

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NAVAJO NATION, a federally recognized Indian Tribe; NAVAJO NATION HUMAN RIGHTS COMMISSION; LORENZO BATES; JONNYE KAIBAH BEGAY; GLORIA ANN DENNISON; TRACY DEE RAYMOND; and BESSIE YAZZIE WERITO,

Plaintiffs,

v.

SAN JUAN COUNTY, NEW MEXICO; SAN JUAN COUNTY BOARD OF COMMISSIONERS; JOHN BECKSTEAD, in his official capacity as Chairman; TERRI FORTNER, in her official capacity as Commissioner; STEVE LANIER, in his official capacity as Commissioner; MICHAEL SULLIVAN, in his official capacity as Commissioner; GLOJEAN TODACHEENE, in her official capacity as Commissioner; and TANYA SHELBY, in her official capacity as County Clerk,

Defendants.

No. 1:22-cv-00095-JB-JFR

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON *GINGLES* 2 AND 3**

Defendants argue that they are entitled to summary judgment because of Plaintiffs' proofs do not rise to the level of the second and third *Gingles* preconditions, i.e., that American Indian voters are not cohesive and that their candidates of choice are not defeated by white bloc voting. *See* Dkt. 103.

To arrive at the first of these conclusions, Defendants ask the Court to adopt an arbitrary cohesion threshold for the second *Gingles* precondition that the Tenth Circuit has said is

inappropriate. Plaintiffs' uncontradicted statistical evidence using Ecological Inference analysis shows that of more than fifty elections analyzed, American Indian voters support the same candidate in most elections at "landslide" levels, which is enough to demonstrate a triable question of fact of cohesion under the second *Gingles* precondition.

To arrive at its conclusion as to the third *Gingles* precondition, Defendants must ignore the abundant evidence demonstrating a triable question of fact. Plaintiffs' statistical evidence shows that none of the candidates preferred by American Indian voters are preferred by Non-American Indian voters and that in the last four election cycles in District 2 – the district at issue in this case – the candidate preferred by American Indian voters has lost every time as a result of bloc voting by Non-American Indian voters. Finally, in response to an argument made by Defendants regarding the percentage of the white population in District 2 because of the existence of a sizable non-White, Non-American Indian population, the federal circuits that have addressed the question have found that courts can consider the voting patterns of this third group as part of the third *Gingles* precondition analysis.

For these reasons, and as explained below, Plaintiffs respectfully submit that Defendants' Motion should be denied because there are issues of material fact that must be resolved at trial.

I. RESPONSE TO DEFENDANTS' "UNDISPUTED MATERIAL FACTS" ("DSOF")

1. Undisputed.
2. Undisputed that District 2 of the Enacted Plan has eleven precincts that have over 90 percent non-Hispanic any-part American Indian VAP and over 90 percent non-Hispanic American Indian VAP of a single-race. *See Large v. Fremont Cnty.*, 670 F.3d 1133, 1135 n.2 (10th Cir. 2012). Disputed as to the percentages because Defendants' data includes any-part American Indian VAP regardless of Hispanic origin for some listed precincts.

3. Undisputed but immaterial to *Gingles 2* and *Gingles 3*.
4. Undisputed but immaterial to *Gingles 2* and *Gingles 3*.
5. Undisputed.
6. Disputed as stated in Plaintiffs' Response to DSOF ¶ 2. Disputed and immaterial to *Gingles 2* and *Gingles 3* as stated in Additional Undisputed Material Facts ("PSOF") ¶¶ 8-42.
7. Disputed and immaterial to *Gingles 2* and *Gingles 3* as stated in PSOF ¶¶ 8-9, 29-42.
8. Disputed and immaterial to *Gingles 2* and *Gingles 3* as stated in PSOF ¶¶ 8-9, 29-42.
9. Undisputed that Commissioner McDaniel received 51 more votes in Precinct 16 than Zac George. Undisputed that the Huerfano Chapter House is located in Precinct 16. Disputed and immaterial to *Gingles 2* and *Gingles 3* as stated in PSOF ¶¶ 8-9, 29-42.
10. Disputed because the percentage of votes received by Zac George varies in the identified precincts. Immaterial to *Gingles 2* and *Gingles 3* as stated in PSOF ¶¶ 8-42.
11. Same response as the Response to DSOF ¶10.
12. Immaterial to *Gingles 2* and *Gingles 3*.
13. Immaterial to *Gingles 2* and *Gingles 3*.
14. Immaterial to *Gingles 2* and *Gingles 3*, which is proven through the statistical methods as stated in PSOF ¶¶ 8-9. Mr. Chavez was the candidate of choice of 67.2 percent and 51.4 percent of American Indian voters in 2014 and 2018, respectively. *See* PSOF ¶¶ 18, 20-21.
15. Disputed because none of the cited deposition testimony identifies the candidate for whom the listed Plaintiffs voted in 2022, if any. Immaterial to *Gingles 2* and *Gingles 3*, which is proven through the statistical methods as stated in PSOF ¶¶ 8-9, except to the extent that the

cited testimony shows special circumstances explaining why there was less American Indian support for Mr. George in the 2022 District 2 election. Mr. George was the candidate of choice of 58.6 percent of American Indian voters in 2022. *See* PSOF ¶ 18.

16. Undisputed as to the description of the election results and candidates to the extent they refer to San Juan County Commission District 2. The 2018 District 2 election reflects racial bloc voting by white and Non-American Indian voters. *See* PSOF ¶¶ 20-21.

17. Disputed for the reasons identified in Plaintiffs' Response to DSOF ¶ 2. Disputed and immaterial to *Gingles 2* and *Gingles 3* as stated in PSOF ¶¶ 8-42.

18. Disputed because the cited deposition testimony does not support the stated proposition. Immaterial to *Gingles 2* and *Gingles 3*, which is proven through the statistical methods as explained in PSOF ¶¶ 8-9, except to the extent that the cited testimony shows special circumstances explaining why there was less American Indian support for Mr. Chavez in the 2018 District 2 election involving three candidates. Mr. Chavez was the candidate of choice of 67.2 percent and 51.4 percent of American Indian voters in 2014 and 2018, respectively. *See* PSOF ¶¶ 18, 20-21.

19. Disputed and immaterial to the analysis of *Gingles 2* and *Gingles 3*. *Gingles* does not require any set percentage for cohesion. *See infra* Part V(B). Defendants improperly aggregate countywide analysis with district-specific analysis in District 1, 2, and 4. *See* PSOF ¶¶ 8-28.

20. Undisputed that Professor Barreto does not identify the race of all of candidates in his report.

21. Disputed. *See* Ex. 1, Barreto Rebuttal Rep. ¶¶ 16-20 & App. A. Gertrude Lee was a candidate favored by white voters and not favored by American Indian voters. *See* PSOF ¶¶ 25-26.

22. Same response as the Response to DSOF ¶ 21.

23. Immaterial to *Gingles 2* and *Gingles 3*, with no evidence that the two cited elections fail to show the same sustained pattern of American Indian cohesion and white racial bloc voting in the 58 elections Dr. Barreto examined between 2010 and 2022. *See* PSOF ¶¶ 11-28.

24. Disputed. The cited material does not support the stated proposition, as DSOF ¶ 25 demonstrates.

25. Undisputed as to the cited District 2's King's EI data showing American Indian voter cohesion for the four identified elections. The rest is disputed because it misrepresents Dr. Barreto's analysis. *See* Ex. 2, Barreto Rep; Ex. 1, Barreto Rebuttal Rep.

26. Undisputed that the expert witnesses conducted analysis subject to limitations of "idiosyncrasy in data" such as inconsistencies "in the results from the NM Legislatures [sic] published block assignment files and shapefile" with the files the County produced for the Enacted Plan." Ex. 3, Bryan Rep. ¶ 40 & n.6. Immaterial to *Gingles 2* and *Gingles 3* because Defendants offer no evidence of any material impact on Dr. Barreto's EI analysis and conclusions.

27. Undisputed, to the extent the statement refers to District 2 not having a majority American Indian population under any measure using 2020 Census data.

28. Disputed. *See* PSOF ¶¶ 14-16.

29. Disputed. Dr. Barreto's analysis of the 51 countywide exogenous elections includes data showing voting patterns in the area of District 1 under the Enacted Plan. *See* Ex. 2, Barreto Rep. & Tables 2-3 and App. A; Ex. 1, Barreto Rebuttal Rep.

30. Undisputed that according to the 2020 Census, American Indians comprise the identified percentages of VAP in District 2 under the Enacted Plan, depending upon which data

characteristics for American Indians are used. Undisputed that according to the 2020 Census, Non-Hispanic single-race whites comprise 26.8 percent of District 2’s VAP under the Enacted Plan.

II. ADDITIONAL UNDISPUTED MATERIAL FACTS (“PSOF”)

A. **Demographics and Geography of San Juan County**

1. The majority of San Juan County’s land mass, just under two-thirds, is located on the tribal lands of the Navajo Nation. Citizens of the Navajo Nation (“Navajos”) comprise the overwhelming majority of the County’s American Indian residents. Dkt. 1, Compl. ¶¶ 2, 35; Dkt. 30, Answer ¶¶ 2, 35.

2. The County’s population has declined over the past decade. It has decreased from a total population of 130,044 in the 2010 Census to a total population of 121,661 in the 2020 Census. The population change between 2010 and 2020 represents a decrease of 8,383 people. Dkt. 1, Compl. ¶¶ 36-37; Dkt. 30, Answer ¶¶ 36-37.

3. The County’s population loss has been driven by “significant amounts of white, non-Hispanic population [that] left between 2010 and 2010.” Ex. 3, Bryan Rep. ¶ 60. During that same period, the number of American Indian residents has increased. *See id.*; Dkt. 1, Compl. ¶ 6.

4. The 2020 Census demographics for San Juan County are as follows, using non-Hispanic single-race data to avoid double-counting (Dkt. 1, Compl. ¶ 42; Dkt. 30, Answer ¶ 42):

Figure 1 – San Juan County Population (2020 Census)

	Total Population		Voting Age Population (VAP)	
Non-Hispanic American Indian and Alaska Native Alone	48,413	39.8%	34,663	38.7%
Non-Hispanic White Alone	43,583	35.8%	35,509	39.6%
Non-Hispanics of Some Other Race Alone	1,947	1.6%	1,494	1.7%
Hispanics of any Race	23,630	19.4%	15,477	17.3%
Two or More Races	4,088	3.4%	2,521	2.8%
Total	121,661		89,664	

Source: U.S. Census, 2020 Census Redistricting Data (Public Law 94-171) Summary File, Hispanic or Latino, and Not Hispanic or Latino by Race, Tables P2 and P4.

5. The map the County adopted in 2021 for commission district elections (“the Enacted Plan”) “consists of only one performing American Indian District in District 1 (D1). This map cracks the Navajo population in multiple other districts across the county, rendering it too small to have meaningful . . . equal opportunities to elect outside of District 1 . . .” District 1 has a VAP “of 83% American Indian which overly packs American Indian voters into this single district.” Ex. 2, Barreto Rep. ¶ 16.

6. The 2020 Census demographics for the Enacted Plan are (Dkt. 1, Compl. ¶ 67):

Figure 2 – Enacted Plan (2020 Census)

District	Total Population	Deviation	Percent Deviation	Total VAP	American Indian VAP	American Indian Share of VAP
1	23,294	-1038	-4.27%	17,073	14,223	83.31%
2	24,549	217	0.89%	18,023	9,424	52.29%
3	25,187	855	3.51%	18,837	2,241	11.90%
4	24,551	219	0.90%	18,229	2,824	15.49%
5	24,080	252	-1.04%	17,502	5,951	34.00%

Source: U.S. Census, 2020 Census Redistricting Data (Public Law 94-171) Summary File, Hispanic or Latino, and Not Hispanic or Latino by Race, Tables P2 and P4.

7. District 2 in the Enacted Plan is not an effective majority American Indian district. At 52 percent American Indian VAP, District 2 “*appear[s]* to be narrowly majority-minority” but it does not “perform to elect American Indian preferred candidates.” District 2 includes “some of the most polarized voting precincts which bloc vote against [the] American Indian candidate of preference.” Ex. 2, Barreto Rep. ¶¶ 14-17 (italics in original); *see also id.* at ¶ 30 (describing the polarized precincts).

B. Professor Barreto’s Use of Accepted Scientific Analysis Shows American Indian Voters are Cohesive and Their Candidate of Choice is Usually Defeated by Legally Significant Racial Bloc Voting by White Voters.

8. “[R]acially polarized voting (RPV) is defined as voters of different racial or ethnic groups exhibiting different candidate preferences in an election. It simply means that voters of different groups are voting in *polar* opposite directions, rather than in a coalition . . . RPV statistical analysis is not concerned with *why* voters make decisions. Rather, RPV simply reports *how* voters are voting.” Ex. 2, Barreto Rep. ¶ 21 (italics in original). RPV analysis is “only concerned with the race and ethnicity of voters, and which candidates they support.” *Id.*

9. “Ecological inference (EI) ‘has been the benchmark in evaluating racial polarization in voting rights lawsuits . . . Two variations of EI that have emerged are referred to as King’s EI and EI: RxC . . . Generally speaking, both methods take ecological data in the aggregate – such as precinct vote totals and racial demographics – and use Bayesian statistical methods to find voting patterns by regressing candidate choice against racial demographics within the aggregate precinct.” Ex. 2, Barreto Rep. ¶ 25; *see also id.* at ¶ 21.

10. Professor Barreto performed both EI methods using the total votes cast in each precinct for each candidate and the total VAP that is American Indian, white, Hispanic, or Other. Through his EI analysis, he was able to “assess if increases or decreases in candidate vote choice are correlated with the American Indian or white voting population in order to determine if voting patterns in San Juan County are racially polarized.” Ex. 2, Barreto Rep. ¶ 26.

11. Professor Barreto performed EI analysis on 58 County elections between 2010 and 2022. His analysis “represents one of the most comprehensive reviews of election results and voting patterns” he has “ever undertaken for an expert report.” Ex. 2, Barreto Rep. ¶ 21 & Tables 2-3 (57 elections); *see also* Ex. 1, Barreto Rebuttal Rep. ¶¶ 16-20 & App. A (appeals court election).

12. Plaintiffs' uncontradicted statistical evidence using Ecological Inference analysis shows that of more fifty elections analyzed, American Indian voters support the same candidate in most elections at "landslide" levels of 60 percent or more. *See Garza v. Cnty. of Los Angeles*, 756 F. Supp. 1298, 1335 (C.D. Cal.), *aff'd in part, rev'd in part on other grounds*, 918 F.2d 763 (9th Cir. 1990). Plaintiffs' statistical evidence further shows that none of the candidates preferred by American Indian voters are preferred by Non-American Indian voters. In addition, in the last four election cycles in District 2 – the district at issue in this case – the candidate preferred by American Indian voters has lost every time as a result of bloc voting by Non-American Indian voters. *See Ex. 2, Barreto Rep.* ¶ 29 & Tables 2-3; *Ex. 1, Barreto Rebuttal Rep.* ¶¶ 16-20 & App. A.

13. "Endogenous elections are for the elected office that the vote-dilution claim is being brought against; in this case, it is the San Juan County Commission. Exogenous elections are for elected offices at all other levels of government, including county government, state government or even federal office." Analysis of these elections offers "a more comprehensive view of voting patterns" to determine whether County elections are racially polarized. *Ex. 2, Barreto Rep.* ¶ 22.

14. Professor Barreto analyzed seven endogenous elections for County Commission seats including four for District 2, two for District 1, and one for District 4. *See Ex. 2, Barreto Rep.* ¶ 29 & Tables 2-3. Two additional District 1 elections in 2022 and 2018 were uncontested except for a few write-in votes with insufficient data for regression analysis. *See San Juan Cnty. Clerk, Past Election Results, available at* <https://www.sjcounty.net/government/county-clerk/election-department/general-information/past-election-results>.

15. In the District 1 elections, the candidates of choice of American Indian voters were Charley with 63.3 percent of the American Indian vote in 2014 and Todacheene with 56.5 percent of the American Indian vote in 2010. *See Ex. 2, Barreto Rep.* ¶ 29 & Tables 2-3.

16. The District 1 elections showed strong racial bloc voting with only 2.4 percent of white voters and 1.2 percent of Non-American Indian voters supporting Charley in 2014 and only 13.3 percent of white voters and 5.8 percent of Non-American Indian voters supporting Todacheene in 2010.¹ *See* Ex. 2, Barreto Rep. ¶ 29 & Tables 2-3.

17. “[I]n every single election analyzed in District 2 County Commission, the American Indian preferred candidate lost due to bloc voting among Non-American Indians, in particular among Whites.” Ex. 2, Barreto Rep. ¶ 29; *see also id.* at Tables 2-3.

18. In the District 2 elections, the candidates of choice of American Indian voters were George with 58.6 percent of the American Indian vote in 2022, Chavez with 67.2 percent of the American Indian vote in 2014, and Woodie with 78.4 percent of the American Indian vote in 2010. *See* Ex. 2, Barreto Rep. ¶ 29 & Tables 2-3.

19. The District 2 elections showed strong racial bloc voting with only 0.8 percent of white voters and 10 percent of Non-American Indian voters supporting George in 2022, 0.7 percent of white voters and 15.7 percent of Non-American Indian voters supporting Chavez in 2014, and 30.4 percent of white voters and 19.5 percent of Non-American Indian voters supporting Woodie in 2010. *See* Ex. 2, Barreto Rep. ¶ 29 & Tables 2-3.

20. The 2018 District 2 election had special circumstances because it included two American Indian candidates, Chavez and Bates, along with a third candidate who is white, McDaniel. “Chavez received majority support from American Indians [51.4 percent], but less than 20% support from Non-American Indians, and virtually no support at all from white voters [0.9 percent]. An additional candidate, Bates, finished last and received fewer votes [29.7 percent of

¹ The data provided here uses King’s EI analysis from Table 2. Any differences with Table 3’s use of EI: RxC are negligible, involving a fraction of one percent. Compare Barreto Rep. Table 2 with *id.* at Table 3 for the 2010 election (reflecting 5.8 percent White crossover using King’s EI and 6 percent White crossover using EI: RxC).

the American Indian vote] and . . . was not the American Indian preferred candidate (Chavez was preferred).” Ex. 2, Barreto Rep. ¶ 29 & Tables 2-3.

21. The 2018 District 2 election had special circumstances because Bates was an independent candidate and it was the only election in the period of 2010 to 2022 in which there two American Indian candidates in a three-way race. Ex. 2, Barreto Rep. ¶ 29 & n.19.

22. The results from the 2012 District 4 election also showed strong racially polarized voting, with 70.8 percent of American Indian voters supporting Lasater, compared to just 9.8 percent of white voters and 18.1 percent of Non-American Indian voters supporting Lasater in that election. Ex. 2, Barreto Rep. Tables 2-3.

23. Professor Barreto initially analyzed 50 exogenous elections from 2010-2022 for federal, state, and county offices. His King’s EI and EI: RxC analysis yielded the same overall averages for these elections. On average, 67.3 percent of American Indian voters supported the same candidate and 92 percent of white voters supported a different candidate. An average of just eight percent of white voters and 18.5 percent of Non-American Indian voters crossed over to support the American Indian candidate of choice. *See* Ex. 2, Barreto Rep. Tables 2-3.

24. The average level of support of American Indian voters for their candidates of choice in exogenous elections has remained steady since 2012. The average level of Non-American Indian and white support for those candidates has steadily decreased since 2010, reflecting increased racial polarization in the most recent elections among white voters:

Figure 3 – Average level of support for the American Indian candidate of choice from American Indian, Non-American Indian, and White voters, by Year (2010 to 2022 elections).

	2022	2020	2018	2016	2014	2012	2010
Average AI	67.6	63.8	71.1	67.7	69.3	71.9	53.9
Average White	3.4	5.5	6.9	3.6	13.5	10.0	19.9

Average Non-AI	17.0	15.9	18.3	13.7	19.7	24.7	25.6
Average AI/White Gap	64.2	58.3	64.2	64.1	55.8	61.9	40.0

See Ex. 2, Barreto Rep. Table 2 (King’s EI analysis). The EI: RxC yields similar results. *See id.* at Table 3.

25. Professor Barreto also analyzed the 2022 Court of Appeals Position 2 Election and determined that the American Indian candidate of choice was Katherine Ray. Contrary to Mr. Adair’s erroneous non-scientific methodology, *see* Ex. 4, Adair Dec. at ¶¶ 25-29, King’s EI analysis shows that Ms. Ray received 57.3 percent of the American Indian vote but just 3.8 percent of the white vote, clearly demonstrating racially polarized voting. Ex. 1, Barreto Rebuttal Rep. ¶ 20 & App. A.

26. In the 2022 Court of Appeals Position 2 Election, Gertrude Lee was the preferred candidate of white voters and not American Indian voters. Ex. 1, Barreto Rebuttal Rep. ¶ 20 & App. A. Ms. Lee won.

27. In the 58 elections Dr. Barreto examined between 2010 and 2022, 60 percent or more of American Indian voters “demonstrated strong cohesion,” at a landslide level, by supporting the same candidate in 45 elections. Ex. 1, Barreto Rebuttal Rep. ¶ 24; *see* Ex. 2, Barreto Rep. Tables 2-3. Those 45 elections with strong cohesion represent 78 percent of all elections Professor Barreto analyzed. *See id.* In the remaining 13 elections, there was moderate American Indian voter support of between 51.4 percent to 59.99 percent. *See id.*; Ex. 1, Barreto Rebuttal Rep. ¶¶ 18, 20 & Table 1, App. A. An average of 67.3 of American Indian voters supported the same candidate in 50 exogenous elections. *See* Ex. 2, Barreto Rep. Tables 2-3.

28. Dr. Barreto’s analysis also demonstrates that Whites and Non-American Indian voters voted as a bloc *against* American Indian-preferred candidates in every contest. Ex. 1, Barreto Rebuttal Rep. ¶ 24 (*italics in original*).

C. Defendants' Experts Have Not Used Any Methodologies Accepted by Federal Courts to Evaluate the *Gingles 2* and *Gingles 3* Preconditions.

29. Neither of Defendants' proffered experts, Thomas Bryan and Rod Adair, performed the statistical tests that federal courts have accepted for evaluating *Gingles 2* and *Gingles 3*.

30. Defendants' proffered expert Thomas Bryan is not an expert on *Gingles 2* or *Gingles 3* and is not offering an opinion on either of those two preconditions in this litigation. Ex. 5, Bryan Dep., 83:6-18; *see also* Ex. 3, Bryan Rep. at 8 (describing his report as focusing on assessments of the enacted plan and Plaintiffs' proposed maps under *Gingles 1*).

31. Defendants' proffered expert Rod Adair "has not offered a *Gingles* analysis." Ex. 6, Adair Dep. II, 88:1-4; *see also id.* at 89:15-22 (stating that he did not perform his homogenous precinct evaluation as part of a *Gingles 2* or *Gingles 3* analysis).

32. When Mr. Adair was asked about *Gingles* in his first deposition in January 2023, he testified, "I can't recite the three-prong test" and stated that his understanding was "an effort should be made to allow a recognized minority, ethnic or racial minority, to have an opportunity to elect a candidate of their choice." Ex. 7, Adair Dep. I, 180:15-181:4.

33. When Mr. Adair was asked if he performed or was familiar with EI analysis, he testified, "I don't guess I am." Ex. 7, Adair Dep. I, 121:25-122:5. Similarly, when Mr. Adair was asked if he performed any regression analysis, he testified, "... I tend not to, no." Ex. 7, Adair Dep. I, 122:8-9. Mr. Adair likewise does not use Bayesian regression in his analysis. Ex. 6, Adair Dep. II, 50:19-51:20.

34. Instead of applying any of the statistical methodologies that *Gingles* and its progeny have accepted for analyzing the *Gingles 2* and *Gingles 3* preconditions, Mr. Adair performs demographic work he refers to as "psephology," which he defines as "the study of elections" to provide testimony about voter behavior. Ex. 6, Adair Dep. II, 38:21-39:16.

35. Mr. Adair testified his application of psephology is not limited to determining whether there is a relationship between voting patterns and race, instead suggesting a non-scientific multivariate approach. *See* Ex. 6, Adair Dep. II, 88:8-89:7.

36. No published federal court decision has endorsed Mr. Adair's proposed use of psephology to evaluate the *Gingles 2* and *Gingles 3* preconditions.

37. Mr. Adair limited his homogenous precinct analysis to non-Hispanic American Indian voters and did not evaluate Anglo (Non-Hispanic white) voters. Ex. 6, Adair Dep. II, 90:14-91:4.

38. Mr. Adair did not use any accepted statistical methodology to estimate the race or ethnicity of registered voters in precincts in District 2. Instead, Mr. Adair employed a non-scientific method of looking at the number of all registered voters with the VAP in District 2 precincts with 90 percent non-Hispanic American Indians and comparing it with the registered voters in District 2 precincts that were majority "Anglo-Hispanic." *See* Ex. 4, Adair Rep. at ¶¶ 15-22.

39. Lower voter registration and voter turnout rates caused by historic discrimination are present among American Indian voters in District 2. *See* Ex. 2, Barreto Rep. at ¶ 17. The U.S. Census Bureau has estimated that in the 2022 mid-term elections, 79.5 percent of non-Hispanic white alone citizens of voting age in New Mexico were registered to vote compared to just 49.2 percent of Hispanic citizens of any race of voting age, a difference of 30.3 percentage points. *See* Ex. 8, U.S. Census, Table 4b, Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2022, *available at* <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-586.html>.

40. Mr. Adair does not offer any statistical estimates of whether non-Hispanic American Indians are registered at higher rates than non-Hispanic whites in any of the precincts he describes. *See* Ex. 4, Adair Rep. at ¶¶ 15-22. According to the 2020 Current Population Survey, the most recent estimate available, the U.S. Census Bureau reported that nationally, 60 percent of respondents identifying as American Indian/Alaska Native alone citizens of voting age were registered to vote compared to 76 percent of non-Hispanic white citizens of voting age, a disparity of 16 percentage points. Ex. 9, The White House, Interagency Steering Group on Native American Voting Rights (“White House Report”) at 9 n.12 (Mar. 2022), *available at* <https://www.whitehouse.gov/wp-content/uploads/2022/03/Tribal-Voting-Report-FINAL.pdf>.

41. Mr. Adair’s conclusion that “a reasonable estimate of the most recent election returns indicates that some 3,978 of the 7,254 votes cast in District 2 were cast by non-Hispanic Indians,” Ex. 4, Adair Rep. ¶ 23, is unsupported by any analysis or an explanation of his methodology.

42. Nationally, according to the Current Population Survey, the U.S. Census Bureau estimates that 55 percent of American Indian/Alaska Native and Native Hawaiian/Pacific Islander voting-age citizens alone or in combination voted in 2020, compared to 71 percent of non-Hispanic white citizens of voting age, a disparity of 16 percentage points. Ex. 9, White House Report at 9 n.13.

III. STANDARD OF REVIEW ON SUMMARY JUDGMENT

Summary judgment is proper only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “When evaluating a motion for summary judgment, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary

judgment.” *Mirzai v. N.M. Gen. Servs. Dep’t*, No. CIV 06-219 JB/LAM, Mem’*m* Opinion and Order at 6 (D.N.M. Mar. 30, 2007) (Browning, J.) (citing *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1124-25 (10th Cir. 2000)).

IV. LAW REGARDING GINGLES 2 AND GINGLES 3

“As Justice O’Connor noted, the question arises within the context of determining whether racial bloc voting defeats the minority’s opportunity to elect a candidate of its choice. Indeed, the VRA ensures members of a protected class equal opportunity ‘to elect representatives of their choice,’ not “‘necessarily members of their class.’” *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996) (internal citations omitted); *see also* 52 U.S.C. § 10301(b) (same). The Supreme Court recently reaffirmed the three-part framework from *Thornburg v. Gingles*, 478 U.S. 30 (1986), which has governed evaluation of this question for four decades. *Allen v. Milligan*, 599 U.S. ___, 143 S.Ct. 1487, 1502 (2023). If plaintiffs prove these preconditions, then they must prove by a “totality of the circumstances” that the political process is not equally open to minority voters. *Id.* at 1503.

The second *Gingles* factor (“*Gingles* 2”) requires Plaintiffs to show they are “politically cohesive.” *Gingles*, 478 U.S. at 51. This factor establishes that if the district lines in the Enacted Plan are adjusted, a second representative of choice of American Indian voters “would in fact be elected.” *Allen*, 143 S.Ct. at 1503 (citing *Grove v. Emison*, 507 U.S. 25, 40 (1993)). Under the third *Gingles* factor (“*Gingles* 3”), Plaintiffs must demonstrate that white voters vote “sufficiently as a bloc” to enable those voters to “usually defeat” the candidate of choice of American Indian voters in the absence of special circumstances. *Id.* *Gingles* 3 “‘establishes that the challenged districting thwarts [American Indian voters] at least plausibly on account of race.’” *Id.* (citing *Grove*, 507 U.S. at 40).

V. ANALYSIS

Gingles 2 and *Gingles 3* employ a similar “functional focus” on elections. *See Sanchez v. Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1996). The inquiry is whether American Indian voters have “expressed clear political preferences that are distinct” from those other voters. *Id.* (citation omitted). The same evidence of voter preferences expressed through election results is used for analysis of both preconditions:

[W]e judge political cohesiveness by looking at the “voting preferences expressed in actual elections.” Necessarily, when we examine the evidence of political cohesiveness as voting preferences, we look to the same statistical evidence plaintiffs must offer to establish vote polarization. Indeed, political cohesiveness is implicit in racially polarized voting.

Id. (citations omitted). The “heart of each inquiry requires a searching look into statistical evidence to discern the way voters voted.” *Sanchez v. Colorado*, 97 F.3d at 1315. “The legal standard looks only to the difference between how majority and minority votes were cast; it does not ask why those votes were cast the way they were or whether there were other factors presented in contested elections” *Id.* at 1315-16.

A. **County elections, and the elections in District 2 in particular, demonstrate that American Indian voters are cohesive and that their candidate of choice is defeated by bloc voting by white and Non-American Indian voters.**

Plaintiffs’ claims and the evidence in this litigation are straightforward. The majority of San Juan County’s land mass, just under two-thirds, is located on the tribal lands of the Navajo Nation. PSOF ¶ 1. Over the past decade, thousands of Non-Hispanic whites of a single-race have moved out of the County, resulting in the County’s decrease of 8,383 people. PSOF ¶¶ 2-3. With Non-Hispanic whites of a single race constituting a bare plurality of 39.6 percent of the VAP compared to 38.7 percent of American Indians of a single-race, PSOF ¶ 4 & Figure 1, Defendants packed American Indians into a single performing district, District 1. American Indians in the

other four districts, particularly District 2, were placed in districts that did not give them equal opportunities to elect the candidates of their choice, thereby rendering their votes ineffective. PSOF ¶¶ 5-7. Under the Enacted Plan adopted by Defendants in 2021, American Indians of a single-race comprise 83.3 percent of the VAP in District 1 and 52.3 percent in District 2; District 5, which forms the boundary in between much of Districts 1 and 2, has an ineffective American Indian VAP of 34 percent. *See* PSOF ¶ 6. District 2 does not perform to elect American Indian preferred candidates and includes “some of the most polarized voting precincts which bloc vote against [the] American Indian candidate of preference.” PSOF ¶ 7.

Plaintiffs’ statistical analysis is uncontradicted because Defendants have not named a statistician as an expert to dispute his evidence. *See* PSOF ¶¶ 29-42. Dr. Barreto’s Ecological Inference (“EI”) regression analysis of 58 of the County’s elections, which include 7 endogenous elections (those involving the challenged county commission district elections) and 51 exogenous elections (those involving all other elections held in the county) is unrebutted. PSOF ¶¶ 8-11, 13-14.

American Indian voters in the County and in District 2 have high levels of cohesion. Overall, the vast majority of examined elections show landslide levels of American Indian support of 60 percent or greater for the same candidate of choice. Specifically, in 45 out of 58 elections (78 percent), American Indian voters demonstrated strong cohesion of 60 percent or higher. PSOF ¶ 27. In the remaining 13 examined elections, there was moderate American Indian support of between 51.4 percent to 59.99 percent. *Id.* An average of 67.3 percent of American Indian voters supported the same candidate in 50 exogenous elections. PSOF ¶¶ 23-24, 27. In the only two contested races by candidates who qualified in District 1 between 2010 and 2022, the candidates of choice were Charley with 63.3 percent of the American Indian vote in 2014 and Todacheene

with 56.5 percent of the American Indian vote in 2010. PSOF ¶¶ 14-15. In the four District 2 elections during that same period, the candidates of choice of American Indian voters were George with 58.6 percent in 2022, Chavez with 51.4 percent of the vote in a three-candidate race in 2018, Chavez with 67.2 percent in 2014, and Woodie with 78.4 percent in 2010. PSOF ¶¶ 18, 20. In the District 4 election in 2012, Lasater was the American Indian candidate of choice at 70.8 percent. This election data is more than enough to establish *Gingles* 2. It also is ample evidence to show a triable question of fact on American Indian cohesion.

The EI analysis likewise establishes a sustained pattern of racial bloc voting, which has worsened in more recent elections. Across 50 exogenous elections between 2010 and 2022, an average of just 8 percent of Non-Hispanic white voters and 18.5 percent of Non-American Indian voters crossed over to support the American Indian candidate of choice. PSOF ¶ 23. In the eleven exogenous elections in 2022, only 3.4 percent of white voters and 17.0 percent of Non-American Indian voters voted for the preferred candidate of American Indian voters. PSOF ¶ 24. In the District 1 elections, only 2.4 percent of white voters and 1.2 percent of Non-American Indian voters supported the preferred candidate of American Indians in 2014, and 13.3 percent and 5.8 percent, respectively, in 2010. PSOF ¶ 16. The District 2 elections showed strong racial bloc voting with only 0.8 percent of white voters and 10 percent of Non-American Indian voters supporting George in 2022, 0.9 percent of white voters and 17.2 percent of Non-American Indian voters supporting Chavez in 2018, 0.7 percent of white voters and 15.7 percent of Non-American Indian voters supporting Chavez in 2014, and 30.4 percent of white voters and 19.5 percent of Non-American Indian voters supporting Woodie in 2010. PSOF ¶¶ 19-20. In the 2012 District 4 election, the preferred candidate of American Indian voters, Lasater, was supported by just 9.8 percent of white voters and 18.1 percent of Non-American Indian voters. PSOF ¶ 22. Plaintiffs'

statistical evidence demonstrates that white voters and Non-American Indian voters voted as a bloc *against* American Indian-preferred candidates in every contest. PSOF ¶ 28. In the last four election cycles in District 2 – the district at issue in this case – the candidate preferred by American Indian voters has lost every time as a result of bloc voting by non-American Indian voters. This evidence shows legally significant racial bloc voting that establishes *Gingles* 3. It also is more than enough to show a triable question of fact to be answered at trial.

B. Federal courts, including *Gingles*, have rejected Defendants’ argument that political cohesion must be over 75 percent to satisfy the second precondition.

Defendants concede “[t]here is no bright line cutoff for what is legally significant cohesion among minority voters in the Tenth Circuit.” Defs.’ Mot. at 14. They further argue that “[t]he Court should reject any arbitrary cohesion threshold” *Id.* Defendants then proceed to contradict their own argument by contending “that legally significant minority cohesion exists only in the ranges above 75%,” *id.* at 15, which is, in Defendants’ own words, an “arbitrary cohesion threshold.” *Id.* at 14. To arrive at their conclusion, Defendants inaccurately state that “[t]he leading cases that have considered the second *Gingles* precondition are in accord,” providing selected citations that do not support their erroneous proposition. *Id.* at 15-17. None of those decisions held as a matter of law that plaintiffs’ voter cohesion must exceed 75 percent to establish *Gingles* 2.

Defendants’ own references to *Gingles* defeat their argument. As Defendants acknowledge in a parenthetical, *see id.* at 15, the Supreme Court required only “showing that *a significant number* of minority group members *usually* vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2.” 478 U.S. at 31 (italics added). “There is no bright-line numeric cutoff for a finding of political cohesion,” *Alabama State Conf. of NAACP v. Alabama*, 612 F. Supp.3d 1232, 1271 (M.D. Ala. 2020), a proposition with which Defendants

acknowledge that the Tenth Circuit agrees. Defs.’ Mot. at 14; *see Sanchez v. Colorado*, 97 F.3d at 1320 (rejecting any “shortcut” that support for a minority candidate is automatically established at 50 percent or more). Moreover, Defendants’ description of the support needed to demonstrate cohesion in *Gingles* is incomplete. There, the standard was met when Black support for the same candidates ranged from 71 percent to 92 percent in just 11 out of 16 primary elections with greater support in most general elections. *See Gingles*, 478 U.S. at 59, 80-82. Stated another way, cohesion was demonstrated even with several elections in which a majority of Black voters did not agree on a candidate. As the Tenth Circuit has explained, “*Gingles* doesn’t require an absolute monolith in the Anglo or [American Indian] bloc vote” *Sanchez v. Colorado*, 97 F.3d at 1319.

The weight of authority indicates that 60 percent of voters of color support their preferred candidate in most elections, that is a showing of “a significant number of minority group members [who] usually vote for the same candidates. . . .” sufficient to establish cohesion. *Gingles*, 478 U.S. at 31; *see also Garza v. Cnty. Of Los Angeles*, 756 F. Supp. 1298, 1335 (C.D. Cal.) (finding cohesion because in “14 of the 19 elections, voters with Spanish surnames voted for Hispanic candidates at a level equal to or greater than the 60 percent that is generally considered to be a landslide victory in American political history.”), *aff’d in part, rev’d in part on other grounds*, 918 F.2d 763 (9th Cir. 1990).

At least one federal Circuit, the Ninth, has found that even less than a majority can suffice under certain circumstances. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998). But most federal courts that have addressed contested issues of cohesion have found that a range of support greater than 50 percent but less than 75 percent is sufficient to establish *Gingles 2*. *See, e.g., Flores v. Town of Islip*, 382 F. Supp.3d 197, 230 (E.D.N.Y. 2019) (Hispanic candidates of choice who received the support of greater than 50% of Latino voters in all seven analyzed

elections was “sufficient to establish political cohesion”); *Pope v. County of Albany*, 94 F. Supp.3d 302, 334 (N.D.N.Y. 2015) (citing a decision that cohesion was “overwhelming” when there was over 67 percent support by minority voters in three of five analyzed elections and that 54.1 percent “moderate” cohesion was enough); *Large*, 709 F. Supp.2d at 1194, 1202 (cohesion satisfied where in “elections from 1982 to 2006, [there were] four instances of strong cohesion and fourteen instances of moderate cohesion, for a total of eighteen cohesive elections” out of 32 elections examined); *Johnson v. Hamrick*, 155 F. Supp.2d 1355, 1370 (N.D. Ga. 2001) (cohesion where minority support exceeded 50% in ten out of eleven elections and was clearly established in seven elections in which the candidate received over 66% of the minority vote), *aff’d*, 296 F.3d 1065 (11th Cir. 2002); *Morris v. City of Houston*, 894 F. Supp. 1062, 1066 (S.D. Tex. 1995) (cohesion satisfied in part where one candidate received 51.4 percent of the minority vote in a general election); *Dillard v. Baldwin Cnty. Bd. of Educ.*, 586 F. Supp. 1459, 1465 (M.D. Ala. 1988) (*Gingles 2* met in analysis of two at-large elections where minority support was 65% in one and 92% in the other).

Defendants simply have not shown that their proposed arbitrary cohesion threshold of 75 percent is “required for compliance with *Gingles*.” *Lopez v. Abbott*, 339 F. Supp.3d 589, 609 (S.D. Tex. 2018). Moreover, their proposal is contrary to the Tenth Circuit’s proscription of any specific “shortcut.” *Sanchez v. Colorado*, 97 F.3d at 1320. Applying the flexible approach mandated by *Gingles*, the proper cohesion test is evaluation of whether “a significant number of minority group members usually vote for the same candidates,” 478 U.S. at 23, with the benefit of federal court decisions that have ably applied it. Here, taking into consideration the “intensely local appraisal” required by Section 2, *id.* at 79, including the circumstances of each election, it is evident that a

landslide average of 60 percent of American Indian voters supporting the same candidate in most elections, PSOF ¶¶ 14-27, demonstrates cohesion under *Gingles 2*.

C. Professor Barreto has demonstrated American Indian cohesion and legally significant racial bloc voting is present in the elections he examined.

Defendants “accept[] Dr. Barreto’s statistical analysis on its face,” Mot. at 17, as they must because they do not have an expert qualified to respond to the “statistical evidence plaintiffs must offer to establish vote polarization.” *Sanchez v. Colorado*, 97 F.3d at 1312; *see also* PSOF ¶¶ 29-42. Recognizing their lack of statistical evidence, Defendants limit their arguments to a handful of erroneous critiques of Dr. Barreto’s findings. Their contentions are addressed in Parts I-II.

Dr. Barreto examined *Gingles 2* and *Gingles 3* using Ecological inference (“EI”), “the benchmark in evaluating racial polarization in voting rights lawsuits,” by applying two methods, King’s EI and EI: RxC. PSOF ¶¶ 9-10; *see also Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1311 (N.D. Ga. 2022) (all experts agreed that King’s EI is “the gold standard for experts in this field doing a racially-polarized voting analysis.”); *Alabama State Conf. of Nat’l Ass’n for Advancement of Colored People v. Alabama*, 612 F. Supp. 3d 1232, 1275 n. 27 (M.D. Ala. 2020) (recognizing that ecological regression and homogeneous precinct analysis is “standard in the literature” and describing the third technique, created after *Gingles*, as being “recognized as the ‘gold standard.’”) (citation omitted). Dr. Barreto performed EI analysis on 58 County elections between 2010 and 2022, which “represents one of the most comprehensive reviews of election results and voting patterns” he has “ever undertaken for an expert report.” PSOF ¶ 11.

Professor Barreto analyzed seven endogenous elections for County Commission seats including four for District 2, two for District 1, and one for District 4. Two additional District 1 elections in 2022 and 2018 were uncontested except for a few write-in votes and therefore offered no data for regression analysis. PSOF ¶¶ 13-14.

In the District 1 elections, the candidates of choice of American Indian voters were Charley with 63.3 percent in 2014 and Todacheene with 56.5 in 2010. PSOF ¶ 15. District 1 elections showed strong racial bloc voting with only 2.4 percent of white voters and 1.2 percent of Non-American Indian voters supporting Charley in 2014 and only 13.3 percent of white voters and 5.8 percent of Non-American Indian voters supporting Todacheene in 2010. PSOF ¶ 16.

“[I]n every single election analyzed in District 2 County Commission, the American Indian preferred candidate lost due to bloc voting among Non-American Indians, in particular among Whites.” PSOF ¶ 17. In the District 2 elections, the candidates of choice of American Indian voters were George with 58.6 percent in 2022, Chavez with 51.4 percent in 2018, Chavez with 67.2 percent in 2014, and Woodie with 78.4 percent in 2010. PSOF ¶¶ 18, 20. District 2 elections showed strong racial bloc voting with only 0.8 percent of white voters and 10 percent of Non-American Indian voters supporting George in 2022, 0.9 percent of white voters and 17.2 percent of Non-American Indian voters supporting Chavez in 2018, 0.7 percent of white voters and 15.7 percent of Non-American Indian voters supporting Chavez in 2014, and 30.4 percent of white voters and 19.5 percent of Non-American Indian voters supporting Woodie in 2010. PSOF ¶¶ 19-21.

Defendants concede that on average across all elections, more than two-thirds of American Indians – “an average of 66.84%,” Mot. at 17, supported the same candidate. PSOF ¶ 12. Breaking those results down even further, 60 percent landslide levels of support by American Indian voters “demonstrated strong cohesion” through their support of the same candidate in 45 out of 58 elections (78 percent of all elections analyzed). PSOF ¶ 27. In the remaining 13 elections, a modest level of cohesion of between 51.4 percent and 59.99 percent of American Indian voters supported the same candidate. *See id.*

Dr. Barreto’s analysis likewise shows strong racial bloc voting. Across all elections, just 8 percent of white voters and 18.5 percent of Non-American Indian voters supported the preferred candidate of American Indian voters. Racial polarization has been increasing among whites and Non-American Indian voters, particularly in the most recent elections. PSOF ¶¶ 23-24, 27-28. The 2022 Court of Appeals Position 2 Election yielded similar results. PSOF ¶¶ 25-26.

To summarize evidence that in 78 percent of all elections analyzed, landslide levels of 60 percent or more of American Indian voters supported the same candidates with little white and Non-American Indian crossover voting is more than sufficient to satisfy the *Gingles* 2 requirement that “a significant number of minority group members usually vote for the same candidates” and the *Gingles* 3 requirement that white voters vote “sufficiently as a bloc” to “usually defeat” those candidates. *Gingles*, 478 U.S. at 23.

D. Lay witness testimony and the two elections discussed by Defendants do not refute Plaintiffs’ statistical evidence of cohesion and racial bloc voting.

Defendants next urge the Court to reject Plaintiffs’ statistical evidence of American Indian cohesion and racial bloc voting by white and Non-American Indian voters in favor of lay witness testimony. *See* Defs.’ Mot. at 19-20. It is true that expert evidence does not preclude consideration of other testimony on the two factors. *Sanchez*, 97 F.3d at 1493-94; *see also Gingles*, 478 U.S. at 52 (acknowledging the district court “credited some testimony of lay witnesses, but relied principally on statistical evidence” to evaluate cohesiveness and racial bloc voting). Nevertheless, Defendants’ argument fails on at least three counts. First, Defendants only offer testimony that a single Plaintiff did not support the American Indian candidate of choice in one, or possibly two, elections; none of the other listed Plaintiffs testified as to their votes. *See* Pls.’ Resp. to DSOF ¶¶ 14-15. Commissioner McDaniel’s testimony regarding his personal belief about cohesion is of little, if any, weight. *See id.* at ¶¶ 9-13. Second, the Tenth Circuit makes clear that in cases like

this in which Plaintiffs have offered statistical evidence, “absent a finding the statistical evidence is unreliable, insufficient, or irrelevant, *lay witness testimony should not eclipse the analysis.*” *Sanchez v. Colorado*, 97 F.3d at 1320 (emphasis added). Third, the lay testimony demonstrates the presence of special circumstances that impact the weight to be accorded to the two identified elections. Each of these issues requires factual determinations that are not susceptible to judicial resolution at the summary judgment stage.

Defendants’ references to the most recent District 2 elections in 2018 and 2022 illustrate triable issues requiring factual determinations and an evaluation of what weight to give to expert testimony. *Gingles* cautions that the result of a particular election “does not necessarily prove that the district did not experience polarized voting in that election; special circumstances . . . may explain minority electoral success in a polarized contest” or lower cohesion among voters of color. 478 U.S. at 57; *see also supra* Part V(B) (recognizing minority cohesion need not be present in every election). “To invoke the special circumstances doctrine regarding an election that occurred after a Section 2 lawsuit is filed, plaintiffs must show that a particular election was surrounded by unusual circumstances. Those unusual circumstances must demonstrate that the election was not representative of the typical way in which the electoral process functions. The focus is voter behavior, not voter motivation.” *Ruiz*, 160 F.3d at 557. Here, there is sufficient evidence to demonstrate a triable question of fact of whether special circumstances present in both District 2 elections cited by the Defendants caused American Indian cohesion to be lower than normal.

In 2018, “Bates ran as an Independent candidate.” PSOF ¶ 21. Unlike any of the other three District 2 elections in the period between 2010 and 2022, the 2018 election was the only one in which a third candidate was on the ballot in the general election. *See id.* With two American Indian candidates on the ballot, Chavez and Bates, candidate Chavez was the American Indian candidate

of choice with support from 51.4 percent of American Indian voters, PSOF ¶ 20, which was over fifteen percentage points lower than the 67.2 percent of the American Indian vote that Chavez received in 2014. *See* PSOF ¶ 18. Professor Barreto’s analysis suggests that Chavez’s level of support in 2018 would have been approximately the same as in 2014 if Bates had not been on the ballot. *See generally* Ex. 1, Barreto Rebuttal Rep. ¶ 22. The presence of an independent candidate making an election a three-way race, like a write-in candidacy, can be “a special circumstance which does not shed light on whether there is ‘racial bias in the voting community.’” *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp.3d 1297, 1316 (M.D. Ga. 2018), *aff’d*, 979 F.3d 1282 (11th Cir. 2020) (citation omitted). Here, the basis for discounting that election is even stronger because it was the only District 2 election of the four examined between 2010 and 2022 that featured two American Indian candidates, Chavez and Bates, in the general election.

The evidence offered by Defendants also establishes a question of fact of whether special circumstances were present in the other District 2 election Defendants mention. In 2022, 58.6 percent of American Indian voters cast ballots for American Indian candidate Zachariah George, PSOF ¶ 18, which is slightly below the landslide level of 60 percent or more support that American Indian voters generally give to the same candidate. PSOF ¶ 12. But as the Defendants’ evidence shows, Mr. George was not known in the community and did little, if any, campaigning. Plaintiff Werito testified, “I don’t know Zachariah George.” Mot. at 7 ¶ 15 (citations omitted). Plaintiff Dennison testified that “she did not know Zachariah George nor whether he campaigned in her community because she has ‘never heard of him.’” *Id.* Plaintiff Raymond likewise testified he “does not know Zachariah George, has never met him and does not know if he campaigned at the Nenahnezad Chapter.” *Id.* Plaintiff Bates testified he “does not know who Zachariah George is or if he campaigned in the Upper Fruitland area because he has never met him.” *Id.* That evidence

shows that Mr. George was a weak and unknown candidate, who did little campaigning in American Indian communities. That conclusion is supported by Mr. George receiving approximately ten percent fewer votes from American Indian voters than their preferred candidates received in the 2010 and 2014 District 2 elections. PSOF ¶ 18. It also is anomalous compared to the average of 67.3 percent American Indian support for their preferred candidates in exogenous elections. *See generally Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1114 (5th Cir. 1991) (“Both experts testified that the degree of racial polarization of the Westwego electorate should not vary between exogenous and indigenous elections.”).

Elections that are “marked by special circumstances” have “less probative value” than other elections. *Ruiz*, 160 F.3d at 557-58; *see also Gingles*, 478 U.S. at 75-76 (same). Moreover, a “pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences significant polarization than are the results of a single election.” *Id.* at 57. The Court’s determination of these issues requires a “searching practical evaluation of the ‘past and present reality.’” *Gingles*, 478 U.S. at 76. It also requires resolving conflicting plausible evidence, which makes “resolution at the summary judgment stage . . . inappropriate.” *Bone Shirt v. Hazeltine*, No. CIV 01-3032-KES, 2004 WL 7337452, at *5 (D.S.D. Jan. 22, 2004); *see also Ruiz*, 160 F.3d at 558 (“Plaintiffs have raised a triable issue of fact in whether the 1994 city council election was representative of typical voting behavior,” which was not suited for summary judgment); *United States v. City of Eastpointe*, 378 F. Supp.3d 589, 610 (E.D. Mich. 2019) (an election that raised questions of special circumstances weighed “in favor of denying summary judgment”). As a result, the factual issue of whether the 2018 and 2022 District 2 elections demonstrated special circumstances not generally present in other elections is a matter that must be resolved at trial.

E. White voters combine with other Non-American Indian voters to vote as a bloc to defeat American Indian candidates of choice, which is not altered by electoral success of some of those candidates several decades ago.

Defendants further argue that legally sufficient racial bloc voting cannot be established when white voters comprise a minority of a district's population, as they do in District 2 under the Enacted Plan. Defs.' Mot. at 22-23. Defendants recognize that the "Tenth Circuit has not had occasion to address whether there can be white bloc voting where the white bloc is far less than a majority." *Id.* at 23. In the absence of supporting authority, Defendants recite a handful of cases stating the truism that racial bloc voting can be defeated by evidence that there is sufficient white crossover voting to allow the minority candidate of choice to be elected. *See id.* at 22-23. But none of those cases support their argument. The standards for Section 2 claims explain why.

The focus of Section 2 is whether San Juan County's Enacted Plan denies Plaintiffs an equal opportunity to participate in the electoral process and to elect candidates of their choice. *Sanchez v. Colorado*, 97 F.3d at 1309-10. *Gingles* 3 examines whether "the challenged districting thwarts" American Indian voters "at least plausibly on account of race." *Allen*, 143 S.Ct. at 1503. In conducting that analysis, *Gingles* cautions that "there is no simple doctrinal test for the existence of legally significant racial bloc voting." 478 U.S. at 58. That has led at least two federal circuits to conclude that it is possible for voters of color to prove racial bloc voting by non-Hispanic whites even in districts in which they comprise a minority of the voters. In particular, the courts that have considered the issue have found that for purposes of the *Gingles* 3 analysis, it is appropriate to aggregate Non-Hispanic white voters with voters from other racial or ethnic groups outside of the plaintiff group challenging the districting system to show that bloc voting by white voters and those other racial and ethnic groups thwart the plaintiffs' ability to elect candidates of their choice.

For example, in *Betts v. Murphy*, the First Circuit denied a motion to dismiss because the record lacked “any evidence at this stage about how vigorously the majority votes as a bloc over time, [or] **the impact that the ‘majority’ here is made up of both Hispanics and whites.**” 363 F.3d 8, 12 (1st Cir. 2004) (en banc) (emphasis added). Consistent with that reasoning, the Eleventh Circuit affirmed a finding of “keen hostility” between Black and Non-Black voters (Hispanic voters) in county elections and affirmed a finding of vote dilution grounded in majority bloc voting by Hispanic voters and Non-Hispanic white voters. *See Meek v. Metropolitan Dade Cnty.*, 985 F.2d 1471, 1481-82 (11th Cir. 1993). Specifically, the trial court found “that the statistical evidence demonstrates that when there is a Black candidate running for office, **Black and Non-Black voters differ in their voting, with the Black voters overwhelmingly supporting the Black candidate, while the Non-Black voters support the Non-Black candidate and vote against the Black candidate.**” *Meek v. Metropolitan Dade Cnty.*, 805 F. Supp. 967, 980 (S.D. Fla. 1992) (emphasis added), *aff’d in part and rev’d in part on other grounds*, 985 F.2d at 1471.

That is precisely the form that racial bloc voting has taken here, particularly in District 2. Dr. Barreto’s EI analysis shows that consistently between 2010 and 2022, racial bloc voting by Non-American Indian voters and white voters combined to defeat every American Indian candidate of choice in the four District 2 elections, the one District 4 election, and the 51 countywide elections; the American Indian candidate of choice only has been elected from District 1, in which American Indian voters are packed with an 83.3 percent American Indian VAP. PSOF ¶¶ 5-6, 12, 27-28. Bloc voting by white voters and Non-American Indian voters against American Indian voters’ candidates of choice can be extreme, as shown in the 2022 elections. In the District 2 election, only 0.8 percent of white voters and 10 percent of Non-American Indian voters supported the American Indian candidate of choice. PSOF ¶ 19. Overall, an average of just 3.4

percent of white voters and 17.0 percent of Non-American Indian voters supported an American Indian candidate of choice in eleven exogenous elections in 2022. PSOF ¶ 24. This evidence is sufficient to demonstrate a triable question of fact of whether by voting with Non-American Indian voters, “whites vote sufficiently as a bloc usually to defeat” the American Indian voters’ preferred candidates. *Sanchez*, 97 F.3d at 1312.

Finally, Defendants assert that electoral success of American Indian candidates from a second district decades ago is necessary “to truly understand the voting patterns . . .” Defs.’ Mot. at 24. The most recent of those elections is from 17 years ago, Dkt. 101 at 12, involving different district lines and a completely different electorate. In contrast, Dr. Barreto’s analysis shows that recent elections are dominated by extremely racially polarized voting. PSOF ¶¶ 8-28. For example, while there was an average of 19.9 percent white crossover voting and 25.6 percent Non-American Indian crossover voting in 2010, those percentages have plummeted to 3.4 percent and 17.0 percent, respectively, in 2022. PSOF ¶ 24. That is why decades-old electoral success has little weight. It also is why Plaintiffs’ expert used a range of elections from 2010 to the present (2022). *See, e.g., United States v. Charleston Cnty.*, 365 F.3d 341, 350 (4th Cir. 2004) (finding that the district court properly found that electoral success of Black candidates from two to three decades ago “were of marginal relevance to whether minorities currently enjoy equal access to the electoral process” and pointing out that the defendants’ own expert refused to consider elections more than 12 years old, “recognizing that recent elections are the most probative in determining vote dilution.”); *Luna v. County of Kern*, 291 F.Supp.3d 1088, 1133 (E.D. Cal. 2018) (finding reelection of a candidate of color “roughly two decades ago” to be of little relevance that did not detract from court’s finding of lack of electoral success based upon more recent elections); *Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013) (“Temporally, recent elections are more

probative than elections in the distant past.”), *aff’d sub nom. Gonzalez v. Harris Cnty., Tex.*, 601 F. App’x 255 (5th Cir. 2015). For the reasons discussed in Part V(C), Plaintiffs have established there is a triable question of fact on *Gingles* 3, which is not defeated by decades-past electoral success of American Indian candidates entitled to little, if any weight.

F. Dr. Barreto performed his statistical analysis of American Indian cohesion and racial bloc voting at the precinct level.

Defendants also state the unremarkable proposition that cohesion and racial bloc voting analysis should be conducted at the district level to the extent possible. Defs.’ Mot. at 13-14. *Gingles* certainly contemplates as much. *See* 478 U.S. at 59 (“voters’ ability to elect representatives of their choice . . . will vary from district to district according to a number of factors”). However, that does not negate the relevance of examining countywide evidence as well, particularly because any remedial district necessarily contemplates that performance must be evaluated in precincts outside of the one district being challenged. *See Large v. Fremont Cnty.*, 709 F. Supp.2d 1176, 1193-94 (D. Wyo. 2010) (evaluating elections covering various parts of county in challenge to at-large elections), *aff’d*, 670 F.3d 1133 (10th Cir. 2012). Professor Barreto’s precinct-level estimates, including 7 endogenous elections and 51 exogenous elections, were provided to Defendants. PSOF ¶¶ 11-14; Ex. 10, Communication providing Prof. Barreto’s data to Defs. Professor Barreto’s analysis of “election results only for voting precincts in the [Plaintiffs’ proposed] District 1 and District 2” have sufficient American Indian support to see their preferred candidate winning in both districts. Ex. 2, Barreto Rep. ¶ 40. This satisfies *Gingles* 2. *See Allen*, 143 S.Ct. at 1503.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs have established there are triable questions of material fact on both *Gingles* 2 and *Gingles* 3. Accordingly, respectfully request the Court DENY the Defendants' Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of July 2023, I filed the foregoing via the CM/ECF electronic filing system, causing a copy of the same to be served on all counsel of record.

/s/ Leon Howard
Leon Howard