "[o]ther circumstances may indicate that both the degree and nature of the bloc voting weigh against an ultimate finding of minority exclusion from the political process," since "what appears to be bloc voting on account of race may, instead, be the result of political or personal affiliation of different racial groups with different candidates." *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc). But significantly, the "inference [of] racial bias" created by the *Gingles* preconditions "will endure *unless and until* the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system." *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995). Defendants thus have the burden precisely backwards: The

onus is on *them* to "rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to non-racial causes." *Nipper*, 39 F.3d at 1526.

B. Defendants have failed to rebut Plaintiffs' proof of vote dilution.

There is no question that Defendants have failed to disprove the inference that racial bias causes polarized voting in Georgia. Defendants repeatedly *suggest* that partisanship and not race is responsible for the polarization that Drs. Palmer and Alford identified, but they have not provided a shred of probative evidence to *prove* this is the case.

The testimony of their only expert on this issue underscores their failure to meet their burden. Dr. Alford concluded in his report that "the voting pattern is clearly one of partisan polarized voting, with both highly cohesive Black vote for the Democrat and highly cohesive white vote for the Republican candidate." Alford Report 9. But he undertook *no* research or analysis to support his assertion that partisanship and not race explains the polarization. Instead, Dr. Alford simply looked at Dr. Palmer's data and drew different inferences—and the data cannot support his expansive, unwarranted conclusions.

Most significantly, although Dr. Alford emphasized that the data show "cohesive Black voter support for *Democratic* candidates, and white voter support for *Republican* candidates," *id.*, these same empirical results would be seen if Black

Georgians voted Democratic (and white Georgians voted Republican) *because of race*—in other words, if race were indeed the root cause of the polarization. Dr. Alford conceded as much, noting that the data "doesn't demonstrate that" partisan behavior is not "actually being driven by racial considerations." SAMF ¶ 29; Alford Dep. 109:15–111:1. The partisan breakdown of the data cannot support the causal weight Dr. Alford places on it; the objective numbers alone say nothing about what "*motivated* [the] voting patterns" Dr. Palmer reported, and Dr. Alford did not undertake that inquiry. *Nipper*, 39 F.3d at 1515 (emphasis added). Moreover, "*Gingles* . . . requires Plaintiffs to show that voting is both racially polarized *and* politically cohesive. This necessarily means that the correlation between race and partisan voting must be high, or else there would be no discernable evidence of cohesive bloc voting." *Rose*, 2022 WL 3135915, at *7. Far from undermining Plaintiffs' showing, the presence of a stark partisan divide supports it.

Dr. Alford also concluded that race has no effect on polarization because the data do not show "cohesive Black voter support for *Black* candidates and white voter support for *white* candidates." Alford Report 9. But he also admitted that the race of candidates is not the *only* role race might play in a voter's decision, SAMF ¶ 30; Alford Dep. 99:14–100:7, and therefore he cannot foreclose the possibility of racial motivation based solely on this single racial cue. Indeed, Dr. Alford conceded that

race likely plays a role in shaping voters' party preferences. SAMF ¶ 30; 99:14–100:7, 134:19–135:18 ("[T]here's certainly room for race to be involved in decision-making in a wide variety of ways."). He did *not*, however, explore the role of race in shaping political behavior, either generally or in this case. SAMF ¶ 31; Alford Dep. 12:15–18, 115:12–116:10, 132:8–133:15.

In short, Dr. Alford's conclusion that party and not race explains the stark voting polarization reported by Dr. Palmer is based on nothing more than speculation. Under the most generous standard available to them, it is Defendants' burden to "introduc[e] *evidence* of objective, non-racial factors" that caused the polarization that Plaintiffs demonstrated. *Nipper*, 39 F.3d at 1513 (emphasis added). Dr. Alford's report falls well short of this burden; having reviewed Dr. Palmer's data, he merely drew competing (and unsupported) inferences but *did not prove* that factors other than race motivated the decisions of Georgia voters. Indeed, he admitted that he could *not* have made such a showing by only considering the results of Dr. Palmer's ecological inference analysis. SAMF ¶ 32; Alford Dep. 82:17–84:14, 90:4–91:9 ("EI is never going to answer a causation question. . . . Establishing causation is a very difficult scientific issue[.]").[5]

[5] The shortcomings in Dr. Alford's report reflect those of the Secretary of State's racially polarized voting expert in *Rose*, whose analysis was "of limited utility"

In short, while "Plaintiffs have proven both political cohesion and racial polarization," Defendants have "not offered any evidence of an alternate explanation for why minority-preferred candidates are less successful, such as 'organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent.'" *Rose*, 2022 WL 3135915, at *14 (quoting *Uno*, 72 F.3d at 983 n.4). Having failed to rebut the inference of racial bias established by Plaintiffs' evidence, Defendants are not entitled to summary judgment on this issue. To the contrary, summary judgment in *Plaintiffs'* favor is warranted.

C. Plaintiffs demonstrated that voting in Georgia is polarized on account of race.

Defendants contend that "Plaintiffs' claim fails under Section 2 because they 'have not even attempted to establish proof of racial bloc voting by demonstrating that race, not . . . partisan affiliation, is the predominant determinant of political preference.'" Defs.' Mot. 28 (alteration in original) (quoting *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 855 (5th Cir. 1993) (en banc)). Setting aside that

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because he "did not consider the impact of race on party affiliation, which was a crucial omission. Indeed," like Dr. Alford, "[he] conceded that his model did not account for factors that may determine partisanship, including race or racial identity." 2022 WL 3135915, at *7.

Plaintiffs need not make this showing in the first instance, *see supra* at 17–19, Defendants are simply incorrect: Plaintiffs *did* prove that race drives political preferences in Georgia.

Plaintiffs' Senate Factors expert, Dr. Orville Vernon Burton, explored the relationship between race and partisanship in Georgia politics. SAMF ¶ 33; Ex. 4 ("Burton Report") at 57–62.[6] As he explained,

> [s]ince Reconstruction, conservative whites in Georgia and other southern states have more or less successfully and continuously held onto power. While the second half of the twentieth century was generally marked by a slow transition from conservative white Democrats to conservative white Republicans holding political power, the reality of conservative white political dominance did not change.

SAMF ¶ 35; Burton Report 57. Notably, the Democratic Party's embrace of civil rights legislation in the mid-20th century—and the Republican Party's opposition to it—was the catalyst for this political transformation, as Black voters left the Republican Party (the "Party of Lincoln") for the Democratic Party. SAMF ¶ 36; Burton Report 57–58. In turn, the Democratic Party's embrace of civil rights sparked the "Great White Switch," in which white voters abandoned the Democratic Party for the Republican Party. SAMF ¶ 37; Burton Report 58.

[6] Notably, Dr. Alford did not review Dr. Burton's conclusions on this issue, SAMF ¶ 34; Alford Dep. 16:3–14, and certainly provided no grounds to refute them.

Electoral politics in the postwar American South illustrated this phenomenon. During the 1948 presidential election, South Carolina Governor Strom Thurmond mounted a third-party challenge to Democratic President Harry Truman in protest of Truman's support for civil rights, including his integration of the armed forces. SAMF ¶ 38; Burton Report 58. Thurmond ran on the ticket of the so-called Dixiecrat Party, which claimed the battle flag of the Confederacy as its symbol, and ended Democratic dominance of the Deep South by winning South Carolina, Alabama, Mississippi, and Louisiana. SAMF ¶ 38; Burton Report 58. Sixteen years later, in 1964, Republican presidential nominee Barry Goldwater—who told a group of Southern Republicans that it was better for the Republican Party to forgo the "Negro vote" and instead court white Southerners who opposed equal rights—became the first Republican candidate to win Georgia's electoral votes. SAMF ¶¶ 39–40; Burton Report 58–59. Four years after that, third-party candidate George Wallace won Georgia's electoral votes after running on a platform of vociferous opposition to civil rights legislation. SAMF ¶ 41; Burton Report 58.

The effectiveness of what was called the "Southern strategy" during Richard Nixon's presidency had a profound impact on the development of the nearly all-white modern Republican Party in the South, including in Georgia. SAMF ¶ 42; Burton Report 59. Matthew D. Lassiter, an historian of the Atlanta suburbs, observed

that "the law-and-order platform at the center of Nixon's suburban strategy tapped into Middle American resentment toward antiwar demonstrators and black militants but consciously employed a color-blind discourse that deflected charges of racial demagoguery." SAMF ¶ 43; Burton Report 60 (quoting Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* 234 (2006)). As Dr. Burton concluded, "[w]hite southerners abandoned the Democratic Party for the Republican Party because the Republican Party identified itself with racial conservatism. Consistent with this strategy, Republicans today continue to use racialized politics and race-based appeals to attract racially conservative white voters." SAMF ¶ 44; Burton Report 59.

The significant impact of race on Georgia's partisan divide can be further seen in the opposing positions taken by officeholders of the two major political parties on issues inextricably linked to race. For example, the Democratic and Republican members of Georgia's congressional delegation consistently oppose one another on issues related to civil rights, according to a report prepared by the NAACP. SAMF ¶ 45; Burton Report 74–75. These opposing attitudes extend to voters as well: In a poll of 3,291 likely Georgia voters conducted just before the 2020 election, among voters who believed that racism was the most important issue facing the country, 78% voted for Joe Biden and 20% voted for Donald Trump; among voters who

believed that racism was "not too or not at all serious," 9% voted for Biden and 90% voted for Trump; and among voters who believed that racism is a serious problem in policing, 65% voted for Biden and 33% voted for Trump. SAMF ¶ 46; Burton Report 76. The Pew Research Center found a similar divergence on racial issues between Democratic and Republican voters nationwide. SAMF ¶ 47; Burton Report 75–76.[7]

Dr. Burton concluded that racial bloc voting "is so strong, and race and partisanship so deeply intertwined, that statisticians refer to it as multicollinearity, meaning one cannot, as a scientific matter, separate partisanship from race in Georgia elections." SAMF ¶ 49; Burton Report 61; *see also Rose*, 2022 WL 3135915, at *13 ("[T]he Court is heavily persuaded by . . . testimony that it is impossible to separate race from politics in current-day Georgia, even if that were

[7] Dr. Burton further noted that, while "Republicans nominated a Black candidate—Herschel Walker, a former University of Georgia football legend—to challenge Senator Raphael Warnock in the 2022 general election for U.S. Senate"—a fact Defendants previously cited as "tend[ing] to indicate a lack of racism in Georgia politics," ECF No. 40 at 19—"Walker's nomination only underscores the extent to which race and partisanship remain intertwined. Republican leaders in Georgia admittedly supported Walker because they wanted to 'peel[] off a handful of Black voters' and 'reassure white swing voters that the party was not racist,'" SAMF ¶ 48; Burton Report 61 (quoting Cleve R. Wootson Jr., *Herschel Walker's Struggles Show GOP's Deeper Challenge in Georgia*, Wash. Post, https://www.washingtonpost.com/politics/2022/09/22/herschel-walker-georgia-black-voters (Sept. 22, 2022)).

required under the [Voting Rights Act]. . . . [R]ace likely drives political party affiliation, not the other way around."). Tellingly, Defendants completely ignore this evidence in their summary judgment motion; Dr. Burton's name appears not once in their brief.[8] Instead, their brief uses the phrase "race-neutral partisan politics," Defs.' Mot. 17—a contradiction in terms, since Dr. Burton's historical analysis (and, indeed, *any* realistic appraisal of Georgia's political history) belies the notion that partisan politics is somehow devoid of racial motivation.

* * *

Once again, Defendants' rush to advance a predetermined legal argument has run up against the evidence in the record. Although Plaintiffs need not demonstrate in the first instance that race and not partisanship is the case of polarized voting—their satisfaction of the *Gingles* preconditions presupposes as much—Dr. Burton's unrebutted testimony proves that this is indeed the case.

[8] Indeed, Defendants baldly assert that "Plaintiffs' experts studiously avoided any analysis of the cause of the polarization they found," Defs.' Mot. 4, notwithstanding Dr. Burton's analysis of this very issue—calling into question whether Defendants have actually engaged with the evidence before the Court.

D. This Court's approach to racially polarized voting is consistent with Section 2, *Gingles*, and the U.S. Constitution.

Given that they have mischaracterized the proper standard for racially polarized voting and ignored Plaintiffs' unrebutted evidence that race does indeed motivate the electoral polarization that Drs. Palmer and Alford observed, Defendants' discussion of other circuits' caselaw and the constitutionality of Section 2 amounts to little more than an academic digression. *See* Defs.' Mot. 18–27. Plaintiffs nevertheless respond to emphasize that the standard for racially polarized voting adopted by this Court (and, for that matter, the Eleventh Circuit) is consistent with precedent and the U.S. Constitution.

First, Defendants fault this Court for adopting the *Gingles* plurality's standard for polarized voting, suggesting that "a closer review of the opinions shows that a majority of the justices . . . declined to endorse this approach to majority-bloc voting." Defs.' Mot. 18. This is simply untrue. The *Gingles majority* "adopt[ed a] definition of 'racial bloc' or 'racially polarized' voting" that was premised on "*correlation*"; specifically, that "'racial polarization' exists where there is a consistent relationship between the race of the voter and the way in which the voter votes." 478 U.S. at 53 n.21 (cleaned up) (emphasis added). Not only is that the standard this Court adopted, *see* PI Order 174–76, but it is *precisely* what Dr. Palmer proved (and Dr. Alford confirmed).

A close reading of Justice White's *Gingles* concurrence demonstrates that the separate position he articulated is consistent with that definition of racially polarized voting. While Justice White disagreed with the *Gingles* plurality's position that causation is *never* relevant to the racially polarized voting analysis, he did not suggest that causation is *always* relevant. To the contrary, Justice White acknowledged that, "on the facts of [that] case," there was "*no need*" to analyze causation. *Gingles*, 478 U.S. at 83 (White, J., concurring) (emphasis added). Nor, under Justice White's reasoning, is there a need to analyze causation in *this* case, as his reservations implicated hypotheticals that simply do not apply here.

Specifically, Justice White noted that where significant numbers of Black voters support white candidates of choice, an inference that electoral decisions might be motivated by issues other than race—such as the "interest-group politics" that Defendants reference, Defs.' Mot. 19—might indeed be drawn, *see Gingles*, 478 U.S. at 83 (White, J., concurring). But that hypothetical is completely divorced from contemporary political realities in Georgia.

As Dr. Palmer reported and Dr. Alford agreed, there is virtually *no* Black crossover voting for white-preferred candidates where Plaintiffs have proposed an additional majority-Black congressional district. Across that area, Black voters supported their candidates of choice with an average of *98.4%* of the vote in the 40

elections Dr. Palmer examined. SAMF ¶ 22; Palmer Report ¶¶ 7, 16. Under such circumstances—where voting is dramatically polarized along racial lines and there is no indication that non-racial interest-group politics is confounding the results—there is "a sufficient inference that racial bias is at work." *Nipper*, 39 F.3d at 1525. This Court was therefore correct in concluding that "Plaintiffs need not prove the causes of racial polarization," PI Order 174, especially given Defendants' failure to produce evidence identifying non-racial causes for the polarization.

Second, Defendants discourse on the constitutionality of a Section 2 standard that would impose liability in cases where partisanship impacts polarization. Given Plaintiffs' evidence that race *does* motivate both partisanship and the polarization reported by Dr. Palmer, these concerns are misplaced. Defendants' argument is also foreclosed by Eleventh Circuit precedent, *see Marengo Cnty. Comm'n*, 731 F.2d at 1550 ("[A]mended section 2 is a constitutional exercise of congressional enforcement power under the Fourteenth and Fifteenth Amendments."), and for good reason. The *Gingles* preconditions and Senate Factors constitute "objective indicia that ordinarily would show whether the voting community as a whole is driven by racial bias as well as whether the contested electoral scheme allows that bias to dilute the minority group's voting strength," *Nipper*, 39 F.3d at 1534—thus

establishing the requisite link between the challenged vote dilution and the racial discrimination that the Fifteenth Amendment was designed to redress.

In any event, Defendants cannot isolate just one factor from the "totality" and pronounce it a poison pill to the entire Section 2 inquiry. *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) ("[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."). Indeed, as the *Gingles* Court explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure *interacts* with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47 (emphasis added). The results test is designed to operate at the intersection of race, politics, and history, and the interaction of these forces is a *feature* of the Section 2 inquiry, not a disqualification. There is thus no need to cleanly disentangle race from political and other considerations, as Defendants suggest—which would be a virtually impossible task at any rate, as their expert conceded. SAMF ¶ 32; Alford Dep. 82:17–84:14, 90:4–91:9.

As then-Chief Judge Tjoflat evocatively expounded in *Nipper*, "[l]ike a Seurat painting, a portrait of the challenged scheme emerges against the background of the voting community. Only by looking at all of the dots on the canvas is a district court

able to determine whether vote dilution has occurred." 39 F.3d at 1527. Here, putting those dots together—including racially polarized voting—demonstrates that Black Georgians in the western Atlanta metropolitan area have been denied equal access to the electoral process on account of race. *See generally* Pls.' Mot.

IV. Proportionality does not bar Plaintiffs' claim.

Despite acknowledging that "proportionality is not a safe harbor" in a Section 2 challenge, Defs.' Mot. 32, Defendants nonetheless ask the Court for summary judgment on this basis. They are wrong on both the law and the facts.

The U.S. Supreme Court has made clear that proportionality merely "provides *some evidence* of whether 'the political processes leading to nomination or election in the State or political subdivision are not equally open to participation.'" *LULAC*, 548 U.S. at 437 (emphasis added) (quoting 52 U.S.C. § 10301(b)); *see also Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020) ("[P]roportionality is a relevant fact in the totality of circumstances analysis." (cleaned up)). It does not follow—and the Court has never held—that proportionality alone can *bar* a Section 2 claim, as Defendants suggest. *See* Defs.' Mot. 30. Defendants cherry-pick from *De Grandy* while ignoring crucial language: "[P]roportionality *is not dispositive* in a challenge to single-member districting." 512 U.S. at 1000 (emphasis added); *accord id*. at 1026 (O'Connor, J., concurring) ("The

Court also makes clear that proportionality is never dispositive."). Instead, courts must look to "the totality of facts, including those pointing to proportionality," to determine if "the [challenged] scheme would deny minority voters equal political opportunity." *Id.* at 1013–14. And here, the totality of circumstances demonstrates that Black voters are denied equal political opportunities. *See* Pls.' Mot. 19–40.

Moreover, Defendants apply the wrong metric for proportionality. They suggest that, because "the 2021 congressional plan elected five Black Democratic candidates to the 14 congressional districts"—in other words, "35.7% of the Georgia congressional delegation"—"the percentage of Black candidates and Black-preferred candidates being elected is more than roughly proportional to the percentage of Black individuals in Georgia." Defs.' Mot. 32. But proportionality "asks whether 'minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population,'" *Wright*, 979 F.3d at 1289 (quoting *De Grandy*, 512 U.S. at 1000), not whether the number of successful minority candidates is proportional to the minority population. Here, *at most*, only four of Georgia's enacted congressional districts have Black voting-age populations that exceed 50%—less than 29% of the total. SAMF ¶ 50; Cooper Report ¶ 73, fig.14. By contrast, Black Georgians comprise *at least* 31.73% of the state's voting-age population. SAMF ¶ 51; Cooper

Report ¶ 18, fig.2.[9] Properly calculated, proportionality would not bar Plaintiffs' claim even if the factor were dispositive.

Notably, Defendants' preferred method for assessing proportionality was expressly foreclosed in *De Grandy*, where the Supreme Court specifically cautioned *against* looking to "the success of minority candidates" because doing so conflates two distinct strands of proportionality:

> "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters.

512 U.S. at 1014 n.11 (citation omitted) (quoting 52 U.S.C. § 10301(b)). Because "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race," *id.*, the Court "provided an explicit definition of proportionality" that "count[s] *only* those districts with 'a clear majority of black voters,'" not districts "in which black voters, although not a majority, had been 'able to elect representatives of their choice with the aid of cross-

[9] Both the number of majority-Black congressional districts and the size of the Black voting-age population vary based on which metrics are employed. SAMF ¶¶ 50–52; Cooper Report ¶¶ 18, 20, 73, figs.2 & 14.

over votes,'" *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291, 312 (D. Mass. 2004) (three-judge court) (quoting *De Grandy*, 512 U.S. at 1023).

In short, the electoral success of Black-preferred candidates statewide is not the relevant metric for assessing proportionality as part of the totality of circumstances—and certainly does not foreclose the ability of Black voters in the western Atlanta metropolitan area to vindicate their voting rights under Section 2.[10]

CONCLUSION

The truth has gotten in the way of Defendants' story. Plaintiffs' illustrative congressional plan is not a racial gerrymander and satisfies the first *Gingles* precondition. Plaintiffs have surpassed their burden of proving that voting in this area of Georgia is polarized on racial lines by demonstrating that the polarization is indeed on account of race. The SEB members are proper defendants in this action, and proportionality does not bar Plaintiffs' claim. Defendants' request for summary judgment is unwarranted, and their motion should be denied.

[10] Moreover, Mr. Cooper demonstrated why proportionality considerations *support* Plaintiffs' claim. Only 49.96% of Georgia's Black voters reside in majority-Black districts under the enacted congressional plan, while 82.47% of non-Hispanic white voters live in majority-white districts—a difference of 32.51 points. SAMF ¶ 53; Cooper Report ¶ 74, fig.15. Under the illustrative plan, by contrast, 57.48% of the Black voting-age population resides in majority-Black districts and 75.50% of the non-Hispanic white voting-age population resides in majority-white districts—a difference of only 18.01 points. SAMF ¶ 54; Cooper Report ¶ 74, fig.15.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment has been prepared in accordance with the font type and margin requirements of LR 5.1, NDGa, using font type of Times New Roman and a point size of 14.

Dated: April 19, 2023

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