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

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| PAMELIA DWIGHT, *et al.*<br><br>*Plaintiffs*,<br><br>v.<br><br>BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia,<br><br>*Defendant*. | CIVIL ACTION<br><br>FILE NO. 1:18-cv-2869-RWS |

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**SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT**

Defendant Secretary of State Brad Raffensperger (Secretary Raffensperger) moves this Court for summary judgment in his favor pursuant to pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1. As shown by the attached Brief in Support of Secretary of State Brad Raffensperger's Motion for Summary Judgment, the Exhibits attached to and filed with that Brief, and the deposition testimony filed with this Court, there are no material issues of fact in dispute and, as a matter of law, Secretary Raffensperger is entitled to summary judgment on Plaintiffs' sole claim.

WHEREFORE, Secretary Raffensperger respectfully requests that this Court enter summary judgment in his favor and cast all costs against Plaintiffs.

Respectfully submitted this 1st day of May, 2019.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT was prepared double-spaced in 13-point Century Schoolbook pursuant to Local Rule 5.1(C).

*/s/ Bryan P. Tyson*
Bryan P. Tyson
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2019, I served the within and foregoing SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise.

This 1st day of May, 2019.

*/s/ Bryan P. Tyson*
Bryan P. Tyson
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**BRIEF IN SUPPORT OF SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

Plaintiffs filed this case with a clear goal: to force the creation of a district that a Democrat can win. Deposition of Marion Warren [Doc. 57], 31:16-32:4. But their attempt to score a partisan goal using the Voting Rights Act comes up short. Defendant Secretary of State Brad Raffensperger is entitled to judgment as a matter of law because the evidence demonstrates that Plaintiffs face three insurmountable obstacles to their claim under Section 2 of the Voting Rights Act. 52 U.S.C. § 10301.

First, as a result of Plaintiffs' delay in bringing their claims against Georgia's congressional districts, any remedy would only be in effect for a

single election and would result in prejudice to the State. Plaintiffs are barred by laches from pursuing their claims.

Second, Plaintiffs cannot meet the first prong of the three-prong test of *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986)—that the minority community is sufficiently large and geographically compact to constitute an additional majority-African-American district. They have not shown that Congressional District 12 can be drawn as a majority-African-American district without including portions of Macon-Bibb County which the General Assembly placed into Congressional District 2. Plaintiffs' own expert testified that dismantling District 2 would be retrogressive. Deposition of Laughlin McDonald [Doc. 61] ("McDonald Dep."), 40:22-41:3, 41:12-16. Plaintiffs further only considered race in uniting the far-flung communities of Augusta, Macon, and Savannah in the proposed District 12. Deposition of William Cooper [Doc. 60] ("Cooper Dep."), 105:24-106:12.

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Third, the state of Georgia already has a districting plan with effective African-American voting majorities roughly proportional to the African-American percentage in the population.

Because Plaintiffs' own evidence demonstrates that they cannot overcome the necessary preconditions to a Section 2 claim and there are no disputes of material fact, Secretary Raffensperger is entitled to judgment as a

matter of law on Plaintiffs' sole claim in this case.

## II. FACTUAL BACKGROUND

### A. Georgia congressional districts.

Georgia is a diverse state, with 30.46% of its total population and 29.75% of its voting-age population identifying as black during the 2010 Census. Report of Gina Wright [Doc. 34-1], attached as Ex. B ("Wright Rep."), p. 5; Report of William Cooper, attached as Ex. C ("Cooper Rep."), p. 15 n.7. Georgia is a growing state, adding congressional districts after both the 2000 and 2010 Census. Wright Rep., pp. 3, 5.

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Georgia has also steadily increased the number of majority-African-American districts on its congressional plan since the mid-1990s. In the 2002 and 2005 congressional plans, only two districts were majority African-American: Districts 4 and 5. Wright Rep., pp. 3-5. When the 2010 Census data was released, three districts on the 2005 congressional plan were majority African-American: Districts 4 and 13 were majority African-American on total population and voting-age population and District 5 was majority African-American on total population only. *Id.*, pp. 5-6. District 2 was underpopulated but almost majority African-American, with an AP

Black[1] total population of 49.32% and an AP BVAP[2] of 46.84%. *Id*. at 6.

In a 2011 special session, the Georgia General Assembly drew plans that had to comply with Section 5 of the Voting Rights Act, which ensured that the position of minority voters did not retrogress. 52 U.S.C. § 10304 (formerly 42 U.S.C. § 1973c). District 2 drew special attention in the 2011 drawing process because it was electing a candidate of choice of African-American voters, was significantly underpopulated, and needed new population. Deposition of Gina H. Wright [Doc. 64] ("Wright Dep."), 92:10-20. Ms. Wright testified that reducing the African-American percentage of the population in District 2 in 2011 would have caused problems for preclearance. Wright Dep., 93:9-94:11. Plaintiffs' expert Laughlin McDonald agreed, testifying that significant changes to District 2 would hurt minority voting strength—and would be a basis for an objection by the Attorney General to any congressional plan. McDonald Dep., 40:22-41:3, 41:12-16.

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Considering this and other factors, the Georgia General Assembly adopted a new congressional district plan that included four majority-African-American districts (an increase of one from the 2005 plan and the

[1] "AP" refers to a racial category that includes all persons self-identifying as belonging to more than one race. A person that identifies as both white and black would be included in the "AP Black" number. Wright Rep., p. 4 n.1.

[2] AP BVAP is the abbreviation for AP Black voting-age population.

equivalent of 28.57% of the fourteen seats allocated to the State): Districts 2, 4, 5, and 13. Wright Rep., pp. 6-7. District 2 was drawn to have a total black population of 52.28% and a black registered-voter percentage of 50.11%. *Id*. The 2011 plan was submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act and was approved in December 2011. *Id*. at 6.

On the 2011 congressional plan, District 12 was significantly adjusted to account for the addition of a new congressional district in the state. *Id*. Incumbent member of Congress John Barrow won reelection in District 12 in the 2012 election, but lost in the 2014 general election to Congress member Rick Allen, who was reelected in 2016 and 2018. Report of Maxwell Palmer, attached as Ex. E, p. 7; Ex. A, ¶ 14 (collecting available election results).

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In other districts on the 2011 plan, African-American incumbent members of Congress John Lewis (District 5), Hank Johnson (District 4), Sanford Bishop (District 2), and David Scott (District 13) were reelected from their respective districts in 2012, 2014, 2016, and 2018. Wright Rep., p. 8; Ex. A., ¶ 14. In 2018, African-American member of Congress Lucy McBath won election in District 6. Wright Rep., p. 8. All of these candidates were candidates of choice of the minority community, because they were all Democrats. *See* Deposition of John Alford [Doc. 63], 87:2-10; Deposition of

Maxwell Palmer [Doc. 62], 93:2-13 (Democrats are candidates of choice for black voters).

**B. Plaintiffs' voting history and proposed district plans.**

The 2011 plan was first used in the 2012 congressional elections. After waiting for almost four election cycles under the 2011 congressional plan, Plaintiffs filed this lawsuit, claiming that Georgia diluted minority voting strength in violation of Section 2 of the Voting Rights Act when it did not draw District 12 as a majority-African-American district eight years ago.

*i. Plaintiffs' voting history.*

Every Plaintiff except one has been registered to vote for the entire decade in which the 2011 congressional plan has been in use, and in most cases, much longer. [Doc. 14, ¶¶ 11-15]. For example, Plaintiff Amanda Hollowell has been registered in the state of Georgia since she moved to Savannah in 2012. Deposition of Amanda Hollowell [Doc. 58] ("Hollowell Dep.") 12:21-25. Since registering in Georgia, Ms. Hollowell has voted in every election, including primaries, Hollowell Dep., 13:11-17, and has been registered to vote for each and every election cycle since the 2011 congressional plan was first implemented. *Id.*

The only Plaintiff not registered to vote in every election in which the 2011 plan was used is Plaintiff Destinee Hatcher—because she did not turn

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eighteen years old until 2014,[3] when she promptly registered. Deposition of Destinee Hatcher [Doc. 59] ("Hatcher Dep.") 10:15-11:2.

Thus, six of the seven plaintiffs in this case were eligible to vote in 2012, 2014, 2016, and 2018 and Ms. Hatcher was eligible in every election except 2012. And yet Plaintiffs did not file this lawsuit until July 13, 2018. [Doc. 14]. No Plaintiff offered any explanation for why this lawsuit was not brought before it could, at most, only impact the 2020 elections.

*ii. Plaintiffs' proposed district plans.*

In an attempt to establish the first *Gingles* precondition—that the minority community is sufficiently numerous and geographically compact to constitute a majority in an additional congressional district—Plaintiffs' expert selected a 71-county area in southeast Georgia because he was looking for an area with a "big minority population that has heretofore not had an opportunity to elect a candidate of choice." Cooper Dep., 70:12-16, 78:25-79:13. Mr. Cooper then created Illustrative Plans that focused on drawing a majority-African-American district, *id,*, raising the black total population in District 12 to 53.85% (Plan 1) and 53.78% (Plan 2). Cooper Rep., pp. 29, 32.

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[3] The Amended Complaint alleges that Ms. Hatcher first registered to vote in 2013, but she in fact registered in 2014, as she testified in her deposition. [Doc. 14, ¶ 16]; Hatcher Dep., 10:15-11:2.

But both Illustrative Plans failed to include a majority of black registered voters in District 12: using 2018 data, the black voter registration percentages in District 12 on the Illustrative Plans are only 49.98% (Plan 1) and 49.92% (Plan 2). Supplemental Report of Gina Wright [Doc. 44-1], attached as Ex. D ("Wright Supp. Rep."), p. 2.

Another significant problem Mr. Cooper encountered was that making District 12 a majority-African-American district required significant changes to District 2. The Illustrative Plans decreased the black total population in District 2 from 52.28% (2011 Plan) to 49.72% (Plan 1) and 49.81% (Plan 2). Wright Rep., p. 11. Each of the Illustrative Plans also brought District 2's 2018 black voter registration percentage below a majority: from 50.37% (2011 Plan) to 47.71% (Plan 1) and 47.82% (Plan 2). Wright Supp. Rep., p. 2.

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The key point is which district gets Macon-Bibb County. Wright Dep., 135:7-11; Cooper Dep., 75:17-76:18. Ms. Wright testified that it was not possible to make District 12 a majority-African-American district without including Macon-Bibb County. Wright Rep., p. 10; Wright Dep., 135:7-11. Mr. Cooper was not sure, but did not disagree that a map drawer would have to violate traditional principles to make District 12 a majority-African-American district without Macon-Bibb County. Cooper Dep., 75:17-76:18.

Each of Mr. Cooper's Illustrative Plans move more than one million

Georgians into different congressional Districts and split more counties than the current congressional plan. Wright Rep., p. 13, 19. Mr. Cooper's Illustrative Plans are also less compact than the current congressional plan. Wright Rep., pp. 18, 22. The Illustrative Plans make use of "fingers" reaching through counties to take out specific population—always in overwhelmingly African-American areas. Wright Rep., pp. 14, 20.

## III. ARGUMENT AND CITATION OF AUTHORITIES

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Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden but is not required to negate the opposing party's claims. Instead, the moving party may point out the absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265 (1986); *Marion v. DeKalb County, Ga.* 821 F. Supp. 685, 687 (N.D. Ga. 1993). In this case, Plaintiffs make one claim: that the State violated Section 2 of the Voting Rights Act when it failed to draw a majority-African-American District 12. [Doc. 14, ¶¶ 74, 77].

Section 2 of the Voting Rights Act prohibits jurisdictions from diluting the strength of minority voters through a "standard, practice, or procedure" "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." 52 U.S.C. § 10301(a). Proof of illegal vote dilution is established through a "totality of the circumstances" analysis. 52 U.S.C. § 10301(b). That analysis begins with the three preconditions in *Gingles*, 478 U.S. at 30. If Plaintiffs cannot prove any one of the three preconditions, their claim fails and no further analysis is necessary.

**A. Plaintiffs' Section 2 claim fails because it is barred by laches.**

Plaintiffs delayed bringing their case, implicating the doctrine of laches. Laches prevents a court from considering a claim when three elements are present: "(1) [A] delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Venus Lines Agency Inc. v. CVG Int'l Am., Inc.,* 234 F. 3d 1225, 1230 (11th Cir. 2000). "[R]edistricting challenges are subject to the doctrine of laches because of the ten-year expiration date of electoral districts." *Sanders v. Dooly Cty.,* 245 F. 3d 1289, 1290-1291 (11th Cir. 2001). Electoral districts must be redrawn every ten years because governments must ensure equal population representation upon the release of new Census data. *See Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

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*i. Plaintiffs delayed in asserting their claim.*

Every Plaintiff has been registered to vote for each election in which

the 2011 congressional plan has been in use except for Ms. Hatcher, who has been registered for every election except one. Despite numerous opportunities to bring this lawsuit challenging the current district plan, each of the Plaintiffs delayed filing this action until July 13, 2018, seven years after the map was put into place and while the election process for the fourth of the five congressional elections using this map was underway. [Doc. 14]. As a result of the delay in bringing this case, the only election to which any remedy could apply is the 2020 election cycle.

Considering the ten year life-cycle of district plans, declining to bring a ripe claim for eight years (or 80% of the time a map will be in use) represents a substantial delay and satisfies the first element of laches. *See, e.g., Benisek v. Lamone*, ___ U.S. ___, 138 S. Ct. 1942, 1944 (2018) (affirming denial of preliminary injunction when plaintiffs did not exercise reasonable diligence in bringing claims against congressional plan); *Chestnut v. Merrill,* 2019 U.S. Dist. LEXIS 51548 *14-15 (N.D. Ala., Jan. 28, 2019) (plaintiffs waiting until 2018 to bring a claim under the Voting Rights Act against a map implemented in 2011 represented delay for the purposes of laches analysis).

*ii. Plaintiffs' delay was not excusable.*

Delay is measured "from the time at which the plaintiff knows or should know she has a provable claim." *Kason Indus., Inc. v. Component*

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*Hardware Grp., Inc.,* 120 F. 3d 1199, 1203 (11th Cir. 1997). Six of the seven plaintiffs in the case at bar knew or should have known their claim was ripe for adjudication prior to the 2012 election cycle. Ms. Hatcher knew or should have known her claim was ripe in 2014, when she registered to vote for the first time. In spite of this knowledge, Plaintiffs delayed bringing this claim until any potential relief could apply to the 2020 election only.

In a similarly situated Alabama case, the court found that a plaintiff group did not have any excusable delay. *Chestnut*, 2019 U.S. Dist. LEXIS 51548. All but one of the *Chestnut* plaintiffs were registered for the entire time the at-issue map was in place and waited until 2018 to bring a claim under the Voting Rights Act for an electoral map that had been in place since 2011. The *Chestnut* court found—with respect to the nine plaintiffs registered in the district since before 2011—that their decision to wait more than three election cycles to bring their claim constituted inexcusable delay. 2019 U.S. Dist. LEXIS 51548 at *15-16. With respect to one plaintiff who only arrived in the state in 2016, the court found that her late arrival did not save her claim, explaining that she waited "an additional two years after moving into the state to join the other nine in bringing this claim." *Id.* at *16. The court found "these excuses for delay unpersuasive." *Id.* The case at bar represents an even more significant delay than that engaged in by the *Chestnut*

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plaintiffs. Every Plaintiff waited until any relief could apply to only the 2020 election before filing this case and did not offer any excuse for such a delay.

*iii. Defendant was prejudiced by Plaintiffs' delay.*

If Plaintiffs are successful, the State of Georgia will be required to redistrict twice in two years: once for the 2020 election and again in 2021 after the release of the 2020 Census results. The State is already beginning a transition process to a new voting system. *See* 2019 Georgia Laws Act No. 24 (H.B. 316) (creating structure for new voting equipment). Mr. Cooper's Illustrative Plans would require changing the congressional districts of more than a million Georgians. Wright Rep., p. 13, 19. The Illustrative Plans also increase the number of county splits over the current congressional plan. *Id.*

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Given the already-changing nature of the state's election system, the impact of moving a huge portion of Georgians into new congressional districts for a single election is massive. Citizens rely on access to their members of Congress for a variety of constituent services, and the confusion in changing districts for a single election, when the districts will only be changed again a year later, is incredibly disruptive. The number of county splits also places additional burdens on local election officials already charged with transitioning to a new voting system. The court in *Chestnut* agreed that these kinds of harm are prejudicial: "Two reapportionments within a short period of

two years would greatly prejudice the [state] and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens." 2019 U.S. Dist. LEXIS 51548 at *20-21, citing *White v. Daniel,* 909 F. 2d 99, 104 (4th Cir. 1990).

Significantly, the Census data upon which any 2020 court-ordered remedial redistricting would be based is the 2010 data. While Census data is presumed valid and must be used for redistricting, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 316 (1999), it is not without its problems. As Plaintiffs' expert acknowledges, the Census itself estimates that almost one million additional individuals have moved into Georgia since 2010. Cooper Rep., p. 36. Drawing maps using nine-year-old data that does not account for growth or other changes would lead to significant prejudice to the State. *See Chestnut,* 2019 U.S. Dist. LEXIS 51548 at *21.

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Plaintiffs have inexplicably delayed this process by waiting until the end of the 2018 election cycle to bring claims that were perfectly capable of being brought by almost all of them as early as seven years ago. As in *White* and *Chestnut,* the state of Georgia would be required to redraw its longstanding congressional district map just before the final election cycle using that plan is to occur, and only months before the legislature is required to begin drawing yet another new congressional map based on the results of

the upcoming 2020 Census. As the *White* court noted, such an order would create "instability and dislocation in the electoral system," and impose "great financial and logistical burdens" on the state. 909 F. 2d at 104. Moreover, these burdens and instability are directly attributable to the conscious delay occasioned by Plaintiffs in waiting to bring this case. Put differently, "[t]his prejudice was caused by Plaintiffs' inexcusable delay in waiting until 2018 to file suit." *Chestnut,* 2019 U.S. Dist. LEXIS 51548 at *21. As a result this Court should find that "the doctrine of laches bars Plaintiffs' claim." *Id.*

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**B. Plaintiffs cannot establish the first *Gingles* precondition.**

In order to show a Section 2 violation, a plaintiff bears the burden of first proving *each* of the three *Gingles* preconditions[4]:

> Specifically, plaintiffs in vote dilution cases must establish as a threshold matter: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the minority group is "politically cohesive"; and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate.

*Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994), quoting *Gingles*, 478 U.S. at 50-51. Only after establishing the three preconditions does a court

[4] These preconditions are also frequently referred to in cases as the *Gingles* "prongs." *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 17, 129 S. Ct. 1231, 1244, 173 L. Ed. 2d 173 (2009); *Johnson v. Hamrick*, 296 F.3d 1065, 1073 (11th Cir. 2002).

begin a review of the so-called "Senate Factors" to assess the totality of the circumstances. *Id.* at 1512; *Gingles*, 478 U.S. at 79; *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647 (1994). Failure to establish one of the *Gingles* prongs is fatal to a Section 2 claim because each of the three prongs must be met. *See Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1567 (11th Cir. 1997).

The undisputed evidence before the Court demonstrates that Plaintiff cannot establish the first *Gingles* prong, because they have not submitted any illustrative plan making District 12 a majority-African-American district without also reducing District 2 below majority-African-American status because the placement of Macon-Bibb County is necessary to make either district majority African-American. Plaintiffs have also submitted no evidence of commonality between Augusta, Macon, and Savannah that merits the determination that they are one community instead of far-flung groups united only by race.

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*i.* Gingles *1: Plaintiffs cannot draw a majority-African-American district without Bibb County, meaning Plaintiffs have not shown a valid remedy.*

The Eleventh Circuit prohibits the separation of the first prong of

liability under *Gingles* and the potential remedy. *Nipper*, 39 F.3d at 1530-31; *see also Burton*, 178 F.3d at 1199 ("We have repeatedly construed the first *Gingles* factor as requiring a plaintiff to demonstrate the existence of a proper remedy."). Whatever plan is used to demonstrate the violation of the first prong of *Gingles* must also be a remedy that can be imposed by the Court. *Nipper*, 39 F.3d at 1530-31. In short, if a plaintiff cannot show that the plan used to demonstrate the first prong can also be a proper remedy, then the plaintiff has not shown compliance with the first prong of *Gingles*. *Nipper*, 39 F.3d at 1530-31.

The key question in this case—whether District 12 should have been drawn as a majority-African-American district—hinges on the placement of Macon-Bibb County. Ms. Wright explained that it was not possible to draw Congressional District 12 as a majority-African-American district without including Bibb County: "If Macon-Bibb County remains in Congressional District 2, Mr. Cooper would be unable to create the District 12 he proposes." Wright Rep., p. 10; Wright Dep., 135:7-11. Mr. Cooper did not disagree, explaining that he was not sure he had looked at every combination, but did not know of any way to make both District 12 and District 2 majority African-American without violating traditional redistricting principles because Macon-Bibb County was necessary. Cooper Dep., 75:17-76:18.

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When creating the 2011 Plan, Georgia was still subject to preclearance of each redistricting plan under Section 5 of the Voting Rights Act. Wright Rep., p. 6; *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273 (2015) (narrow tailoring is a defense to racial gerrymandering claim when state must not retrogress); see also *Shelby Cty. v. Holder*, 570 U.S. 529, 559, 133 S. Ct. 2612, 2632 (2013) (voiding coverage formula in 2013). Any district plan had to avoid retrogression—it must "maintain a minority's ability to elect a preferred candidate of choice" or else be rejected by the Attorney General. *Ala. Legislative Black Caucus*, 135 S. Ct. at 1272; 52 U.S.C. § 10304.

District 2 has consistently elected a candidate of choice: Sanford Bishop. When the 2010 Census data was applied to the 2005 plan, the district had a black total population of 49.32% but was severely underpopulated. Wright Rep., p. 6. Thus, to comply with the Voting Rights Act, the General Assembly had to ensure that the minority community could continue to elect a preferred candidate of choice in District 2 when it created the 2011 plan. It did so by raising the minority population of District 2 to 52.28% of the total population and a majority of voter registration (50.11% using 2010 data; 50.37% using 2018 data) by including Macon-Bibb County in the district. Wright Rep., p. 7; Wright Supp. Rep., p. 2. None of the alternative plans offered by then-Minority Leader Stacey Abrams and Senator Vincent Fort

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placed Macon-Bibb County into District 12 but instead maintained similar minority percentages in proposed versions of District 2. Wright Rep., p. 8. In sharp contrast, Plaintiffs' Illustrative Plans *decrease* the black total population in District 2 from 52.28% (as drawn on the 2011 Plan) to 49.72% (Plan 1) and 49.81% (Plan 2). Wright Rep., p. 11.

Even Plaintiffs' expert agreed that making significant changes to District 2 would have been retrogressive:

> Q: Based on your understanding and knowledge of redistricting and the Voting Rights Act and preclearance particularly, if the Legislature in 2011 had decided to dismantle Congressman Bishop's district, would you believe that would be a basis for objection by the Department of Justice?
>
> A: It should be.

McDonald Dep., 40:22-41:3.

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Each of Mr. Cooper's proposed Illustrative Plans also resulted in both Districts 2 and 12 having a Black voter registration percentage of less than 50%. Wright Supp. Rep., p. 2. Given the requirements of preclearance in 2011, it is doubtful that either of these proposed districts would have passed muster with the Department of Justice.

The Georgia General Assembly made a reasonable policy decision to avoid retrogression by placing Macon-Bibb County into District 2, not District 12. Because the only way to create a majority-African-American District 12 is

to significantly reduce the African-American voter percentages in District 2, Plaintiffs have not shown they have a proper remedy for this Court to consider.[5]

*ii.* Gingles *1: The African-American communities in Plaintiffs' 71-county area are not geographically compact.*

Plaintiffs also have presented no evidence that the African-American community in the proposed District 12 on the Illustrative Plans is geographically compact.[6] This absence of evidence supports a grant of summary judgment to Secretary Raffensperger. *Marion*, 821 F. Supp. at 687. The Supreme Court requires that the size and geographic compactness portions of the first *Gingles* prong relate to the community, not to any potential district created by a plaintiff: "The first *Gingles* condition refers to *the compactness of the minority population*, not to the compactness of the

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[5] Mr. Cooper testified that it is not possible to create a majority-minority District 12 without Macon-Bibb County while complying with traditional redistricting principles. Cooper Dep., 76:8-18. This Court cannot order a racial gerrymander as a remedy without running afoul of *Shaw v. Hunt*, because racial classifications are "antithetical to the Fourteenth Amendment." 517 U.S. 899, 907, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); see also *Abrams v. Johnson*, 521 U.S. 74, 90, 117 S. Ct. 1925, 1935, 138 L. Ed. 2d 285 (1997) (upholding decision that a court "could not draw two majority-black districts without itself engaging in racial gerrymandering").

[6] Plaintiffs apparently believe that they get to pick where in the state of Georgia a majority-African-American district is located. As discussed below, the only possible claim under Section 2 is that the State failed to draw a sufficient number of districts statewide.

contested district." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S. Ct. 2594, 2618, 165 L. Ed. 2d 609 (2006) (*LULAC*) quoting *Bush v. Vera*, 517 U.S. 952, 997, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (emphasis added).

The Illustrative Plans combine distinct minority communities in Macon, Augusta, and Savannah to create a District 12 that is barely majority African-American using nine-year-old Census data and is below 50% using 2018 voter registration data. Cooper Rep., pp. 29, 32; Wright Supp. Rep., p. 2. Mr. Cooper could identify practically nothing beyond the race of the voters in Macon, Augusta, and Savannah that united them—in clear violation of the requirements of *LULAC*: "there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." 548 U.S. at 433. Cooper Dep., 105:24-106:12 (identifying a highway as a possible connection).

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**C. Plaintiffs' Section 2 claim fails because Georgia's congressional-district plan already has effective African-American voting majorities in districts roughly proportional to the African-American percentage in the population.**

The Voting Rights Act "was passed to guarantee minority voters a fair game, not a killing." *Bartlett*, 556 U.S. at 29 (Souter, J., dissenting). Because

Section 2 focuses on "equal political opportunity," the Supreme Court did "not see how . . . district lines, apparently providing political effectiveness in proportion to voting age numbers, deny equal political opportunity." *De Grandy*, 512 U.S. at 1014.

As a result, the totality-of-the-circumstances analysis required in a Section 2 claim begins with an analysis of proportionality—comparing the minority group's proportion of the population and the number of districts where that minority group can elect its candidate of choice.[7] *Id. at* 997.

In *De Grandy*, the Supreme Court concluded that "proportionality . . . is obviously an indication that minority voters have an equal opportunity . . . to participate in the political process and to elect representatives of their choice." 512 U.S. at 1020 (cleaned up). Because Section 2 does not require a State to maximize the number of "safe" minority districts in an area, *id.* at 1016-1017, the Supreme Court found that, when the minority group in

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[7] The proportionality analysis that is part of the totality-of-the-circumstances review in Section 2 cases is distinct from the language in Section 2 regarding proportional representation. *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1223 n.5 (11th Cir. 2000) ("it is important to keep the concepts of 'proportionality' and 'proportional representation' distinct"). While no minority group has a right to proportional representation under Section 2, the degree of achievement of proportional representation may be relevant to evaluating whether minority voters have formed effective voting majorities in districts roughly proportional to their population. *Id.*

question enjoyed "rough proportionality," there was no Section 2 violation. 512 U.S. at 1023.

The Supreme Court gave further direction in *LULAC*, finding that the relevant geographic area for a proportionality analysis is the entire state. 548 U.S. at 437. In *LULAC*, the Supreme Court explained that the proportionality inquiry entails "comparing the percentage of total districts that are [African-American] opportunity districts with the [African-American] share of the citizen voting-age population." 548 U.S. at 436.

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While proportionality is not a safe harbor for a jurisdiction, *LULAC*, 548 U.S. at 436, it is an extremely relevant factor to consider whether an equal opportunity to participate in the political process exists. *See*, *e.g.*, *African Am. Voting Rights Legal Def. Fund v. Villa*, 54 F.3d 1345, 1355 (8th Cir. 1995) (evidence of "persistent proportional representation" sufficient to support grant of summary judgment to jurisdiction); *Fairley v. Hattiesburg Miss.*, 662 F. App'x 291, 301 (5th Cir. 2016) (same).

Applying this analysis to the 2011 plan demonstrates that Georgia's congressional districts have effective African-American voting majorities roughly proportional to the African-American percentage in the population. The parties agree that the 2010 Census for Georgia shows the AP Black total population is 30.46% and the AP Black VAP is 29.75%. Wright Rep., p. 5;

Cooper Rep., p. 15 n.7. Four of the fourteen congressional districts are currently majority African-American on total population and voter registration: Districts 2, 4, 5, and 13. Wright Rep., p. 7. That is 28.6% of Georgia's congressional districts. Plaintiffs cannot dispute that each of these districts is currently electing the candidate of choice of the African-American community. In addition, in the 2018 election, District 6 elected an African-American Democrat. Wright Rep., p. 8. Thus, minority-preferred candidates currently hold five of Georgia's fourteen congressional districts under the 2011 congressional plan, or 35.7% of Georgia's congressional districts.

The 2011 congressional plan clearly reflects at a minimum rough proportionality indicating that minority voters in Georgia have an equal opportunity to participate in the political process and to elect representatives of their choice.[8] Consequently, Plaintiffs' claims for a Section 2 violation fail as a matter of law.

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[8] Plaintiffs' experts limited their analysis to a 71-county area encompassing less than half of the counties in the state. Cooper Rep., p. 4. But singling out a subset of the state makes no sense—the Supreme Court concluded that "the answer in these cases is to look at proportionality statewide." *LULAC*, 548 U.S. at 437. It reached this conclusion because singling out subsets of states is "arbitrary" and could include any combination of districts. *Id.*

## IV. CONCLUSION

Plaintiffs waited too long to bring this claim and are barred by laches. But even if this Court considers the merits, the undisputed evidence shows that Plaintiffs failed to make a threshold showing under the first prong of *Gingles*. Plaintiffs failed to show they can create a congressional redistricting plan with an *additional* majority-African-American district. The decision to place Macon-Bibb County in District 2, and to protect the ability-to-elect District 2, was reasonable and should not be second-guessed by this Court.

But Plaintiffs also challenge a Congressional district plan that already provides effective African-American voting majorities roughly proportional to the African-American percentage of the population, and which in 2018 resulted in the election of five African-American members of Congress. This fact demonstrates that no vote dilution is occurring in Georgia's Congressional elections.

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Because the undisputed facts demonstrate that Plaintiffs cannot establish a Section 2 violation, this Court should grant summary judgment to Secretary Raffensperger.

Respectfully submitted this 1st day of May, 2019.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing BRIEF IN SUPPORT OF SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT was prepared double-spaced in 13-point Century Schoolbook pursuant to Local Rule 5.1(C).

*/s/ Bryan P. Tyson*
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 1, 2019, I served the within and foregoing BRIEF IN SUPPORT OF SECRETARY OF STATE BRAD RAFFENSPERGER'S MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise.

This 1st day of May, 2019.

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