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

ANNIE LOIS GRANT; QUENTIN T. HOWELL; ELROY TOLBERT; TRIANA ARNOLD JAMES; EUNICE SYKES; ELBERT SOLOMON; DEXTER WIMBISH; GARRETT REYNOLDS; JACQUELINE FAYE ARBUTHNOT; JACQUELYN BUSH; and MARY NELL CONNER,

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. 1:22-CV-00122-SCJ

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Defendants offer no meaningful evidence to rebut Plaintiffs' Section 2 claims. Instead, they try to move the goalposts, inventing novel legal requirements and arguing that Plaintiffs failed to meet them. Sometimes, Defendants do not hide their revisionism, admitting that courts have "disagreed" with their racially polarized voting standard. ECF No. 203 ("Defs.' Opp'n") at 19 n.7. Other times, their temerity is concealed—albeit barely. For example, they fault Dr. Loren Collingwood for "not offer[ing] an opinion that racism . . . has caused lower turnout for Black voters," *id.* at 28, even though the U.S. Supreme Court recognized in *Thornburg v. Gingles* that Congress "*repudiated*" the Section 2 intent test in part because "it involve[d] charges of racism on the part of individual officials or entire communities," 478 U.S. 30, 44 (1986) (emphasis added) (quoting S. Rep. No. 97-417, pt. 1, at 36 (1982)). Defendants cannot defeat summary judgment by inventing new law; that this is their best defense speaks volumes. Because there is no genuine dispute of fact as to the elements of Plaintiffs' claims with respect to six of their eight illustrative legislative districts, partial summary judgment in their favor is warranted.

ARGUMENT

I. Plaintiffs have standing to bring their claims.

Standing in a Section 2 vote-dilution case requires that "each voter resides in a district where their vote has been cracked or packed." *Harding v. County of Dallas*, 948 F.3d 302, 307 (5th Cir. 2020); *see also, e.g.*, *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 817–18 (M.D. La.) ("[T]he relevant standing inquiry is . . . whether Plaintiffs have made supported allegations that they reside in a reasonably compact area that could support additional majority-minority districts.'" (cleaned up)), *cert. granted*, 142 S. Ct. 2892 (2022).

Here, Plaintiffs are registered voters who reside in the Atlanta metropolitan area or Black Belt—specifically, in the compact areas where Plaintiffs have demonstrated the possibility of additional majority-Black legislative districts—in districts where their votes have been either cracked or packed. *See* Exs. 24–33.[1] They therefore have standing.

Notably, Plaintiffs *did* provide the Court with the "evidence supporting the residence of particular plaintiffs" needed to establish standing, Defs.' Opp'n 11–12,

[1] Exhibits 1 through 23 are attached to the declaration of Jonathan P. Hawley in support of Plaintiffs' motion for summary judgment. *See* ECF No. 174. Exhibits 24 through 47 are attached to the second declaration of Jonathan P. Hawley in support of Plaintiffs' motion for summary judgment, filed concurrently with this reply.

in the form of declarations filed with their preliminary injunction motion, which Plaintiffs now resubmit, *see* Exs. 24–30. Moreover, Defendants asked Plaintiffs in their depositions to confirm their pertinent details in the amended complaint, their addresses, or both, providing further record evidence of standing. *See* Exs. 34–44. At any rate, that Plaintiffs have satisfied the applicable residence requirement is not disputed as a factual matter; Defendants included this information in their own statement of undisputed material facts. *See* ECF No. 192 ¶¶ 16, 22, 28, 31, 35, 37, 41, 44, 50, 54.[2]

II. There is no genuine dispute that Plaintiffs satisfied the first *Gingles* precondition with respect to six of their eight illustrative districts.

The illustrative Georgia State Senate and Georgia House of Representatives plans drawn by Blake Esselstyn satisfy the first *Gingles* precondition because they demonstrate that the Black populations in the Atlanta metropolitan area and Black

[2] Plaintiffs have also submitted standing declarations for three plaintiffs who joined this lawsuit after the preliminary injunction proceedings. *See* Exs. 31–33; *see also* ECF No. 94 (amending complaint in part to add new plaintiffs). Although these declarations were not previously part of the record in this case, given that they merely memorialize information elicited by Defendants through depositions, they "provide[] no new information" and "offer[] no surprises" that might prejudice Defendants. *Iroko Partners Ltd. v. Devace Integrated LLC*, No. 1:12-cv-01194-SCJ, 2014 WL 11716168, at *2–3 (N.D. Ga. Jan. 6, 2014) (considering evidence filed with summary judgment reply). In any event, these particular plaintiffs are not needed to establish standing, as the initial plaintiffs already covered the areas encompassed by Plaintiffs' claims.

Belt are "sufficiently large and geographically compact to constitute [] majorit[ies] in [additional] single-member district[s]." 478 U.S. at 50.

Mr. Esselstyn demonstrated that "minorities make up more than 50 percent of the voting-age population in the relevant geographic area[s]." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion). Each illustrative district has a Black voting-age population above 50%, ECF No. 189-2 ("Pls.' SUMF") ¶¶ 19, 32; Ex. 1 ("Esselstyn Report") ¶¶ 27, 48 tbls.1 & 5, which neither Defendants nor their expert disputes, *see* ECF No. 204 ("Defs.' SUMF Resp.") ¶¶ 19, 32; Ex. 8 at 74:11–16.

Compactness, in turn, requires that Plaintiffs' illustrative districts satisfy "traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (plurality opinion) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)). Mr. Esselstyn's illustrative districts comply with the same redistricting principles that the Georgia General Assembly adopted to inform its own redistricting efforts. *See* ECF No. 189-1 ("Pls.' Mot.") at 8–10. Defendants dismiss as unhelpful "[t]he various scores and calculations about the illustrative plan[s] trumpeted by Plaintiffs," Defs.' Opp'n 13, but none of Defendants' scattered criticisms of the illustrative plans serves to meaningfully dispute Mr. Esselstyn's satisfaction of the applicable redistricting criteria, as Plaintiffs explained in their opposition to Defendants' summary judgment

motion, *see* ECF No. 205 ("Pls.' Opp'n") at 10–16. At any rate, as the Court has noted, "[a]n illustrative plan can be 'far from perfect' in terms of compactness yet satisfy the first *Gingles* precondition." PI Order 54 (quoting *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1326 (N.D. Ga. 2018)).

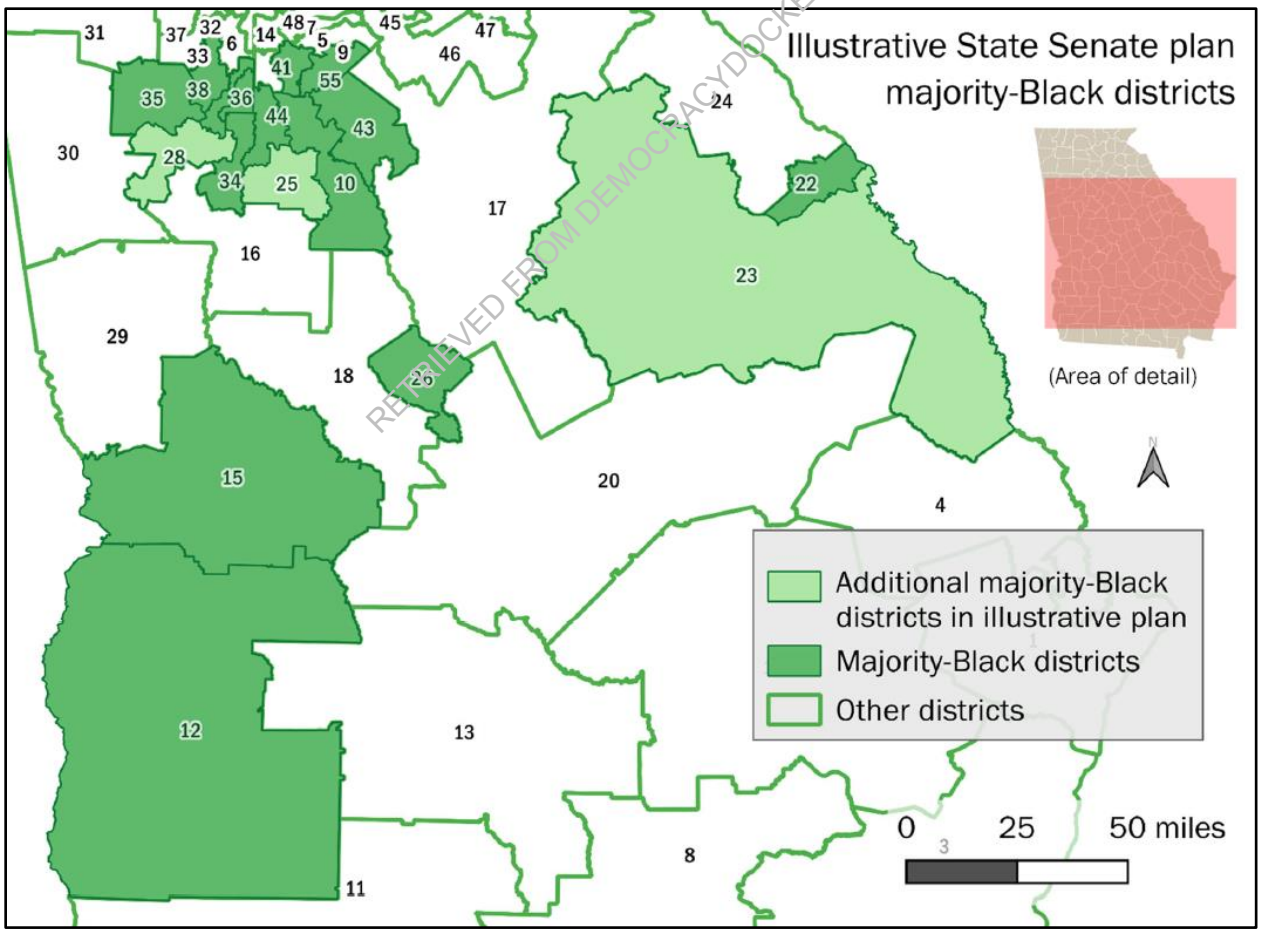
In terms of communities of interest, Defendants nitpick Mr. Esselstyn's methodology and memory but, significantly, never actually contend that his illustrative districts fail to reflect nonracial interests. They fault Mr. Esselstyn for relying on public comments and additional research to confirm the shared interests of the communities in his illustrative districts after his initial round of map-drawing, *see* Defs.' Opp'n 14–15, but they cite no authority proscribing this methodology, and certainly do not dispute Mr. Esselstyn's conclusions about public testimony or the Fall Line. Defendants suggest that "Mr. Esselstyn did not even know about various communities that he kept whole in his proposed districts," *id.* at 15, but this mischaracterizes the deposition testimony they cite, in which Mr. Esselstyn merely acknowledged that he could not recall certain specific line-drawing decisions made more than a year earlier, *see* Ex. 45 at 149:19–150:14, 180:16–23, 181:14–23, 184:5–11. Mr. Esselstyn also explained that "trying to ensure that . . . every corner" of a district "has something in common with every other corner . . . was not part of [his] calcul[us]." *Id.* at 154:2–155:9. Again, Defendants cite no authority to suggest

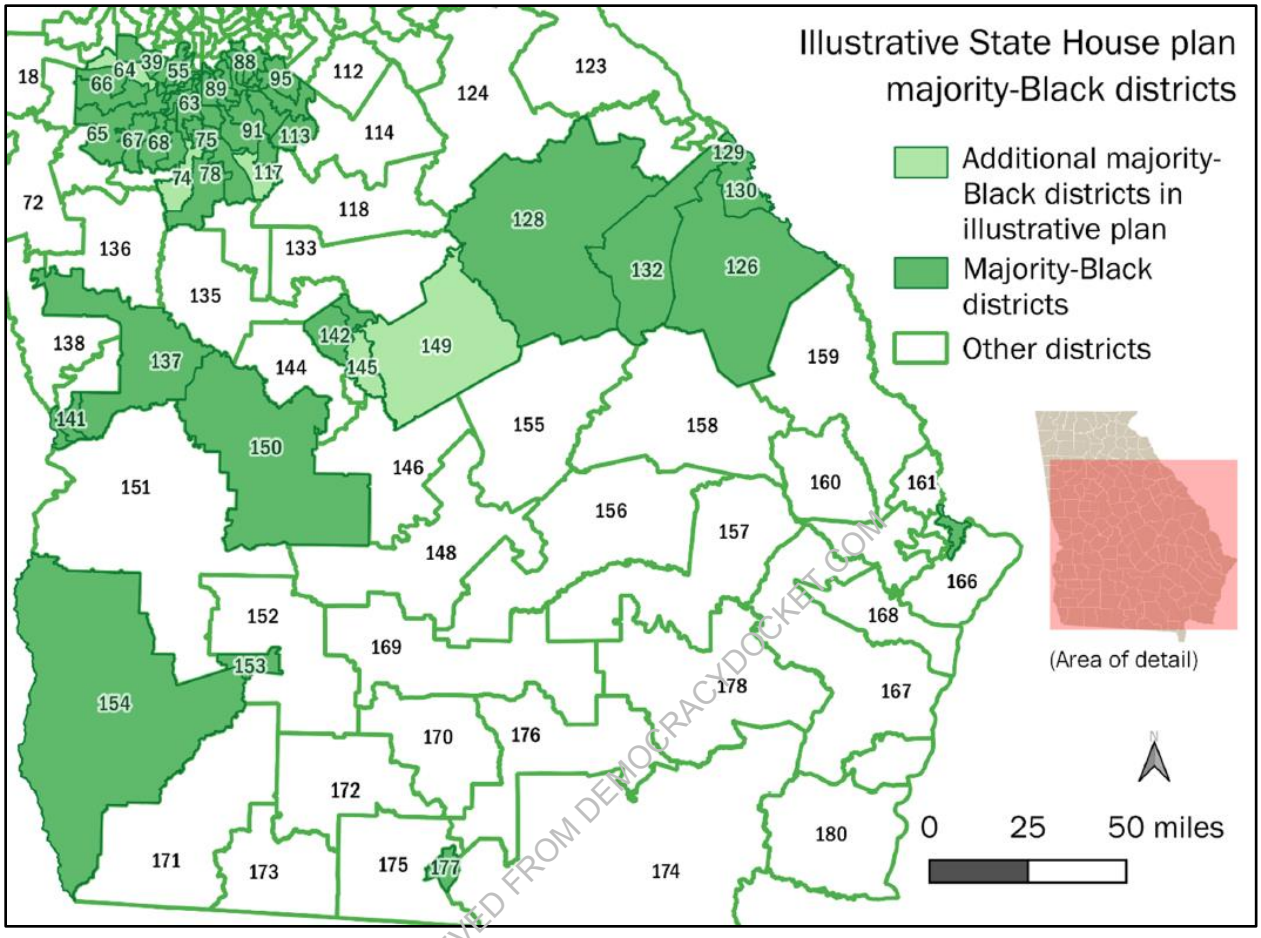
that the failure to achieve homogeneity in a district somehow renders it noncompact for Section 2 purposes.

Defendants offer a Morton's Fork that exemplifies their strategy: After (disingenuously) pointing to Mr. Esselstyn's purported "inability to identify any connection[s]" in his illustrative districts, Defs.' Opp'n 14, Defendants then reference illustrative House District 149, for which Mr. Esselstyn *did* provide specific examples of shared interests, *see* Pls.' Mot. 9–10. But Defendants then turn around and discount these undisputed commonalities because of their manufactured concerns about the timing of Mr. Esselstyn's inquiry. *See* Defs.' Opp'n 14–15. Heads, Defendants win; tails, Plaintiffs lose.

Ultimately, Defendants' quibbles are little more than red herrings, designed to obscure the fact that they never actually assert, let alone prove, that *any* of the districts for which Plaintiffs have moved for summary judgment are improperly configured or otherwise suspect. Defendants throw out various descriptive statements—for example, "to create Senate District 28, Mr. Esselstyn connected more-urban areas of Clayton County with more-rural areas in Coweta County," *id.* at 6—but stop short of reaching any normative conclusions as to whether the illustrative districts unite communities with shared interests. Their hesitancy is understandable: Even a simple visual examination of the six districts at issue on

summary judgment confirms that they encompass shared geographic and political communities. *See, e.g.*, *Robinson v. Ardoin*, 37 F.4th 208, 223 (5th Cir. 2022) (per curiam) (employing "visual inspection" of illustrative district to determine geographic compactness). Illustrative Senate Districts 25 and 28 and illustrative House Districts 64 and 117 are geographically compact districts in the Atlanta metropolitan area, while House Districts 145 and 149 are anchored in Macon-Bibb County:





Esselstyn Report ¶¶ 27, 48, figs.4 & 13.

This is not a case where Plaintiffs have proposed sprawling districts covering hundreds of miles that connect disparate pockets of minority voters. *Cf. LULAC*, 548 U.S. at 433 (rejecting "district[s] that combine[d] two farflung segments of a racial group with disparate interests"). To the contrary, the compactness of Mr. Esselstyn's districts in a physical sense confirms their compactness in a demographic sense: The six illustrative districts at issue here combined voters in two metropolitan areas and

their environs, who undeniably—and, relevant here, *undisputedly*—share common interests.

Having failed to meaningfully dispute the compactness of these six illustrative districts (certainly Mr. Morgan does not do so, *see* Pls.' Mot. 11–13), Defendants cast about for additional points of argument, none availing. Although they do not dispute it, Defendants suggest that Plaintiffs' ability-to-elect analysis is somehow irrelevant. *See* Defs.' Opp'n 16; *see also* Pls.' Mot. 10–11. But "the first *Gingles* prong is 'needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district,'" *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1303 (11th Cir. 2020) (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)), making these undisputed facts material to Plaintiffs' satisfaction of the elements of their Section 2 claims. Finally, Defendants offer yet another refrain of their racial-predominance claim, *see* Defs.' Opp'n 15–16, but, for the reasons already discussed in Plaintiffs' opposition to Defendants' summary judgment motion, this argument is premised on misreadings of caselaw and the record, *see* Pls.' Opp'n 4–16.

III. There is no genuine dispute that Plaintiffs proved the existence of legally significant racially polarized voting.

As discussed at length in Plaintiffs' opposition to Defendants' summary judgment motion, *see* Pls.' Opp'n 17–35, Defendants advance a standard for racially

polarized voting that is wholly divorced from both this circuit's caselaw and the evidence in the record.

A. Plaintiffs have proved the existence of racially polarized voting, and Defendants have failed to rebut this showing.

As the Eleventh Circuit has explained, satisfaction of the second and third *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, e.g.*, *Nipper v. Smith*, 39 F.3d 1494, 1525–26 (11th Cir. 1994) (en banc) (opinion of Tjoflat, C.J.). Here, there is no dispute that, in the areas where Plaintiffs have proposed new majority-Black legislative districts, Black voters overwhelmingly support their candidates of choice and white voters consistently and cohesively vote in opposition to Black-preferred candidates. *See* Pls.' Mot. 13–16; Pls.' Opp'n 20. Plaintiffs' evidence has firmly established that voting is polarized along racial lines, thus creating an "inference that racial bias is at work." *Nipper*, 39 F.3d at 1525.

After a Section 2 plaintiff has established minority cohesion and bloc voting, "[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. But there is no inferential assumption of partisan effect, nor any requirement that Plaintiffs

affirmatively disclaim the effects of non-racial factors as part of the threshold *Gingles* preconditions. Instead, *Defendants* may disprove *racial* motivation among the electorate to rebut the presumption created by Plaintiffs' showing—but they have failed to do so here, as Plaintiffs explained in their opposition to Defendants' summary judgment motion. *See* Pls.' Opp'n 21–26.

Defendants blithely (and incorrectly) accuse Plaintiffs of "oversimplify[ing]" the racial-polarization inquiry. Defs.' Opp'n 16. But there is no actual dispute that Plaintiffs have proved a prima facie case of legally significant racially polarized voting, and Defendants have not adduced countervailing evidence to rebut this showing. Summary judgment in Plaintiffs' favor is therefore warranted.

B. Defendants' approach to racially polarized voting is out of step with *Gingles*, circuit precedent, and Section 2.

Defendants' response to Plaintiffs' unrebutted evidence of racially polarized voting is once again to invent new requirements that, they claim, Plaintiffs must satisfy to prevail on summary judgment. Their arguments are not only unsupported by binding caselaw, but also out of step with the principles animating Section 2.

First, Defendants rely on *Marengo County* for the proposition that "the focus of the Eleventh Circuit with respect to racially polarized voting fell on the *candidates* and not the *electorate* itself," Defs.' Opp'n 17–19, but that opinion did not endorse Defendants' position that racial polarization among the electorate is insufficient to

satisfy Section 2, "tacitly" or otherwise. Notably, *Marengo County* preceded the *Gingles* majority's adoption of a definition of racially polarized voting consistent with Plaintiffs' position. *See infra* at 14–15. Setting that aside, the *Marengo County* court referenced "the consistent lack of success of qualified black candidates" as merely *one* way to establish polarization under the totality of circumstances, *distinct* from proving polarization "through direct statistical analysis of the vote returns," as Plaintiffs have done here. 731 F.2d at 1567 n.34 (quoting *Nevett v. Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978)). Moreover, the court "completely agree[d]" that "the race of the candidates" might not be dispositive or even relevant in a given case; it concluded only that, "at least as of 1978" in Marengo County, Alabama, the race of candidates was significant as a factual matter. *Id.* at 1567. That candidate race is less significant in contemporary Georgia does not mean that race no longer drives the electorate's polarization; instead, as Dr. Orville Vernon Burton has demonstrated, *see infra* at 15–16, race remains "the main issue in [Georgia] politics," *Marengo County*, 731 F.2d at 1567.[3]

[3] Indeed, a closer read of *Marengo County*, *Nipper*, and other cases from decades past demonstrates that focusing on the race of candidates had less to do with safeguarding the ability of Black candidates to win elections and more to do with the apparent unhelpfulness of white-on-white elections where "the candidate of choice of black voters was also the preferred candidate of the white voters." 39 F.3d at 1539–41 ("[W]hite-on-white elections in which a small majority (or a plurality) of

Defendants further concede that "courts in this judicial circuit, including this Court in prior rulings, have disagreed with [their] interpretation of racial polarization." Defs.' Opp'n 19 n.7. This is an understatement, to say the least; courts have regularly held that the *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); *see also, e.g.*, *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) ("The resultant inference is not immutable, but it is strong; it 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."). This standard makes sense: Because Section 2 is ultimately concerned, as *Marengo County* itself recognized, with whether "a particular election method can deny *minority voters* equal opportunity to participate meaningfully in elections," 731 F.2d at 1566–67 (emphasis added) (quoting S. Rep. No. 97-417, pt. 1, at 33), the focus of this inquiry

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black voters prefer the winning candidate seem comparatively less important."). *Nipper* acknowledged that "electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters"—in other words, where, as demonstrated here, "black voters were energized to support a particular white candidate"—*would* be legally significant. *Id.* at 1540; *see also Lewis v. Alamance County*, 99 F.3d 600, 605–06 (4th Cir. 1996).

properly belongs on whether Plaintiffs and other Black voters in the Atlanta metropolitan area and Black Belt are foreclosed from electing their preferred candidates due to white bloc voting.

Second, Defendants' approach to racially polarized voting is inconsistent with *Gingles*. Although Defendants claim that the *Gingles* majority did not endorse a standard for racially polarized voting that focuses on the race of the electorate, this is simply incorrect: The majority expressly "adopt[ed a] definition of 'racial bloc' or 'racially polarized' voting" that was premised on "correlation," concluding 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 (emphasis added) (cleaned up). Although Justice White's concurrence disagreed with the *Gingles* plurality's position that the race of a candidate is *never* relevant to the racially polarized voting analysis, he did not suggest that it is *always* relevant. To the contrary, he acknowledged that, "on the facts of [that] case"—where, as here, "the degree of racial bloc voting was so marked as to be substantively significant, in the sense that the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters," *id.* at 54 (cleaned up)—"there [wa]s *no need* to draw the

voter/candidate distinction," *id.* at 83 (White, J., concurring) (emphasis added); *see also* Pls.' Opp'n 31–33.

Third, given that Plaintiffs need not prove the *causes* of racially polarized voting in the first instance—and, indeed, need not prove it here *at all* given Defendants' failure to rebut the "inference that racial bias is at work" established by the second and third *Gingles* preconditions, *Nipper*, 39 F.3d at 1525—Defendants' objections to Dr. Palmer's analysis are irrelevant. They are also misguided. Defendants fault Dr. Palmer for excluding primaries from his analysis, relying on Dr. Alford to suggest that analysis of primaries would have yielded probative evidence of causation. *See* Defs.' Opp'n 23. But Dr. Alford admitted that ecological inference analysis "is never going to answer a causation question," Ex. 46 at 82:17–84:14—whether the analysis focuses on primary or general elections.

Finally, Defendants suggest that "the Court here has no evidence before it that" voting is polarized on account of race. Defs.' Opp'n 23. Proving the causes of polarization is not Plaintiffs' burden in this case. But even if it were, Plaintiffs *did* submit such evidence: the report of Dr. Burton, who explored the relationship between race and partisanship in Georgia politics. As explained in Plaintiffs' opposition to Defendants' summary judgment motion, *see* Pls.' Opp'n 26–31, Dr. Burton demonstrated that partisanship in the South has been and continues to be

driven by race, and that "race and partisanship [are] so deeply intertwined[] that statisticians refer to it as multicollinearity, meaning one cannot, as a scientific matter, separate partisanship from race in Georgia elections," Pls.' SUMF ¶ 160; Ex. 4 ("Burton Report") at 61; *see also* Pls.' SUMF ¶¶ 148–64; *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG, 2022 WL 3135915, at *13 (N.D. Ga. Aug. 5, 2022), *appeal docketed*, No. 22-12593 (11th Cir. Aug. 8, 2022).

In short, Plaintiffs have not only proved the existence of legally sufficient racially polarized voting through their *undisputed* satisfaction of the second and third *Gingles* preconditions, they have further demonstrated that race drives this polarization—and Defendants adduced *no* evidence to the contrary.[4]

IV. Defendants misconstrue the totality-of-circumstances inquiry.

In response to Plaintiffs' (also unrebutted) evidence relating to the totality of circumstances, *see* Pls.' Mot. 16–35; Pls.' SUMF ¶¶ 98–223, Defendants primarily employ their familiar tactic of imposing novel standards and requirements.

History of discrimination. That Georgia pursued discriminatory, state-sponsored policies aimed at disenfranchising Black voters throughout the 19th and

[4] Defendants also raise a constitutional argument regarding Plaintiffs' interpretation of racially polarized voting, *see* Defs.' Opp'n 24, but Plaintiffs addressed and refuted this contention in their opposition to Defendants' summary judgment motion, *see* Pls.' Opp'n 31–35.

20th centuries cannot be disputed; this Court has taken judicial notice of the fact that, "prior to the 1990s, Georgia had a long sad history of racist policies in a number of areas including voting." *Fair Fight Action, Inc. v. Raffensperger*, 593 F. Supp. 3d 1320, 1342 (N.D. Ga. 2021). As the Court has further noted,

> whether some of the history Dr. Burton discussed is decades or centuries old does not diminish the importance of those events and trends under this Senate Factor, which specifically requires the Court to consider the *history* of official discrimination in Georgia. And it is not a novel concept that a history of discrimination can have present-day ramifications.

PI Order 208 (citing *Marengo Cnty. Comm'n*, 731 F.2d at 1567). Rather than contest this history, Defendants fault Plaintiffs for not "connect[ing] the challenged legislative plans to" it. Defs.' Opp'n 26. But there is no requirement under Section 2 that the challenged election practice be directly "connect[ed]" (whatever that might mean) to a history of discrimination that has the effect of "impair[ing] the present-day ability of minorities to participate on an equal footing in the political process." *Marengo Cnty. Comm'n*, 731 F.2d at 1567; *see also infra* at 22–23.

Defendants' other arguments are no more persuasive. They accuse Plaintiffs of "gloss[ing] over" the U.S. Department of Justice's preclearance of Georgia's 2011 legislative plans, Defs.' Opp'n 26, but do not explain how this single act nullifies the other acts of state-sponsored discrimination identified by Plaintiffs, *see Robinson*, 605 F. Supp. 3d at 847 ("[T]o the extent these facts are offered as

mitigation of the repugnant history of discrimination . . . , they fall completely flat.").[5] Defendants brush aside post-*Shelby County* polling-place closures (including those that occurred in predominantly Black neighborhoods in Macon-Bibb County, where Mr. Esselstyn drew two new majority-Black House districts) on the ground that they are "not the responsibility of state officials," Defs.' Opp'n 26, which is both irrelevant—this factor considers "official discrimination *in* the state" and is not limited only to discrimination *by* the State, *Gingles*, 478 U.S. at 36 (emphasis added) (quoting S. Rep. No. 97-417, pt. 1, at 28)—and ignores Dr. Burton's testimony that these closures were tacitly encouraged by former Secretary of State Brian Kemp, *see* Burton Report 49–50. Lastly, that "partisan motivations may be at issue here versus racial ones," Defs.' Opp'n 26, is essentially a distinction without a difference given the inextricability of race and partisanship in Georgia, *see supra* at 15–16. The discrimination reported by Dr. Burton indisputably "touche[s] the right of" Black Georgians "to register, to vote, or otherwise to participate in the democratic process," regardless of the motivation behind it. *Gingles*, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417, pt. 1, at 28).

[5] Nor, for that matter, would the Department of Justice's previous determination under a different legal framework—Section 5's retrogression standard—insulate the enacted legislative plans from scrutiny under Section 2's vote-dilution standard. *See, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003).

Racially polarized voting. Plaintiffs need not prove that race causes polarization in Georgia's electorate—but did nevertheless. *See supra* at 15–16.

Past voting practices. That Georgia's majority-vote requirement led in recent years to the success of two Black-preferred candidates does not undo this practice's general discriminatory effect; "[o]n balance, the features of the electoral system operate to submerge minority interests." *Marengo Cnty. Comm'n,* 731 F.2d at 1570.

Past discrimination affecting ability to participate. Puzzlingly, Defendants fault Plaintiffs for relying on census data to demonstrate that Black Georgians suffer from socioeconomic disparities, Defs.' Opp'n 28, but this is precisely how the fifth Senate Factor is generally established, *see, e.g.*, *Rose*, 2022 WL 3135915, at *17; *Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819, at *73 (N.D. Ala. Jan. 24, 2022), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022). Defendants flag that "socioeconomic disparities affect political participation, regardless of the race of the voters involved," Defs.' Opp'n 28, but Dr. Collingwood demonstrated—and Defendants do not dispute—that these disparities are more pronounced for Black Georgians, *cf. Teague v. Attala County*, 92 F.3d 283, 294–95 (5th Cir. 1996) ("The fact that blacks *and* whites . . . are going to the polls in decreasing proportions does not explain why blacks *alone* are essentially shut out of the political processes[.]"). And there certainly is no requirement that Plaintiffs

prove that "racism . . . has caused lower turnout for Black voters," nor that they connect the challenged legislative plans to depressed Black voter participation. Defs.' Opp'n 28. Plaintiffs have undisputedly demonstrated (1) "*disproportionate* educational, employment, income level, and living conditions arising from past discrimination" and (2) that "the level of black participation is depressed," and thus they "need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." *Wright*, 979 F.3d at 1294 (emphasis added) (quoting *Marengo Cnty. Comm'n*, 731 F.2d at 1568–69).[6]

Racial appeals. Defendants suggest that Plaintiffs cannot carry their burden on this factor because they "have presented no evidence of racial appeals in legislative elections," Defs.' Opp'n 29, but *Gingles* did not impose such a qualification on this factor, *see* 478 U.S. at 37, and the authority Defendants cite for this proposition stated only that "the type of campaign to which [the appeals] relate is *relevant* to the weight this evidence carries," *Rose*, 2022 WL 3135915, at *17

[6] Defendants also elliptically refer to "several incorrect statements by Dr. Collingwood," Defs.' Opp'n 28, but the only apparent inaccuracy they identify is his conclusion that "Black children [are] more than three times as likely [] to live below the poverty line," Ex. 5 at 4, on the trivial ground that "[t]he figures included in Table 1 on page 5 of Dr. Collingwood's Report from the 2015-2019 ACS for children below the poverty line are 31.3% for Black children and 11.5% for white children, which is less than a three-fold difference," Defs.' SUMF Resp. ¶ 176.

(emphasis added) (considering "political campaign advertisements in Georgia generally"). Nor does it matter that some candidates lost after making racial appeals; as this Court has noted, "[e]ven if the Court were to weigh the evidence, this factor does not require that racially polarized statements be made by successful candidates. The factor simply asks whether campaigns include racial appeals." *Fair Fight Action*, 593 F. Supp. 3d at 1343–44.

Defendants otherwise misconstrue (but, tellingly, never dispute) Plaintiffs' evidence. Plaintiffs do not contend that "efforts to prevent voter fraud" are necessarily "proof of racism." Defs.' Opp'n 29. Instead, Plaintiffs have demonstrated through Dr. Burton's report that *false* allegations of voter fraud in the wake of the 2020 election carried undeniable racial undertones and reflected historic efforts to curtail Black suffrage in Georgia. *See* Pls.' Mot. 31–32; Pls.' SUMF ¶¶ 206–09; Burton Report 70–74. Nor do Plaintiffs rely on impermissible hearsay in support of this factor. As an expert, Dr. Burton may rely on otherwise-inadmissible evidence where, as here, such practices are accepted in his field. *See* Fed. R. Evid. 703; *City of South Miami v. DeSantis*, No. 19-cv-22927-BLOOM/Louis, 2020 WL 7074644, at *15 (S.D. Fla. Dec. 3, 2020) ("[T]he newspaper articles and studies at issue are the types of sources generally relied upon by historians, statisticians, political scientists, and social scientists[.]"). And the additional newspaper articles

cited by Plaintiffs, *see* Exs. 12–23, are offered not for the truth of the matters asserted—which is to say, whether racial appeals were actually made—but rather for the non-hearsay purpose of demonstrating that racial appeals remain a fixture of Georgia's political environment as a consequence of frequent media coverage, *see, e.g.*, *Cochran v. City of Atlanta*, 289 F. Supp. 3d 1276, 1290 n.8 (N.D. Ga. 2017).

Rate of election of Black candidates. Defendants cannot and do not dispute Plaintiffs' evidence on the seventh Senate Factor. Defs.' Opp'n 30. Instead, they vaguely point to the elections of "judicial candidates and Black members of statewide courts," *id.*, but provide no evidence for the Court to evaluate. At any rate, "some success at the polls does not . . . disprove the existence of vote dilution." *Sanchez v. Colorado*, 97 F.3d 1303, 1324 (10th Cir. 1996).

Justification is tenuous. Defendants trumpet "partisanship" as the motivation and justification for the enacted State Senate and House maps, Defs.' Opp'n 31, but they cite no authority suggesting that partisan gamesmanship somehow excuses the State of Georgia from doing what "the Voting Rights Act requires," PI Order 219.

* * *

Defendants repeatedly fault Plaintiffs for not demonstrating direct connections between the Senate Factors and the challenged vote dilution. This overarching criticism fundamentally misunderstands the role of the totality-of-

circumstances analysis. The Senate Factors are "circumstantial evidence [that] support an inference of vote dilution under section 2" because they "were designed as 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. The explicit "connections" that Defendants demand are not required; these factors, taken together, create an *inference* of unlawful dilution—especially since Defendants have produced no evidence whatsoever to contest Plaintiffs' proof.

V. Partial summary judgment in Plaintiffs' favor is appropriate.

Throughout their opposition, Defendants emphasize that "it is unusual to find summary judgment awarded to the plaintiffs in a vote dilution case." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015). But they overlook that this case *is* unusual: Rather than dispute the material facts, Defendants instead try to change the law.

Fayette County does not otherwise foreclose partial summary judgment for Plaintiffs. The record here contains none of the factual disputes that precluded entry of summary judgment for the plaintiffs in that case. *See id.* at 1346 ("[T]he district court did not plainly state that no genuine issues of material fact were present."). Moreover, that court was forced to weigh in on disputes between the parties' experts

and make credibility determinations. *See id.* at 1347–48 (to enter summary judgment in plaintiffs' favor, "the [district] court clearly rejected the deposition testimony of the [defendant's] expert and accepted the deposition testimony of the [plaintiffs'] expert"). Here, by contrast, there is no dispute of material fact among the experts as to illustrative Senate Districts 25 and 28 and illustrative House Districts 64, 117, 145, and 149. Mr. Morgan does not dispute that minority voters are sufficiently numerous and geographically compact to constitute majorities in these districts. *See supra* at 3–9; Pls.' Mot. 11–13. Dr. Alford conceded in his deposition that the relevance of his analysis hinges not on the *fact* of racial polarization, which is not in dispute, *see* Ex. 7 at 3, but on a threshold *legal* question, *see* Ex. 9 at 114:13–21; *see also* Pls.' Mot. 23–25; Pls.' Opp'n 22–26. And neither expert meaningfully disputes that the totality of circumstances permits the inference that "the contested electoral scheme allows [racial] bias to dilute the minority group's voting strength." *Nipper*, 39 F.3d at 1534. Plaintiffs are thus entitled to partial summary judgment.

There is no rule against summary judgment for plaintiffs in Section 2 vote-dilution cases, and courts have granted it both in full, *see Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1414 (E.D. Wash. 2014), and in part, *see, e.g.*, *Rose v. Raffensperger*, 584 F. Supp. 3d 1278, 1295 (N.D. Ga. 2022) (granting summary judgment for plaintiffs as to *Gingles* preconditions), *appeal docketed*, No. 22-12593

(11th Cir. Aug. 8, 2022); *United States v. Charleston County*, 318 F. Supp. 2d 302, 328 (D.S.C. 2002) (same); *Harper v. City of Chicago Heights*, 824 F. Supp. 786, 792–93 (N.D. Ill. 1993) (same); *Pope v. County of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 WL 316703, at *15 (N.D.N.Y. Jan. 28, 2014) (granting summary judgment for plaintiffs as to first *Gingles* precondition). Here, as in those cases, there is no genuine dispute that Plaintiffs satisfied their evidentiary burden as to six of their eight illustrative districts—especially as to the *Gingles* preconditions, which are readily amenable to summary disposition both generally and in this case. Should the Court wish to proceed to trial in whole or in part for further factual consideration, then Plaintiffs will reproduce their evidence in that forum. But this outcome should not be required here simply because summary judgment in Section 2 cases is rare.

CONCLUSION

Defendants want to change the rules because they don't like the score. While Plaintiffs have satisfied their evidentiary burden as to the *Gingles* preconditions and Senate Factors with respect to six of their eight illustrative districts, Defendants have adduced no compelling evidence to the contrary. For this reason and those in their summary judgment briefing, Plaintiffs respectfully request that the Court enter partial summary judgment in their favor.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in Support of 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: May 3, 2023

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