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

COAKLEY PENDERGRASS et al., Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, et al., Defendants.	CIVIL ACTION FILE NO. 1:21-CV-5339-SCJ
ANNIE LOIS GRANT et al., Plaintiffs, v. BRAD RAFFENSPERGER, in his official capacity as the Georgia Secretary of State, et al., Defendants.	CIVIL ACTION FILE NO. 1:22-CV-122-SCJ

PLAINTIFFS' PARTIAL OPPOSITION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE

The Court should decline Defendants' invitation to take judicial notice of facts that are either disputed or irrelevant to Plaintiffs' Section 2 claims. In particular, Defendants' request for judicial notice of Census Current Population Survey data regarding voter turnout by race is disputed not only by Plaintiffs' expert but by the Secretary of State's own data. Judicial notice is also an improper vehicle for Defendants to admit into evidence irrelevant facts such as the partisan makeup of the current state legislature and the success of non-Black candidates in statewide elections. These facts have no bearing on Plaintiffs' Section 2 claims, which pertain to whether *Black voters*—not Democratic *voters* or other minority *voters*—have an equal opportunity to participate in the political process.

Accordingly, Defendants' motion for judicial notice should be denied to the extent it asks the Court to take judicial notice of (1) Census data from Table 4b of the U.S. Census Current Population Survey in 2018, 2020, and 2022; (2) the partisan makeup of the current Georgia state legislature; and (3) the success of non-Black candidates in statewide elections.

ARGUMENT

The Court may judicially notice a fact that "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.

201(b)(1)–(2). But taking judicial notice is a "highly limited process" because it "bypasses the safeguards which are involved with the usual process of proving facts by competent evidence in district court." *Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1273 (11th Cir. 2014) (*quoting Dippin' Dots, Inc. v. Frosty Bites Distribut., LLC*, 369 F.3d 1197, 1205 (11th Cir. 2004)). Judicial notice thus should be limited to only undisputed, adjudicative facts. *See* Fed. R. Evid. 201(b); *see id.* advisory committee's note ("With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy."). The Court may "refuse to take judicial notice of facts that are irrelevant to the proceeding." *United States v. Falcon*, 957 F. Supp. 1572, 1585 (S.D. Fla. 1997), *aff'd*, 168 F.3d 505 (11th Cir. 1999).

I. The Current Population Survey voter turnout data should not be judicially noticed because it is disputed.

The Current Population Survey (CPS) data that Defendants ask the Court to judicially notice is not only subject to reasonable dispute, it is in fact disputed by other evidence already in the trial record.

In support of their motion for preliminary injunction, Plaintiffs introduced the expert report of Dr. Loren Collingwood. *Pendergrass* ECF No. 34-4; *Grant* ECF No. 20-4. Dr. Collingwood's expert report demonstrated that in every election cycle between 2010 and 2020, "registered White voters turned out at higher rates than did

registered Black voters." *Pendergrass* ECF No. 34-4 at 6; *Grant* ECF No. 20-4 at 6. Dr. Collingwood's report also showed the turnout gap between Black and White voters in each of these elections. *Pendergrass* ECF No. 34-4 at 7; *Grant* ECF No. 20-4 at 7. Specifically, the turnout gap between Black and White voters was -12.6% and -8.3%, respectively, in 2020 and 2018. *Pendergrass* ECF No. 34-4 at 7; *Grant* ECF No. 20-4 at 7. The CPS data that Defendants seek to introduce by way of their motion for judicial notice, however, provide different accounts of voter turnout in 2018 and 2020 than the figures provided by Dr. Collingwood, which were based on the Secretary of State's reported election data. *Pendergrass* ECF No. 34-4 at 3; *Grant* ECF No. 20-4 at 3.[1] Defendants' request for judicial notice of CPS data is at odds with their attempt to use it to dispute data that is already in the trial court record. *See* Order Denying Summary Judgment at 88 n.44, *Pendergrass* ECF No. 215 (noting evidence received at preliminary injunction that would be admissible at trial becomes part of trial record); *cf. Pendergrass* ECF No. 63 at 2 (parties stipulating to admission of Collingwood's expert report at preliminary injunction); *Grant* ECF No.

[1] The CPS data also provide different accounts of voter turnout in 2022 than the figures provided by Dr. Collingwood in his December 12, 2022 expert reports, which were also based on the Secretary of State's reported election data. *Pendergrass* ECF No. 174-6 at 3, 8; *Grant* ECF No. 191-5 at 3, 8.

56 at 2 (parties stipulating to admission of Collingwood's expert report at preliminary injunction).

Plaintiffs would be severely prejudiced if the CPS data were judicially noticed, for at least two reasons. First, Plaintiffs' experts relied on data provided by Defendant Secretary of State. *See, e.g.*, *Grant* ECF No. 191-2 at 5 (Palmer Rep. ¶ 13); *Grant* ECF No. 191-5 at 4 (Collingwood Rep. at 3) (using precinct-level voter registration and aggregate turnout, statewide voter turnout, and county-level turnout data from the Georgia Secretary of State)). They have had no opportunity to explain why their methodology for measuring voter turnout is superior to Defendants'. Second, Defendants have offered no corresponding expert testimony relying upon CPS data, and thus have provided no opportunity for Plaintiffs to depose or cross-examine Defendants' apparent preference for CPS data over the Secretary of State's own data. *Compare, e.g.*, *Pendergrass* ECF No. 168 ("Palmer Dep.") at 68–69 (Defendants' counsel questioning Plaintiff's expert about a certain data set he used and whether he did any analysis to determine its accuracy).

Although Defendants are correct that Census records are frequently used in Section 2 cases and have been the subject of judicial notice, *Pendergrass* ECF No. 224 at 7, "census figures [are not endowed] with a conclusive presumption of correctness or held to be immutable and irrebuttable." *Canadian St. Regis Band of*

Mohawk Indians v. New York, No. 5:82-CV-0783, 2013 WL 3992830, at *12 (N.D.N.Y. July 23, 2013) (quoting *Shalvoy v. Curran*, 393 F.2d 55, 58 (2d Cir. 1968)); *see also Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir. 2000) (presumption of accuracy of census data is rebuttable). Here, CPS data should not be given the conclusive presumption of correctness given that the data differs from Defendant Raffensperger's own data. *See, e.g.*, *Fish v. Kobach*, 309 F. Supp. 3d 1048, 1056 (D. Kan. 2018) (refusing to credit expert testimony that "CPS data about registration and turnout is a better measure of registration and turnout than the actual numbers maintained by the SOS's Office"), *aff'd sub nom. Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020); *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1089 (E.D. Va. 2021) (noting that the CPS voter turnout data has a "wide margin of error"), *vacated and remanded on mootness grounds*, 42 F.4th 266 (4th Cir. 2022).

Defendants had the opportunity to put the CPS data on their exhibit list, to file a motion in limine to strike Plaintiffs' experts' reliance on the Secretary of State's data, or to introduce their own expert to analyze and defend the use of CPS data. They did none of these. The Court should not allow Defendants to slip in disputed data through judicial notice where Defendants failed to raise this evidence properly in accordance with the Court's scheduling orders.

II. The current partisan makeup of the legislature and the success of non-Black candidates in statewide elections are irrelevant to the proceedings.

Nor should the Court take judicial notice of irrelevant facts like the partisan makeup of the current Georgia legislature or the success of non-Black candidates in statewide elections.

A court may take judicial notice of only those facts that are adjudicative, meaning that they are "relevant to a determination of the claims presented in a case." *Dippin' Dots, Inc.*, 369 F.3d at 1204. Irrelevant facts are neither admissible nor adjudicative, and therefore the Court may "refuse to take judicial notice of facts that are irrelevant." *Falcon*, 957 F. Supp. at 1585; *see also Berber v. Wells Fargo, NA,* 798 F. App'x 476, 483 n.7 (11th Cir. 2020) (denying motion for judicial notice on relevance grounds).

The partisan makeup of the current legislature is irrelevant to Plaintiffs' Section 2 claims. Section 2 requires Plaintiffs to prove 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," not Republican and Democratic voters, "to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). While Defendants persist in trying to make this case about partisanship rather than race, the partisan makeup of the current Georgia

legislature has no bearing on whether disparities exist between the opportunities afforded to Black and White voters in Georgia.

The success of non-Black candidates in statewide elections is also irrelevant because Plaintiffs have not brought coalition claims alleging vote dilution on behalf of multiple minority groups. Plaintiffs' claims concern discrimination exclusively against Black Georgians. Defendants may attempt to paint all minorities with a broad brush, but Plaintiffs have not sought relief on behalf of non-Black voters, and thus the success of non-Black candidates in statewide elections falls squarely outside the bounds of these cases.[2] Thus, judicially noticing these facts, without any explanation as to their relevance to the claims at issue in these proceedings, would be improper.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion to take judicial notice of (1) Census data from Table 4b of the U.S. Census Current Population Survey in 2018, 2020, and 2022; (2) the partisan makeup of the current Georgia state legislature; and (3) the success of non-Black candidates in statewide elections.

[2] Further, as the Court concluded in its Order denying the parties' cross-motions for summary judgment, "an inquiry into voter preferences as it relates to the race of the candidate is not necessary to prove the second and third *Gingles* preconditions." Order Denying Summary Judgment at 59, *Pendergrass* ECF No. 215.

Dated: August 11, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **PLAINTIFFS' PARTIAL OPPOSITION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE** has been prepared in accordance with the font type and margin requirements of LR 5.1, N.D. Ga., using font types of Times New Roman, point size of 14, and Century Schoolbook, point size of 13.

Dated: August 11, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused to be electronically filed a copy of the foregoing **PLAINTIFFS' PARTIAL OPPOSITION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to counsel of record.

Dated: August 11, 2023

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