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

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

SECRETARY OF STATE BRAD RAFFENSPERGER'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs seek to force the creation of a new Democratic-majority district in southeast Georgia. Defendant Secretary of State Brad Raffensperger opposes this misuse of the Voting Rights Act (VRA). As explained below, Plaintiffs are not entitled to summary judgment.

First, Plaintiffs cannot use the VRA to force a partisan outcome by trading one majority district for another. As all the experts agree, Plaintiffs cannot create a majority-African-American District 12 without bringing District 2 below majority status. The VRA does not allow Plaintiffs to choose

where in the state a majority-African-American district will be drawn, especially when the State of Georgia had compelling reasons for making District 2 a majority-African-American district in 2011.

Second, significant disputes of fact remain about the meaning of the polarization statistics presented by Plaintiffs in support of *Gingles* prongs two and three. The only point of agreement between the experts is that there is polarization—but Plaintiffs' experts claim it is racial; Defendant's expert finds it is partisan. This dispute of fact alone prevents summary judgment in Plaintiffs' favor at this stage of the proceedings, in addition to the Plaintiffs' failure to carry their burden that partisanship is not the cause of the polarization, as required by the Eleventh Circuit.

This case should be resolved in favor of Defendant because (1) of Plaintiffs' delay in bringing this case; (2) the undisputed facts demonstrate that Plaintiffs cannot prevail on prong one; and (3) Georgia's congressional districts reflect, at a minimum, rough proportionality indicating that minority voters in Georgia have an equal opportunity to participate in the political process and to elect representatives of their choice. All of these bases are explained in the Brief in Support of Defendant's Motion for Summary Judgment [Doc. 65-1]. But this case cannot and should not be resolved in favor of Plaintiffs on any of the *Gingles* prongs at summary judgment.

II. ADDITIONAL RELEVANT FACTS

A. Additional facts regarding *Gingles* prong one.

Plaintiffs reduce the legal requirements of *Gingles* prong one[1] to a mechanistic question: "is it possible to draw a compact majority-minority district in central and southeast Georgia?" [Doc. 66-1, p. 9]. Because their expert has drawn a district (even though it was drawn primarily based on race), they argue that they have met the first prong. *Id*. But the undisputed evidence shows that Plaintiffs are unable to draw their proposed majority-African-American District 12 without significantly altering District 2. As explained in Defendant's Brief in Support of Motion for Summary Judgment, the General Assembly chose to make District 2 a majority district to satisfy the preclearance requirements of the VRA in 2011. [Doc. 65-1, pp. 4-5, 16-20].

The various scores and calculations about the illustrative plans trumpeted by Plaintiffs do not provide any useful information to the Court. Plaintiffs must do more than just draw a district—they must demonstrate connections between the disparate geographic communities they unite that go beyond race. [Doc. 65-1, pp. 20-21]; *League of United Latin Am. Citizens v.*

[1] The first prong of *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986) requires a plaintiff to prove that the minority group is "sufficiently large and geographically compact to constitute a majority in a single district." *Id*. at 50-51.

Perry, 548 U.S. 399, 433, 126 S. Ct. 2594, 2618 (2006) (*LULAC*); *Bush v. Vera*, 517 U.S. 952, 997, 116 S. Ct. 1941 (1996). The African-American population in District 12 on Plaintiffs' illustrative plans is not geographically compact. Wright Dep. [Doc. 64], 141:10-14.

In addition, the illustrative plans create a District 12 that is primarily based on race. Most of the county and precinct splits in the illustrative plans are targeted to select small sections of population based solely on the race of those individuals. Wright Report [Doc. 65-3], pp. 13-16, 19-22. As a result, the only way Plaintiffs created a majority-minority District 12 was to disregard traditional redistricting principles and focus exclusively on race. Wright Report [Doc. 65-3], p. 24-25.

Plaintiffs' illustrative plans do not increase the number of ability-to-elect districts in the State of Georgia. They simply trade the existing District 2 for their proposed District 12. Wright Report [Doc. 65-3], p. 11; Cooper Dep. [Doc. 60], 116:13-17. Given testimony by Plaintiffs' own expert that eliminating District 2 as a majority-African-American district would have been retrogressive in 2011, McDonald Dep. [Doc. 61], 40:22-41:3, 41:12-16, Plaintiffs have not shown that merely moving a majority-African-American district from one side of the state to the other meets the first *Gingles* prong.

B. Additional facts regarding prongs two and three.

Plaintiffs spend almost no time explaining their analysis of the second and third *Gingles* prongs,[2] again oversimplifying the standard.

All the experts agree that the appropriate method of calculating the polarization numbers is through a statistical estimating method called Ecological Inference (EI). [Doc. 65-10, p. 5]; [Doc. 34-2, pp. 4-5]. All the experts likewise agree that the EI estimates show significant polarization in the elections calculated. Alford Dep. [Doc. 63], 119:21-122:2.

But then the opinions diverge significantly. Dr. Alford sees two possible explanations: race-based voting or partisan-based voting. [Doc. 34-2, p. 10]; Alford Dep., 124:21-125:4. He concludes that partisan polarization better explains the numbers, because the race of the candidate is irrelevant—African-American voters support Democratic candidates regardless of the candidate's race, just as white voters support Republican candidates regardless of their race. [Doc. 34-2, pp. 6, 9-10]. This conclusion is also supported by the words of Plaintiffs themselves—Ms. Hatcher testified that she did not know any African-American individuals in her community who

[2] The second and third prongs are "(2) that the minority group is 'politically cohesive'; and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate." *Nipper v. Smith*, 39 F. 3d 1494, 1510 (11th Cir. 1994), quoting *Gingles*, 478 U.S. at 50-51.

support Republican candidates. Hatcher Dep. [Doc. 59], 38:7-15. Ms. Hollowell identifies herself as a Democrat. Hollowell Dep. [Doc. 58], 36:2-7. Mr. Warren testified that he had never voted for a Republican candidate and had exclusively worked on Democratic campaigns. Warren Dep. [Doc. 57], 9:5-12:16; 43:2-8. Mr. Warren has considered himself a Democrat ever since he first registered to vote, Warren Dep., 60:10-17, and explained that his goal in this litigation was to ensure there would be an additional Democratic district, Warren Dep., 31:16-32:4.

Plaintiffs' experts also apparently see merit in the partisan-polarization theory. Dr. Palmer had no opinion about whether race or partisanship explained the polarization, instead limiting his opinion to the existence of the polarization alone because he does not believe race and partisanship can be separated. Palmer Dep. [Doc. 62], 91:4-11; 95:9-14. Dr. Hutchings explained that he did not believe any racial animus existed in voting patterns, especially because more than half of Republican voters in 2016 supported non-white candidates in the Presidential Preference Primary. Deposition of Vincent Hutchings [Doc. 70] ("Hutchings Dep."), 105:12-106:20.

Given this strong evidence of partisanship and lack of evidence of race-based voting, Plaintiffs are left with an alternative explanation: that partisanship and race are too intertwined to separate. [Doc. 66-1, p. 24]. But

Dr. Hutchings was careful to limit his testimony on a number of points during his deposition, explaining that his connecting point of partisanship and race, the term "racial conservatism," is not racism or racial intolerance. Hutchings Dep., 97:17-99:17. "Racial conservatism" as used by Dr. Hutchings is based on the Republican Party's historical lack of support of issues that were important to African-American voters, going back to the 1960s. Hutchings Dep., 100:5-101:11. Republican primary voters in Georgia cast more than 50% of their votes for minority candidates in the 2016 Presidential Preference Primary. Hutchings Dep., 105:12-106:20. That is why Dr. Hutchings concluded that there was no racism or racial intolerance present in Republican Party primary voters. Hutchings Dep., 105:12-106:20.

III. ARGUMENT AND CITATION OF AUTHORITY

As explained by all parties, a plaintiff bears the burden of first proving each of the three *Gingles* preconditions to show a Section 2 violation. *Nipper*, 39 F. 3d at 1510. After a plaintiff establishes the three preconditions, a court then reviews the so-called "Senate Factors" to assess the totality of the circumstances. *Id.* at 1512; *Gingles*, 478 U.S. at 79; *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S.Ct. 2647 (1994).

Grants of summary judgment to plaintiffs in Section 2 cases are "unusual." *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*,

775 F. 3d 1336, 1345 (11th Cir. 2015) ("*Fayette*"). The Eleventh Circuit observes that "[n]ormally," Section 2 claims "are resolved pursuant to a bench trial." *Id.* at 1343. Granting summary judgment to a plaintiff is rarely appropriate "due to the fact-driven nature of the legal tests required by the Supreme Court and [Eleventh Circuit] precedent." *Id.* at 1348. This remains true even when the parties agree on many basic facts:

> Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.

Burton v. City of Belle Glade, 178 F. 3d 1175, 1187 (11th Cir. 1999) (quoting *Clemons v. Dougherty Cty., Ga.*, 684 F. 2d 1365, 1369 (11th Cir. 1982)).

Courts considering Section 2 claims must conduct an "intensely local appraisal" of the facts in the local jurisdiction, which is not generally amenable to resolution as a matter of law. *De Grandy*, 512 U.S. at 1020-21 (no statistical shortcuts to determining vote dilution); *Gingles*, 478 U.S. at 45, 78 (stating that courts must conduct a "searching practical evaluation of the 'past and present reality'" of the challenged electoral system and whether vote dilution is present is "a question of fact"); *White v. Regester*, 412 U.S. 755, 769-70 (1983) (assessing the impact "in light of past and present reality, political and otherwise").

While the undisputed facts demonstrate that *Defendant* is entitled to summary judgment on prong one, there is a significant difference of opinion between the experts about what is causing the polarization that each expert agrees exists. As discussed below, this Court should grant summary judgment to Defendant, but at the very least should deny Plaintiffs' Motion due to the disputes of fact about the nature of the polarization.

A. The undisputed evidence demonstrates that Defendant is entitled to summary judgment on *Gingles* prong one.

i. Plaintiffs' swap of majority-African-American districts does not entitle them to summary judgment.

Plaintiffs' Motion falls woefully short of establishing they are entitled to judgment as a matter of law. Plaintiffs cannot establish the first prong because, as explained in Defendant's Motion for Summary Judgment [Doc. 65-1], they have not submitted any illustrative plan making District 12 a majority-African-American district without also reducing District 2 below ability-to-elect status.[3] Instead, Plaintiffs put forth the conclusory and

[3] Plaintiffs misquote *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009), in an attempt to argue that the only relevant metric is voting-age population. *Bartlett* considered the question of whether districts with less than 50% of a single minority population (called crossover and coalition districts) were protected by Section 2. *Id*. In 2011, Georgia maintained the ability-to-elect District 2 by ensuring it had a majority of African-American registered voters through adding Macon-Bibb County. Wright Rep. [Doc. 64-3], p. 7; Wright Supp. Rep. [Doc. 64-11], p. 2. This complied with the requirements of Section

unsupported statement that the 71-county area their expert used to create his illustrative plans was "an effort to respect traditional boundaries and maintain communities of interest." [Doc. 66-1, p. 18]. Declaring this without any support, however, does not make it so. Defendant incorporates the arguments in his Motion for Summary Judgment on prong one [Doc. 65-1, pp. 15-21], but will respond to several additional issues raised by Plaintiffs.

The Georgia General Assembly made a reasonable policy decision to avoid retrogression by placing Macon-Bibb County into District 2, not District 12. [Doc. 65-1, pp. 15-20]. Plaintiffs second-guess that decision by pulling most of Macon-Bibb County away from District 2 in their illustrative plans but have impermissibly diluted minority voting power in that district, as their own expert agreed. [Doc. 65-1, pp. 18-20]. If this Court were to endorse a remedy that Plaintiffs' own expert admits would have violated the VRA at the time of the current plan's inception, it would create the historically unacceptable situation where state actors are "trapped between the competing hazards of liability." *Wygant v. Jackson Bd. of Ed.,* 476 U.S. 267, 291 (1986); see also *Ala. Legislative Black Caucus*, 135 S. Ct. at 1273.

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5 and is the correct analysis—not whether District 12 could be drawn as a majority district. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015).

Because the only way to create a majority-African-American District 12 is to significantly reduce the African-American voter percentages in District 2, Plaintiffs have not shown they have a proper remedy for this Court to consider, and their summary judgment motion should be denied.

Plaintiffs have gone to great pains to draw several illustrative District 12 maps in a way that creates a BVAP percentage of greater than 50%.[4] But this destroys the overall compactness of their proposed District 12 and dilutes District 2—a district that historically allowed the minority community to elect the candidate of its choice. [Doc. 65-1, pp. 18-20]. This approach is not allowed by the VRA: "vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State." *LULAC,* 548 U.S. at 429 citing *Shaw v. Hunt,* 517 U.S. 899, 917 (1996). Put differently, "[i]f the inclusion of the plaintiffs would necessitate the exclusion of the others, then the State cannot be faulted for its choice." *Id.*

[4] Ms. Wright testified that it was not possible to draw District 12 as a majority-African-American district without making race the predominant factor—a significant dispute of fact with Mr. Cooper's testimony. Wright Report [Doc. 65-3], p. 24-25. She documented the techniques used by Mr. Cooper to prioritize race over other factors that still resulted in a district that was under 50% African-American on voter registration. Wright Report [Doc. 65-3], pp. 13-16, 19-22; Wright Supp. Report [Doc. 65-9], p. 1. Both experts agreed that Macon-Bibb County was required to make either District 2 or District 12 a majority-African-American district. Wright Rep., p. 7; Cooper Dep., 76:8-18.

Plaintiffs' inclusion of a number of charts in their brief does not change the fact that they cannot explain why they believe the VRA should allow them to choose to place their preferred district in the place they wish—because they have to dismantle one majority-African-American district to create their preferred District 12 and still must draw primarily based on race to create it. Plaintiffs are not entitled to judgment as a matter of law because merely trading one district for another does not meet the first prong of *Gingles*.

ii. Plaintiffs have not submitted any evidence of the compactness of the minority population.

Plaintiffs also have presented no evidence that the African-American community in the proposed District 12 on the Illustrative Plans is geographically compact. This absence of evidence further supports the denial of the Plaintiffs' Motion.

Plaintiffs believe that compactness of the minority population can somehow be measured without taking into account the geographic area in which it is situated. Plaintiffs suggest that Defendant's expert, Ms. Wright, agreed that the minority communities in Plaintiffs' proposed District 12 are compact. *See* [Doc. 66-1 p. 16]. This is not a correct reflection of Ms. Wright's testimony on this important subject, which went on at some length.

Compactness of minority communities does not, as Plaintiffs suggest,

eliminate the need to consider the geographic boundaries in which those minority communities are situated. The Section 2 analysis of compactness is not centered on, "the relative smoothness [and contours] of the district lines," but rather the compactness of the *minority population itself*. *LULAC*, 548 U.S. at 432-433. The inquiry, therefore, is whether "the minority group is geographically compact." *Id.* at 433, quoting *Shaw II,* at 916. Contrary to what Plaintiffs suggest in their Motion, Ms. Wright affirmatively stated in her deposition that the minority population in their proposed District 12 was not geographically compact:

> Q. So you're not suggesting that the African-American population is not sufficiently compact, but you're saying it's [referring to the African American population] not geographically compact?
>
> A. Right.

Wright Dep. [Doc. 64], 141:10-14. Ms. Wright affirmed without reservation that the minority community in Plaintiffs' proposed District 12 is not geographically compact, which is the appropriate Section 2 analysis.

Given Ms. Wright's testimony about the lack of geographic compactness of the minority population, Mr. Cooper's inability to identify anything beyond the race of the individuals he included in District 12 on the illustrative plans[5]

[5] Mr. Cooper could identify practically nothing beyond the race of the voters in Macon, Augusta, and Savannah that united them—in clear violation of the

demonstrates that Plaintiffs are not entitled to summary judgment, because they have simply united "far-flung segments of a racial group" based on nothing but their race. *LULAC*, 548 U.S. at 433. This Court should grant summary judgment to Defendant on the first *Gingles* prong.

B. There remains a significant dispute of fact about the nature of the polarization found by the experts in their analysis of *Gingles* prongs two and three.

As referenced above, courts tend to disfavor summary-judgment resolutions in favor of plaintiffs in Section 2 cases because of the "inherently fact-intensive" nature of vote dilution cases, especially where complex issues of politics and race are involved. *See*, *e.g.*, *Nipper*, 39 F. 3d at 1498, 1527 ("[c]ourts must consider all relevant evidence" and "the types of evidence that would be relevant under [the *Gingles*] standard plainly defy categorization"); *McIntosh Cty. Branch of the NAACP v. City of Darien*, 605 F. 2d 753, 757 (5th Cir. 1979) (requiring that findings of fact and conclusions of law with sufficient detail to enable appellate review of the factual and legal basis for the court's ultimate conclusion). Indeed, the Eleventh Circuit in *Nipper* had difficulty conceiving how any dispute about whether racial or partisan patterns explained electoral losses could ever be conclusively determined at

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requirements of *LULAC*, 548 U.S. at 433. Cooper Dep., 105:19-106:6 (identifying a highway as a possible connection).

any phase before trial. *See Nipper*, 39 F. 3d at 1525 n. 61 (discussing how to practically approach trial on vote-dilution claims).

Recent Eleventh Circuit decisions in Section 2 cases reaffirm the reluctance to grant summary judgment where partisanship-versus-race issues are raised. In two cases, the court reversed summary judgment decisions, faulting the trial courts for improperly weighing evidence and making credibility determinations on issues virtually identical to those raised by Plaintiffs' Motion. The court found it improper at summary judgment to (1) make determinations about the reason minority candidates had not been elected to office (*i.e.*, on account of politics or race), (2) weigh the Senate factors to determine the totality of the evidence, and (3) find the evidence supported racially polarized voting. *See Fayette*, 775 F. 3d at 1347-48, and *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 872 (11th Cir. 2016). For these same reasons, Plaintiffs are not entitled to summary judgment here.

i. Where electoral defeat is a result of partisanship, there is no Section 2 violation.

Section 2 plaintiffs bear the burden of proving that electoral losses are the result of racial bias—not partisan voting patterns. *Nipper*, 39 F. 3d at 1494; *Solomon v. Liberty County*, 220 F. 3d 1218 (11th Cir. 2000) (*en banc*);

League of United Latin Am. Citizens v. Clements, 999 F. 2d 831 (5th Cir. 1993) (*en banc*). As the Eleventh Circuit explained:

> Courts must undertake the additional inquiry into the reasons for, or causes of, these electoral losses in order to determine whether they were the product of "partisan politics" ***or*** "racial vote dilution," "political defeat" ***or*** "built-in bias." It is only upon concluding that a minority group's failure to prevail at the polls ... was the "result" or "function" of "racial vote dilution" or "built-in bias," that a court may find that minority plaintiffs have suffered "a denial or abridgement of the right ... to vote on account of race or color."
>
> "Electoral losses that are attributable to partisan politics" … "do not implicate the protections of Section 2."

Nipper, 39 F. 3d at 1525 (quoting *Clements*, *supra*) (quotes and emphasis in original). Where partisanship causes the defeat of minority-preferred candidates, it is reversible error to find a Section 2 violation:

> When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, . . . the district court's judgment [for plaintiffs] must be reversed.

39 F. 3d at 1525. This interpretation of Section 2 by both the Eleventh Circuit in *Nipper* and the Fifth Circuit in *LULAC* is based on the purpose and legislative history of the VRA itself:

> [S]ection 2 . . . prohibits voting practices that deny minority voters equal access to the political process *on account of race*. Indeed, "[w]ithout an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense 'discriminatory,' and any distinction

> between deprivation and mere losses at the polls becomes untenable."
>
> * * *
>
> Unless the tendency among minorities and white voters to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, voting rights plaintiffs simply cannot make out a case of vote dilution.

39 F. 3d at 1523-24 (citations omitted) (emphasis in original).

This connection to racial bias is key, because Plaintiffs must prove "objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process is due to the interaction of *racial bias in the community* with the challenged voting scheme." *Id.* at 1524 (emphasis added). The voting community must be "driven by racial bias" which allows the bias "dilute the minority population's voting strength." *Id.* at 1524-25.

If the evidence demonstrates that racial bias "does not play a major role in the political community, and the plaintiff cannot overcome that proof, then obviously [Congress] did not intend the plaintiff to win, *even if the plaintiff has proven bloc voting*." *Id.* at 1524 n.60 (emphasis in original).

Plaintiffs' own evidence demonstrates that there is no racial bias present in the voting patterns they identify. Dr. Hutchings concluded that partisan polarization was unrelated to racism or racial intolerance.

Hutchings Dep., 52:2-12; 97:17-99:17; 105:12-106:20. This testimony supports Dr. Alford's conclusion that the polarization between white and African-American voters is the result of partisanship, not racial bias. [Doc. 34-2, pp. 6, 9-10]. Plaintiffs have submitted no evidence of a voting community "driven by racial bias." *Nipper*, 39 F. 3d at 1524-25.

Facing this evidentiary problem in light of *Nipper*, Plaintiffs attempt to modify their burden. They claim that they do not have to refute evidence of partisan politics, instead attempting to argue that partisan considerations are not relevant to the second and third *Gingles* preconditions and should be reserved for the later totality-of-the-circumstances analysis. [Doc. 66-1 at 23 (quoting *Nipper*, *supra* at 1525 n.60]. These assertions are incorrect, as contrary to the plain language of *Nipper* and *LULAC*, which demonstrate that the question of racial or partisan polarization is relevant to whether legally significant bloc voting exists. At the very least, this demonstrates that Plaintiffs are not entitled to summary judgment: courts repeatedly find that totality-of-the-circumstances inquiries are not appropriate for summary judgment. *See*, *e.g.*, *Fayette*, 775 F. 3d at 1347-48; *McNeil v. Springfield Park Dist.*, 851 F. 2d 937, 940-43 (7th Cir. 1988); *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 868 F. Supp. 1376, 1382 (M.D. Fla. 1994), *rev'd on other grounds*, 72 F. 3d 1556 (11th Cir. 1996).

Plaintiffs cite just one case to support the concept that "courts consider[] evidence of non-racial explanations for bloc voting, if at all, in the second phase of the Section 2 analysis, after determining whether the *Gingles* preconditions had been met." [Doc. 66-1 at 23.] But that case does not help their cause. In *Georgia State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, No. 3:11-cv-123-TCB (N.D. Ga.), no evidence related to partisanship was introduced until after the Eleventh Circuit reversed an initial grant of summary judgment, *see* 775 F. 3d at 1336, and the trial court did not resolve the partisanship question before the case settled.

Nipper clearly sets forth Plaintiffs' affirmative burden to prove race—not partisan politics—caused the electoral defeats of minority-preferred candidates that they identified. On the present record, Plaintiffs have not met their burden to demonstrate the absence of disputed facts regarding whether the defeats of minority-preferred candidates were due to race. Indeed, Plaintiffs' own evidence shows that racial bias plays no role in white bloc voting which usually defeats minority-preferred candidates—their own expert admitted that there was no racism or racial intolerance in Republican primary voters and that his baseline comparison of "racial conservatism" had nothing to do with racism. Hutchings Dep., 97:17-99:17; 105:12-106:20. Because Plaintiffs have not put forward evidence rebutting the significant

evidence of partisanship as an explanation for bloc voting, Plaintiffs' Motion should be denied.

ii. The evidence offered by Plaintiffs does not support a finding under the Gingles *2 and 3 criteria of political cohesion among minority voters, or that racial bloc voting causes the white majority to "usually defeat" the minority-preferred candidate.*

Plaintiffs rely solely on Dr. Palmer for evidence that satisfies the second and third *Gingles* preconditions. Dr. Palmer's testimony as to these critical issues (including with respect to politics-versus-race), is challenged by Dr. Alford. In their attempt to gloss over the obvious factual disputes in the expert opinions, Plaintiffs repeatedly misrepresent Dr. Alford's testimony and unwittingly highlight examples of those very disputes.

For example, Plaintiffs state that "Dr. John Alford[] agree[d] that African Americans in an around CD 12 vote cohesively in support of the same candidates, and that the white majority votes as a bloc usually to defeat their candidates of choice." [Doc. 66-1 at 21]. But the cited testimony from Alford's deposition, more fully explains his views beyond the simplistic re-reading offered by Plaintiffs:

> Q The black voters voted cohesively in favor of a candidate which was different from the voters -- from the candidate that the white voters supported cohesively?
>
> A Okay, so now we're moving -- so we're talking about black cohesion, right? *So clearly, across all these elections, blacks*

> *are voting cohesively for a candidate of choice, the Democrat.*
>
> So we have hundreds or at least a hundred elections here, I think; and every single one of them, it's the same candidate of choice. *So, right, this chart demonstrates that black voters in Georgia vote overwhelming for Democratic candidates.*

Alford Dep., [Doc. 63], at 87:20-88:10 (emphasis added).

Plaintiffs also cherry-pick testimony in which Dr. Alford agreed that "Dr. Palmer's report and analysis demonstrates white bloc voting that usually defeats the candidate of choice of African-American voters" [Doc. 66-1 at 21 (citing Doc. No. 63 at 206:17-22)] (emphasis added)), while ignoring the contemporaneous explanation clarifying Dr. Alford's position and criticizing Dr. Palmer's analysis and conclusion:

> . . . [Y]ou asked me if it demonstrated racial bloc voting. I don't think it demonstrates racial bloc voting . . . . I think you have to be careful about what it is Palmer has demonstrated. *There is -- he has no demonstration of racially polarized voting, and so that's going to be an issue in the case.*

Alford Dep., 205:14-206:16 (emphasis added).

Plaintiffs broadly misrepresent that Dr. Alford "has no dispute with Dr. Palmer's methods, nor does he dispute the results of Dr. Palmer's analysis." [Doc. 66-1 at 21]. This testimony applied only to Dr. Alford's view of the EI calculations performed by Dr. Palmer; Dr. Alford never agreed with the result

of that analysis. And Dr. Alford explicitly clarified that it was the methodology—as distinct from the methods—applied by Dr. Palmer in conducting the analysis, with which Dr. Alford did not disagree. *See* Alford Dep., 77:9-78:11. Dr. Alford later explained, directly contrary to Plaintiffs' representation, that he *does* disagree with Dr. Palmer's election analysis, specifically including on the grounds of partisanship-versus-race issues overlooked or ignored by Dr. Palmer:

> He's left out the -- in terms of labeling, at least, he's left out the variable that's the most obvious explanator here, which is despite the coincidence that every single one of these candidates that's preferred is a Democrat, he doesn't label party. He does label the race of the candidate. And it appears to make no difference. He makes no comment on it at all. Right?
>
> So there are two factors here competing, as they always are in partisan elections: the possibility that this is racially polarized voting and the possibility that it's just partisan polarized voting.
>
> He's eliminated the information that would suggest that it might be partisan by just not putting it in there, which is an odd thing to do. He's included the evidence that would allow you to assess it was racial, and then he hasn't used it.

Alford Dep., at 96:6-13; *see also* 98:4-99:5.

Dr. Alford independently analyzed Dr. Palmer's EI calculations, the pertinent underlying voting data, and conducted his own analysis on election results within District 12 from 2012 to 2018. That analysis showed that, because black and white Democratic candidates received similar levels of

support from both minority voters and white voters, the party—not the race—of candidates determined voter preferences:

> *[T]he race of the candidates does not appear to be particularly influential.* Black voter support for Black Democratic candidates is certainly high, in 2018 just as it was in 2012-2016, but Black voter support is in the same high range for white Democratic candidates as it is for Black Democratic candidates. Similarly, white voter support for Black Democratic candidates is low, in 2018 just as it was in 2012-2016, but white voter support for white Democratic candidates is also low.
>
> In his report Dr. Palmer summarizes his conclusion about racially polarized vote by stating that 'these results demonstrate high levels of racially polarized voting in CD 12 and its surroundings . . . . However, as the discussion above indicates *these are differences tied to the party of the candidate, not the race of the candidate.*
>
> * * *
>
> Both the election analysis report by Dr. Palmer for 2012-16, and the 2018 election analysis provided here show that Black voters cohesively support Democratic candidates, regardless of whether those candidates are Black or white. Similarly, white voters cohesively vote for Republican candidates, and in opposition to Democratic candidates, regardless of whether those candidates are Black or white. Thus it is cohesive Black voter support for Democratic candidates, and white voter support for Republican candidates that the election analysis reveals, not cohesive Black voter support for Black candidates and white voter support for white candidates. In short, *the election analysis provided here and in Dr. Palmer's report demonstrates that party polarization, rather than racial polarization, is the best explanation for the voting patterns in these House districts.*

[Doc. 34-2, pp. 7-10] (emphasis added).

Finally, as Dr. Alford explained, this Court faces a real danger if it accepts Plaintiffs' invitation to conflate party and race where, as here, a factual dispute remains concerning the true cause of minority-preferred candidate political defeats:

> [A]s is in this case, . . . if all you've established is that voting is polarized by party, . . . and then from that you [] simply assume that therefore it's racially polarized, then I think you haven't really done anything because *all partisan elections in the United States are party polarized. It's the nature of our system.*

Alford Dep., 63:4-13 (emphasis added). Plaintiffs have not shown sufficient evidence to support a grant of summary judgment on prongs 2 and 3 of the *Gingles* preconditions.

iii. Plaintiffs' effort to avoid the partisan explanation for the data they rely on does not resolve that disputed issue of material fact.

Plaintiffs present no evidence that refutes Dr. Alford's analysis of the relative importance of race and party in determining voter preferences, other than by exclaiming that partisanship in Georgia is inextricably intertwined with race.[6] [Doc. 66-1 at 24]. Plaintiffs claim the expert analysis and testimony offered in support of this notion is uncontested, but comparing Dr. Hutchings' own testimony with Dr. Alford's indicates that there are facts in

[6] This contention fails as a matter of law, however, because it ignores the Eleventh Circuit's binding precedent in *Nipper*.

dispute. *Compare* Hutchings Dep., at 51:5-52:12; 55:24-57:15; 97:17-99:17 *with* Alford Dep., 41:5-43:18; 123:14-124:2. Accordingly, even if an inextricable relationship between race and politics could satisfy *Nipper*, this Court cannot determine the disputed fact at summary judgment, because it would have to make a credibility determination. *Fayette*, 775 F. 3d at 1347-48.

Plaintiffs do not offer or cite any further supporting evidence refuting the obvious role of partisanship in the electoral outcomes because they cannot. Plaintiffs' evidence fails to prove that race, and not partisanship, is the "polarization" responsible for the election results and thus cannot support a grant of summary judgment as to *Gingles* prongs two and three.

IV. CONCLUSION

Plaintiffs are asking this Court to extend the VRA to the protection of Democratic districts, to the point of choosing where in the state each Democratic-majority district will be located. And they are asking the Court to do so on a record that is rife with disputes of fact about whether party or race is influencing voter decisions. This Court should decline that invitation.

Respectfully submitted this 29th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

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

/s/ Bryan P. Tyson
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I served the within and foregoing SECRETARY OF STATE BRAD RAFFENSPERGER'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties to this matter via electronic notification or otherwise.

This 29th day of May, 2019.

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