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

GEORGIA STATE CONFERENCE OF THE NAACP; GEORGIA COALITION FOR THE PEOPLE'S AGENDA, INC.; GALEO LATINO COMMUNITY DEVELOPMENT FUND, INC., *Plaintiffs*, v. STATE OF GEORGIA; BRIAN KEMP, in his official capacity as the Governor of the State of Georgia; BRAD RAFFENSPERGER, in his official capacity as the Secretary of State of Georgia, *Defendants.*	Civil Case No. 21-c5338-ELB-SCJ-SDG

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs' experts—whose opinions are virtually unrebutted—and the corroborative evidence from depositions have, at a minimum, raised genuine issues of material fact as to whether Georgia's congressional and state legislative redistricting was fueled by racial gerrymanders, diluted the votes of Black and Hispanic citizens in violation of Section 2 of the Voting Rights Act, and did so intentionally. The caselaw in this Circuit and elsewhere consistently echoes the proposition that the fact-intensive nature of redistricting claims renders summary judgment a poor vehicle to decide such claims. This case is no exception.

In apparent acknowledgement of their heavy burden to obtain summary judgment in a case such as this, Defendants simply ignore facts supporting Plaintiffs' claims, mischaracterize others, improperly shift the burden of summary judgment onto Plaintiffs, and ask this Court to create new and unsupported law in order to make this case go away. Summary judgment is starkly inappropriate.

In challenging the standing of Plaintiffs, the Georgia State Conference of the NAACP ("GA NAACP"); GALEO Latino Community Development Fund, Inc. ("GALEO"); and Georgia Coalition for the People's Agenda ("GCPA") (collectively "Plaintiffs"), Defendants first assert without support and contrary to precedent that organizational standing is not permitted in vote dilution cases. Then,

as to associational standing, Defendants fail to advise the Court of their agreement limiting discovery to the disclosure of one member per organizational Plaintiff, an agreement that limits their right to argue that Plaintiffs have failed to identify injured members in each district. In any event, Plaintiffs offer abundant proofs of at least a dozen, and in some cases hundreds, of members residing in each challenged district.

Next, despite considerable evidence in the record that race predominated over traditional redistricting principles during the redistricting process, Defendants contend that this evidence is not "conclusive" to support Plaintiffs' racial gerrymander claims. But it is Defendants, not Plaintiffs, who bear the burden of proving "conclusiveness" on this motion. The abundant circumstantial evidence as to the motivations of the legislature is enough to defeat summary judgment. Indeed, Plaintiffs' expert goes beyond that and demonstrates that if, as Defendants claim, their aim was partisanship, the lawmakers could have achieved that goal without moving anywhere near as many voters of color as they did.

Defendants' challenge to Plaintiffs' Section 2 Voting Rights Act claims is also easily dispatched. Virtually every court that has considered the issue of whether sovereign immunity applies to Section 2 cases has rejected Defendants' argument of no waiver. As to the first *Gingles* precondition, Defendants argue that districts comprised of a coalition of two or more racial groups are barred as a matter of law,

when this Circuit's precedent is decidedly to the contrary. Failing that, they are left with a purely factual argument, inappropriate for decision on this motion, as to whether Plaintiffs' demonstrative maps sufficiently balanced traditional districting principles. Turning to the second and third *Gingles* preconditions, Defendants do not rebut Plaintiffs' expert's finding of minority group cohesion and white bloc voting, but rather improperly seek to insert into the discussion the question of what causes the racially polarized voting, an issue relevant, if at all, in adjudicating the totality of the circumstances.

Finally, as court after court has held, summary judgment is an inappropriate vehicle to decide issues of discriminatory intent. Plaintiffs will easily demonstrate the existence of a genuine factual dispute on their intentional discrimination claim.

BACKGROUND

The full set of relevant facts is set forth in Plaintiffs' Response to Defendants' Statement of Material Facts in Support of Motion for Summary Judgment ("PSOF") and Plaintiffs' Statement of Material Facts Which Present a Dispute of Facts in Opposition to Defendants' Motion for Summary Judgment. ("PODSOF").

LEGAL STANDARD

Summary judgment is appropriate only if "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). A fact is "material" if it can affect the outcome of the lawsuit under the governing legal principles. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment has the burden of informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

ARGUMENT

I. Defendants Are Not Entitled to Summary Judgment on Standing.

A. Plaintiffs have associational standing.

In *Hunt v. Washington State Apple Advert. Comm'n*, the Supreme Court held:

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. 333, 343 (1977); *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1316 (11th Cir. 2021). Defendants do not contest that the interests at stake in this litigation are germane to the purposes of each of the Plaintiff organizations. Defendants' sole argument on associational standing is that "each organization has failed in discovery to provide evidence that they have members in

every challenged district." Def. Mot. at 11. But Defendants neglect to inform the Court of their agreement with Plaintiffs in which they agreed to limit their discovery on associational standing as to each Plaintiff so long as each Plaintiff identified a single injured member. *See* Declaration of Crinesha Berry ("Berry Decl."); Declaration of Julie Houk ("Houk Decl."). This agreement was expressly intended to limit the number of members Plaintiffs had to disclose in discovery. Berry Decl. 4-14; Houk Decl. 7-14. In any event, Plaintiff organizations have numerous members that reside in each challenged district, as explained below, easily meeting the controlling standing standard.

1. Defendants agreed to limit their discovery on associational standing to a single member for each Plaintiff organization.

Defendants' Interrogatory Number 6 asked Plaintiffs to: "Identify all 'members' of the Organizational Plaintiffs that Organizational Plaintiffs plan to rely on for purposes of establishing associational standing." Berry Decl. ¶ 2 (Ex. 1); Houk Decl. ¶ 3. Although Plaintiffs objected to this request on the grounds of associational privilege, among other reasons, with respect to naming individual members, each plaintiff noted that it "expect[ed] to offer evidence that it has members residing in certain of the challenged districts at issue in this litigation." Berry Decl. ¶ 3 (Exs. 2-4); Houk Decl. ¶¶ 4-6 (Exs. 2-4). In an attempt to move the case along and resolve any dispute over Plaintiffs' associational standing, counsel

conferred and agreed that Plaintiffs would supplement their interrogatory response by naming a single member for each Plaintiff organization and that Defendants would limit their discovery on associational standing to those three individuals. Berry Decl. ¶¶ 4-14; Houk Decl. ¶¶ 7-14. Plaintiffs confirmed this oral agreement with Defendants in writing:

> I'm writing to confirm the outcome of our meet and confer on Friday. The conclusion was that for any Plaintiff that identifies one member, the State's challenge to *that Plaintiff's associational standing* will be limited to the identified member's individual standing. If circumstances arise such that a Plaintiff identifies a different member for associational standing purposes, the State may take additional discovery regarding that member's individual standing notwithstanding the expiration of discovery-related deadlines. (emphasis added)

Berry Decl. ¶ 12. Counsel for Defendants agreed. Berry Decl. ¶ 13 ("Thanks for this email – yes, this confirms our agreement and the meet and confer."). Pursuant to this agreement, Plaintiffs supplemented their interrogatory responses, and each organizational plaintiff named one individual member. Berry Decl. ¶ 14; Houk Decl. ¶ 14.

Without advising this Court of their agreement to limit discovery, Defendants now seek to penalize Plaintiffs for complying with that very deal. Def Mot. at 11. However, the Supreme Court has made clear that a defendants' right to seek discovery on associational standing in redistricting cases is limited to the information defendants specifically request. *Ala. Legislative Black Caucus v.*

Alabama, 575 U.S. 254, 270 (2015) ("At the very least, the common-sense inference is strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership list. . . .").[1]

2. Plaintiff organizations collectively have at least one—and sometimes hundreds—of members in each challenged district, sufficient to raise at least a genuine dispute of fact as to standing.

Not surprisingly—and as indicated in their response to Interrogatory No. 6—given the thousands of members Plaintiffs have throughout the State of Georgia, Plaintiffs have sufficient membership in the challenged districts to support

[1] Plaintiffs recognize that Defendants may assert an understanding of the agreement – however unjustified – different than that had by Plaintiffs. If more is needed, in these circumstances, as the Court further explained in *Ala. Legislative Black Caucus*, "elementary principles of procedural fairness" require that this Court give Plaintiffs "an opportunity to provide evidence of member residence." *Id.* at 271. Plaintiffs provide that evidence in the next point. Further, the agreement limiting Defendants' discovery also provided that Plaintiffs may identify different members for the purposes of satisfying associational standing as long as "the State may take additional discovery. . . notwithstanding the expiration of discovery-related deadlines." In accordance with that provision, Plaintiffs advised Defendants on April 26, 2023 that they are identifying a substitute for one of the members previously identified, because that member no longer would support associational standing. This provision could be used as a basis for allowing Plaintiffs to identify additional members if required. However, for the reasons set forth in the next point, that need not be required. Further, if there was not a meeting of the minds as to the meaning of the agreement to limit discovery as to associational standing, then there is ample time for discovery to be reopened on that limited issue.

associational standing easily. In *Ala. Legislative Black Caucus*, the Court found that testimony from a "representative of the Conference" that it had "members in almost every county in Alabama" and is a "statewide political caucus" with the "'purpose' of 'endors[ing] candidates for political office who will be responsible to the needs of the blacks and other minorities and poor people'" was "sufficient to meet the Conference's burden of establishing standing" in a redistricting case. *Id*. at 269-70, 84 (alteration in original); *see also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1163 (11th Cir. 2008).

In *Ala. Legislative Black Caucus*, the information deemed sufficient was nothing more than a sworn statement that the organization had many members. Similarly, in *Browning*, the information deemed sufficient by the Eleventh Circuit was nothing more than that the organization had thousands of members. *Browning*, 522 F.3d at 1163. Here, Plaintiffs have submitted much more: declarations from the GA NAACP, GALEO, and the GCPA providing evidence that across all three groups, the Plaintiff organizations have numerous—often hundreds—of members in each district challenged as a racial gerrymander. *See* PSOF at ¶¶ 1-7 (GA NAACP); 8-11 (GALEO); 12-16 (GCPA). These declarations also provide evidence that—in every district cluster Plaintiffs challenge under the Voting Rights Act—numerous (often hundreds) of members of the Plaintiff organizations reside in majority-white

districts under the enacted plan but in majority-minority districts under one of the Plaintiffs' mapping expert's illustrative plans. *Id*. This evidence is more than enough to create a fact issue as to whether the Plaintiffs have associational standing. *See Ala. Legislative Black Caucus*, 575 U.S. at 269-70.[2]

B. Plaintiffs have organizational standing.

Each of the Plaintiffs also has organizational standing. "To establish standing, an organization, like an individual, must prove that it either suffers actual present harm or faces a threat of imminent harm." *City of S. Miami v. Governor*, No. 21-13657, 2023 WL 2925180, at *4 (11th Cir. Apr. 13, 2023). An organization suffers actual harm "if the defendant's illegal acts impair [the organization's] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Id*. (alteration in original) (quoting *Browning*, 522 F.3d at 1165). The Eleventh Circuit has found organizational standing in voting cases where civil rights groups provide evidence that the challenged laws "divert[ed] personnel and time" from other core projects. *Browning*, 522 F.3d at 1166; *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009).

[2] If the Court requires more, notwithstanding Defendants' agreement, Plaintiffs ask that they be given an opportunity to contact the individual members and request permission to identify them, and further ask that such identification be made *in camera* to protect the associational rights of Plaintiffs and their members.

Here, Defendants do not dispute the ample evidence in the record that Plaintiff organizations have diverted personnel and time from other projects.[3] *See* PSOF at ¶¶ 17-38. Instead, Defendants argue only that resource diversion-based organizational standing is inapplicable to redistricting cases as a matter of law. Def. Mot. at 8-9. But their only support for that proposition are cases dealing with *associational* standing. *See* Def. Mot. at 9 (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018)). At least one court has recognized the applicability of organizational standing in redistricting cases, in language fully aligned with the prevailing Eleventh Circuit law. *See Perez v. Abbott*, 267 F. Supp. 3d 750, 772 (W.D. Tex. 2017), *aff'd in part, rev'd on other grounds in part and remanded*, 138 S. Ct. 2305 (2018) ("courts have consistently found standing under *Havens* for organizations to challenge alleged violations of § 2 of the VRA and the Fourteenth Amendment").

II. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Racial Gerrymandering Claims (Count I).

To prevail on a racial gerrymandering claim, Plaintiffs must ultimately prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). To do so, Plaintiffs need not rely on direct

[3] Plaintiffs have agreed to waive any argument that they can support standing on the basis of diversion of financial resources.

evidence of motivation, but instead can show predominance through "circumstantial evidence of a district's shape and demographics[.]" *Id.* "The task of assessing a jurisdiction's motivation . . . is not a simple matter; on the contrary, it is an inherently complex endeavor [that] require[s] the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Thus, summary judgment on racial gerrymandering claims is improper if reasonable inferences can be drawn such that the motivations of the legislature are in dispute. *Id.* at 552. A single expert affidavit that contains circumstantial evidence about the motivations of the legislature is enough to defeat summary judgment on a racial gerrymander claim. *Id.* at 549-51.

Here, Defendants seemingly concede that the record is replete with circumstantial evidence of racial gerrymandering, but merely complain that such evidence is not "conclusive." Def. Mot. at 14. It is Defendants', not Plaintiffs', burden on this motion to prove that its evidence is both undisputed and "conclusive." For that reason alone, summary judgment should be denied on this claim.

If more is needed, the record contains ample evidence sufficient to create at a minimum a genuine dispute of material fact as to whether race predominated in the drawing of Congressional Districts 2, 3, 4, 6, 8, 10, 13, and 14; Senate Districts 1, 2, 4, 17, 26, 48, and 59; and House Districts 44, 48, 49, 52, and 104. Plaintiffs' expert,

Dr. Moon Duchin provided detailed analyses to that effect, showing how traditional districting principles were subordinated to the cracking and packing of communities of color, as explained below. Dr. Duchin's findings are unrebutted, as Defendants' mapping expert did not offer any opinion as to racial gerrymandering. Declaration of Jacob Canter ("Canter Decl.") ¶ 23 (Exhibit 22).

- **CD 2 and CD 8**: Dr. Duchin determined that political subdivision splits with racial disparities in Bibb County provide evidence that race predominated in the drawing of these districts, consistent with the packing of CD 2 and the cracking of CD 8. PSOF at ¶¶ 145-146.

- **CD 3**: Dr. Duchin determined that political subdivision splits in CD 3 consistent with cracking Black voters is evidence that race predominated over traditional redistricting principles in the drawing of CD 3. *Id*. at ¶¶ 147-148.

- **CD 4 and CD 10**: Dr. Duchin determined that political subdivisions splits with racial disparities in Newton County provide evidence that race predominated in the drawing of these districts such that Black voters in CD 4 were packed and Black voters in CD 10 were cracked. *Id*. at ¶¶ 149-150, 154.

- **CD 6**: Dr. Duchin determined that her core retention/population flow and political subdivision split analysis is evidence that race predominated over traditional redistricting principles in the cracking of CD 6, which previously performed for Black and Latino voters. *See e.g. id*. at ¶¶ 151-153 (district targeted to crack Black and Hispanic voters from CD 6); *id*. at ¶¶ 96-106 (core retention/population flows); *id*. at ¶¶ 143-144, 147-18 (county splits), *id*. at ¶¶ 151-153 (racially charged precinct splits). Dr. Duchin also reviewed community testimony and determined that the cracking of CD 6 split communities of interest by pairing disparate, white, rural and suburban voters from Forsyth, Dawson, and Cherokee counties with urban, Black voters in the metro-Atlanta region. *Id*. at ¶¶ 95, 98, 104, 258.

- **CD 13**: Dr. Duchin determined that political subdivision splits in CD 13 with racial disparities were evidence that race predominated over traditional redistricting principles in the drawing of CD 13. *Id*. at ¶¶ 143-144, 147-148.

- **CD 14**: Dr. Duchin determined that her core retention/population flow and political subdivision analysis is evidence that race predominated over traditional redistricting principles in the drawing of CD 14. *Id*. at ¶¶ 107-113 (core retention/population flows); *id*. at ¶¶ 143-144, 147-148 (county splits). Dr. Duchin determined that the movement of two majority-Black cities—Powder Springs and Austell—into CD 14, which resulted in the "submerg[ing]" of Black voters "among more numerous, dissimilar communities from CD 14 "can't be justified in terms of compactness or respect for urban/rural communities' of interest." *Id*. at ¶¶ 108-113.

- **SD 56**: Dr. Duchin determined that her core retention/population flow analysis, which shows that Black and Latino voters were cracked—is evidence that race predominated over traditional redistricting principles in SD 56. *Id*. at ¶¶ 130-137 (racially imbalanced population shifts)]. Dr. Duchin also opined that SD 56 was cracked just as Black and Latino voters were on the verge of electing their candidates of choice. *Id*.

- **SD 1, SD 2, and SD 4**: Dr. Duchin determined that her political subdivision split analysis—showing that parts of Chatham County are "clearly racially sorted into Senate districts in a way that ensures that Black and Latino voters can only have effective influence in one of the constituent districts"—is evidence that race predominated over traditional redistricting principles in the drawing of SDs 1, 2, and 4. *Id*. at ¶¶ 158-160.

- **SD 17:** Dr. Duchin determined that her core retention/population flow analysis—showing that Black and Hispanic voters were cracked from the district—is evidence that race predominated over traditional redistricting principles in the drawing of SD 17. *Id*. at ¶¶ 122-129.

- **SD 26**: Dr. Duchin determined that her political subdivision split analysis—showing that Black and Hispanic voters were packed into SD 26—is evidence that race predominated over the drawing of SD 26. *Id*. at ¶¶ 155-157.

- **SD 48**: Dr. Duchin determined that her core retention/population flow analysis—showing the Black and Hispanic voters were cracked from the

district—is evidence that race predominated over traditional redistricting principles. *Id.* at ¶¶ 115-121. Notably, this occurred after Black and Hispanic voters were able to elect their candidate of choice, the Asian candidate Michelle Au. *Id*. ¶ 115.

- **HDs 44, 48, 49, 52, and 104:** Dr. Duchin determined that her core retention/population flow analysis indicates that Black and Latino voters were cracked from these districts just as they were on the verge of electing candidates of choice. *Id*. at ¶¶ 138-142. Dr. Duchin opined that this is evidence that race predominated over traditional redistricting principles in the drawing of these districts. *Id*.

Contrary to Defendants' argument, Def. Mot. At 14, there is no requirement. that Plaintiffs provide *direct* evidence of improper legislative intent. Circumstantial evidence that race predominated is sufficient. *See Miller*, 515 U.S. at 916. Nor, as Defendants would have it, does the existence of a partisan motive in and of itself immunize a racial gerrymander. Plaintiffs meet their burden of proof by showing "race-based districting for ultimately political reasons, leveraging the strong correlation between race and voting behavior to advance [the lawmakers'] partisan interest[.]" *Cooper v. Harris*, 581 U.S. 285, 319 n.15 (2017). Here, Plaintiffs have produced undisputed evidence voting in Georgia is heavily racially polarized, and that the lawmakers knew it. PSOF at ¶ 372. They have shown that map-drawers had only racial data (and not political data) available at the census block level, belying Defendants' argument that political motivations were the cause of precinct splits with disparate racial impact. PSOF at ¶¶ 76-77. That alone is sufficient to raise a

dispute of fact as to whether the districting was unconstitutionally "race-based . . . for ultimately political reasons[.]" *Cooper*, 581 U.S. at 319 n.15.

But there is much more. "One, often highly persuasive way to disprove a State's contention that politics drove a district's lines is to show that the legislature had the capacity to accomplish all its partisan goals without moving so many members of a minority group into the district." *Id*. at 317. Dr. Duchin has done just that. She ran a series of algorithmic experiments that altered district lines in accordance with traditional districting principle—but not considering race—with the goal of creating 100,000 additional Trump-favoring districts, and then plotted the enacted plan's Black Voting Age Population ("BVAP") in comparison to these partisan-advantaged plans. PSOF ¶¶ 161-177. In the middle-ranges of these plans, i.e., the most competitive districts, she found that the enacted plans were extreme outliers as to the cracking of Black voters. She concluded that the legislature could have achieved their partisan goals without moving so many voters of color, precisely the standard accepted by the Court in *Cooper*.

III. Sovereign Immunity Does Not Immunize the State of Georgia From Section 2 Claims.

Defendants' argument that sovereign immunity immunizes one Defendant—the State of Georgia—from Section 2 claims, (Def. Mot. at 18-19), is decidedly against the weight of authority. *See Mixon v. State of Ohio*, 193 F.3d 389, 398 (6th

Cir. 1999) (holding that Congress intended to abrogate the States' sovereign immunity under the VRA because it "specifically prohibits 'any State . . .' from discriminating against voters on the basis of race"); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (same); *see also Ga. State Conf. of NAACP v. State of Georgia*, 269 F. Supp. 3d 1266, 1274-75 (N.D. Ga. 2017) (same); *Terrebonne Par. NAACP v. Jindal*, 154 F. Supp. 3d 354, 359 (M.D. La. 2015) (same).

The Eleventh Circuit has ruled to the same effect. *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647 (11th Cir. 2020), *cert. granted, judgment vacated sub nom. Alabama v. Ala. State Conf. of NAACP*, 141 S. Ct. 2618 (2021) ("*Ala. NAACP"*). Although the vacating of that decision may deprive it of precedential authority, it retains persuasive weight. *See DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F. 3d 1169, 1176 (9th Cir. 2005) (Beezer, J., concurring) (discussing persuasive effect of vacated decisions).[4] This authority far outweighs Defendants' reliance on a lone, unreported and therefore nonprecedential, decision, *Christian Ministerial All.*

[4] Defendants appear to recognize this, and plead that this Court not consider it bound by Eleventh Circuit decisions. Def. Mot. at 17. But three-judge panels within this district have consistently found that they are so bound. *See, e.g., Ga. State Conf. of NAACP*, 269 F. Supp. 3d at 1278 ("[w]e do not write on a clean slate, and we are bound by Eleventh Circuit precedent"); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1305 (M.D. Ala. 2013) ("[i]t is well settled that [the Court is] bound by Eleventh Circuit precedent when [it] sit[s] as a three-judge district court").

v. Arkansas, No. 4:19-cv-402, 2020 U.S. Dist. LEXIS 262252, at *17 (E.D. Ark. Feb. 21, 2020), and on Judge Branch's dissent in *Ala. NAACP*, 949 F.3d at 656.

IV. Defendants Are Not Entitled to Summary Judgment on the *Gingles* Preconditions (Counts II and III).

A. General legal standards

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), the Court articulated three preconditions that plaintiffs must satisfy to bring a Section 2 vote dilution claim. *First*, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id*. at 50. *Second*, "the minority group must be able to show that it is politically cohesive." *Id.* at 51. *Third*, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* If these preconditions are met, then courts must consider the "totality of circumstances" to determine whether there is a Section 2 violation. *League of United Latin Am. Citizens v. Perry* ("*LULAC"*), 548 U.S. 399, 425 (2006).[5] The Eleventh Circuit has noted that Section 2 vote dilution cases,

[5] When analyzing the totality-of-circumstances, "the Court has referred to the Senate Report on the 1982 amendments," which "identifies factors typically relevant to a § 2 claim." *Id*. at 426. These "Senate Factors" include: (1) a history of voting-related official discrimination; (2) the extent to which voting in the state or political subdivisions at issue is racially polarized; (3) the use of voting practices that enhance the opportunity for discrimination; (4) exclusion from candidate slating; (5) ongoing

"are [normally] resolved pursuant to a bench trial," not by way of summary judgment. *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015) (acknowledging critical role trial court plays in "[s]ifting through the conflicting evidence and legal arguments").

B. There are issues of fact as to whether Plaintiffs' satisfy the first *Gingles* precondition.

The first part of the *Gingles* One inquiry—the "numerosity" requirement—is a straightforward mathematical question: "Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). The second part of the inquiry—the "compactness" requirement—requires a showing that it is "possible to design an electoral district[ ] consistent with traditional [re]districting principles[.]" *Davis v. Chiles*, 139 F.3d 1414, 1424-25 (11th Cir. 1998); *see also LULAC*, 548 U.S. at 433.

1. There are issues of fact as to whether Plaintiffs satisfy the numerosity requirement.

Defendants cannot dispute that Black and Hispanic Georgians drove the population growth in Georgia over the last ten years. PSOF ¶¶ at 72-74. Nor do

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effects of discrimination in socioeconomic areas that hinder participation in the political process; (6) racial appeals in campaigns; (7) minority representation in public office; (8) lack of responsiveness to minority needs from elected officials; and (9) tenuousness of the policy underlying the challenged practice. *Id.*

Defendants dispute Dr. Duchin's analysis that each of the illustrative districts she identifies as containing minorities making up more than 50 percent of the voting age population does just that. Rather, Defendants' argument on numerosity is limited to the purported legal proposition that the numerosity requirement cannot be satisfied by the creation of coalition Black and Hispanic districts, which a few of Dr. Duchin's districts are. Def. Mot. at 21-22.

However, in *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*—a decision that Defendants inexplicably omit from their brief—the Eleventh Circuit squarely held that "[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner." 906 F.2d 524, 526 (11th Cir. 1990). *Strickland*, the only case Defendants cite in support of their proposition, Def. Mot. at 21-22, does not say otherwise. There, the Court's observation that "no federal court of appeals has held that § 2 requires creation of coalition districts" refers to coalition districts between minority groups *and white voters*—also known as "crossover districts"—where the minority groups did not make up the majority in a given geographic area. *Strickland*, 556 U.S. at 1242-46.

Defendants also argue that "to the extent that Plaintiffs are relying on a coalition theory, they have not offered evidence from primary elections, which

would be required to consider the degree of cohesion among minority groups." Def. Mot. at 22. But cohesion is not germane to the first *Gingles* precondition, only to the second. In any event, Plaintiffs are aware of no case that requires consideration of primary elections for coalition districts.[6]

2. Plaintiffs' illustrative maps were drawn consistent with traditional redistricting principles.

The record is replete with evidence that the "minority group" is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper*, 581 U.S. at 301. Defendants' arguments to the contrary are unavailing.

First, contrary to Defendants' argument, there is no daylight between Dr. Duchin's calling her maps "demonstratives" and the proposition that *Gingles* preconditions are intended to give the trial court confidence that "it can fashion a permissible remedy in the particular context of the challenged system." *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994). Indeed, although "[p]laintiffs typically

[6] Nowhere in the only case Defendants cite in support of this argument, *Perez*, 267 F. Supp. 3d at 760, does the court indicate that it was referring to the first *Gingles* precondition in discussing primaries. Moreover, the court merely noted that there was evidence of *non*-cohesion between Black and Hispanic voters in the primaries, *not* that Plaintiffs were required to prove the existence of cohesion in the primaries. Here, Defendants have offered no proofs of lack of cohesion between Black and Hispanic voters in the primaries or otherwise.

attempt to satisfy [the first *Gingles* precondition] by drawing hypothetical majority-minority districts," "such illustrative plans are 'not cast in stone' and are offered only 'to demonstrate that a majority-[B]lack district is feasible[.]'" *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1250 (N.D. Ga. 2022) (first and second alterations in original) (citing *Clark v. Calhoun Cnty.*, 21 F.3d 92, 95 (5th Cir. 1994)); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006).

Here, Dr. Duchin testified that, during the hand-drawing process of her map-drawing, she balanced many of the traditional redistricting principles announced by the legislature's redistricting guidelines. PSOF at ¶¶ 180-1864. While Defendants may argue as to whether Dr. Duchin struck the right balance, that is a trial issue, not an issue to be resolved on summary judgment.

In this context, Georgia itself allows for a balancing of factors—some of which are principles that must be satisfied, and others of lesser rank. *Id*. at ¶ 182. The top of the hierarchy consisted of principles that *must* be satisfied, including that the congressional plan *must* be "drawn with a total population of plus or minus one person from the ideal district size;" that all districts "*shall be"* composed of contiguous geography;" and that "all plans *will comply*" with Section 2 of the Voting Rights Act and the U.S. and Georgia Constitutions. *Id*. The guidelines also state that "each legislative district of the General Assembly *should be drawn* to achieve a

total population that is substantially equal as practicable," while considering other redistricting principles. *Id*. As Dr. Duchin stated in her report, she kept these principles in mind and worked to ensure that her maps reflected or addressed these requirements. *See id*. at ¶¶ 178-188. *See also id*. ¶¶ at 247-248 (indicating that each district in all of Dr. Duchin's illustrative maps are contiguous, and that the populations of each district were "tightly balanced"); *id*. at ¶ 182 (the guidelines).

Lower in the hierarchy were principles that the legislature should "consider" when drawing the maps: the boundaries of counties and precincts; compactness; and communities of interest." *Id*. at ¶ 182. Dr. Duchin balanced and considered each of these factors when hand-drawing her illustrative plans and determined that her plans were comparable or better for each metric. *See id*. at ¶¶ 243-258.

Fittingly lowest on the scale, the guidelines note that "efforts should be made to avoid the *unnecessary* pairing of incumbents." *Id*. at ¶¶ 182 (emphasis added). At the time of her report, Dr. Duchin did not have accurate incumbent addresses available to her, so a number of her districts did have incumbents paired—as did some in the enacted plan. *Id*. at ¶¶ 255-256. However, incumbent protection is "subordinate" to remedying violations of the VRA or Constitution. *See LULAC*, 548 U.S. at 441 (incumbent protection "cannot justify the [dilutive] effect [of a redistricting plan] on [minority] voters"). This is particularly true when, as here,

state guidelines themselves subordinate incumbency protection to other traditional redistricting principles. *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *68 (N.D. Ala. Jan. 24, 2022) ("we note that under the Legislature's redistricting guidelines, the protection of incumbents is a decidedly lower-level criterion . . . and that this is consistent with the lower-level importance that criterion has been afforded in other redistricting cases"), *cert. granted before judgment sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022) . Additionally, Defendants have not demonstrated, as a matter of undisputed fact, that the pairing of incumbents in any of Dr. Duchin's districts rendered the district an impermissible remedial district, let alone an inadequate *Gingles* 1 plan. *See Abrams v. Johnson*, 521 U.S. 74, 84-85, 99 (1997) (approving remedial plan that "subordinated" unpairing incumbents to "other factors").

Thus, Plaintiffs' have set forth evidence sufficient to establish that whether Dr. Duchin's illustrative plans are "reasonably configured," *Raffensperger*, 587 F. Supp. 3d at 1250 (citing *Cooper*, 581 U.S. at 301), is a triable issue of fact. To the extent that Defendants' nitpick about how reasonably configured the illustrative plans are, those objections are to be resolved at trial, not at summary judgment.

Second, Defendants argue that Dr. Duchin's plans deal only with numerically quantifiable districting principles, and that Dr. Duchin did not have knowledge of

communities in Georgia. Def. Mot. at 20. To the contrary, Dr. Duchin testified that she reviewed quantitative *and* non-quantitative metrics apart from race, including a voluminous record of community testimony (which is the only "non-numeric" principle identified by the legislature in its redistricting guidelines) that informed her map-drawing throughout the hand-drawing process. *See* PSOF at ¶¶ 178-188.

Third, Defendants seem to argue that there is no evidence in the record that the minority "*community*" is geographically compact. Def. Mot. at 20. Defendants again are wrong.

First, Dr. Duchin opined that all of her illustrative maps (both at the statewide and cluster level) are comparable or better than the enacted plans in terms of compactness. PSOF at ¶¶ 243, 249-251. *See also* PSOF at ¶ 252.

Second, the Supreme Court has explained that district shape is relevant to determining whether a district satisfies the compactness inquiry. *Bush v. Vera*, 517 U.S. 952, 980 (1996); *see also Sensley v. Albritton*, 385 F. 3d 591, 596 (5th Cir. 2004) (geographical shape of proposed district "necessarily directly relates to the geographical compactness and population dispersal of the minority community in question").

Third, Dr. Duchin created heat-maps demonstrating the compactness and density of minority population throughout the state of Georgia. PSOF at ¶ 250.

There are issues of fact as whether Dr. Duchin drew "reasonably configured" illustrative districts that considered traditional redistricting principles.

C. There are issues of fact as to whether Plaintiffs establish *Gingles* 2 and 3.

There is overwhelming, indeed undisputed, evidence in the record that Black voters—and sometimes Black and Hispanic voters—overwhelmingly support the same candidates of choice in Georgia, so as to meet the second *Gingles* precondition. PSOF at ¶¶ 262-302. This is true for statewide elections, for each geographic cluster that Dr. Duchin analyzed for her *Gingles* 1 analysis, and for each challenged district. *See e.g. id*. at ¶¶ 262-264 (demonstrating racially polarized voting statewide); *id*. at ¶¶ 265-271 (RPV at cluster levels); *id*. at ¶¶ 272-280 (RPV at Congressional district level); *id*. at ¶¶ 281-289 (RPV at Senate district level); *id*. at ¶¶ 290-302 (RPV at House district level). This is also true for every illustrative majority-minority district that Dr. Duchin created for her *Gingles* 1 analysis. *Id*. at ¶¶ 280 (RPV at Alt CDs 3, 4, 5, 13); *id*. at ¶¶ 289 (RPV at Alt 1 SD 1 16, 17, 25, and 28 and Alt 2 SD 16 and 24); *id*. at ¶¶ 298 (HDs Alt 1 64, 74, 117, 144, 151, and 171). Further, there is similarly overwhelming evidence in the record that in every challenged district, the White majority votes as a bloc to usually defeat the candidate of choice of voters of color, so as to meet the third *Gingles* precondition. PSOF at ¶¶ 303-371.

Notably, neither Defendants nor Defendants' RPV expert dispute any of these voting patterns. PSOF ¶¶ 368-371. Instead, Defendants' proffer a single, *legal* argument for why summary judgment is appropriate on *Gingles* 2 and *Gingles* 3. Defendants—in a section littered with citations to concurring or dissenting opinions—argue that Plaintiffs have the burden of ruling out non-racial explanations for minority political cohesion or White majority bloc voting. *See* Def. Mot. § III(C).

To satisfy the second and third *Gingles* preconditions, however, Plaintiffs need not proffer evidence about the *underlying cause* of minority group cohesion or White majority bloc voting. That is because "proof of the second and third *Gingles* factors will ordinarily create a sufficient inference that racial bias is at work." *Nipper*, 39 F.3d at 1525. To the extent such causation evidence is relevant, it is only relevant to the totality-of-circumstances analysis. *Id.* at 1513-14, 1524-26; *see also United States v. Charleston Cnty., S.C.*, 365 F.3d 341, 347-48 (4th Cir.), *cert. denied*, 543 U.S. 999 (2004); *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 493 (2d Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997), *cert. denied*, 522 U.S. 1076 (1998); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Raffensperger*, 587 F. Supp. 3d at 1303 ("The Court concludes as a matter of law that, to satisfy the second Gingles precondition, Plaintiffs need not prove the causes

of racial polarization, just its existence. . . applying the standard advocated by Defendants would undermine the congressional intent behind the 1982 amendments to the VRA—namely, to focus on the results of the challenged practices."). And even at the totality stage, the burden is on the "defendant to rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to non-racial causes." *Nipper*, 39 F.3d at 1526.

Defendants expressly acknowledge this law, but ask this Court to deviate from it, relying on a misreading of the separate opinions in *Gingles*. But, even were this Court to engage in piecing together the various opinions, the fact is that eight justices agreed in *Gingles* that causation is *not* relevant to the second and third *Gingles* preconditions. Justice Brennan, joined by three other justices, unequivocally stated "the reasons black and white voters vote differently have no relevance to the central inquiry of § 2." *Gingles*, 478 U.S. at 63. Justice Stevens joined in that part of the opinion that included this language. *See id.* Justice O'Connor, joined by two Justices and the Chief Justice agreed with Justice Brennan's plurality that "defendants cannot rebut this showing [of the second and third Gingles preconditions] by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race[.]" *Id.* at 100. Justice O'Connor

explained that such evidence could be considered only as part of the "overall vote dilution inquiry"—that is, during the totality-of-circumstances analysis. *Id*.

Defendants also argue that some "circuits have rejected a view of Section 2 that showing polarization is enough." Def. Mot at 29. But the three decisions that Defendants rely on do not say that. Although *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 860 (5th Cir. 1993), views causation evidence as potentially relevant to *Gingles* 2 and *Gingles* 3, it does not place the burden on *plaintiffs* to proffer causation evidence in support of Gingles 2 or 3, as Defendants argue. *Clements* held only that the district court erred when it "excluded evidence" at trial of the non-racial causes of majority political cohesion or majority white bloc voting *proffered by Defendants in rebuttal* to a showing of cohesive voting patterns. *Clements*, 999 F.2d at 850. Here, Defendants' racially polarized voting expert conducted no analysis of his own on this issue and offers no opinion as to whether non-racial causes can explain minority cohesion or white majority bloc voting. PSOF at ¶¶ 263-264, 368-371. In fact, Defendants' expert expressly disclaimed that he had reached that conclusion. *Id*. at ¶ 368-371.

Defendants' reliance on *City of Holyoke* and *Nipper* falls even further from the mark. These decisions merely hold that Defendants can themselves offer evidence of non-racial causes of racially cohesive voting patterns in rebuttal to

Plaintiffs' satisfaction of *Gingles* 2 and *Gingles* 3 as part of the *totality-of-circumstances* analysis. *Nipper*, 39 F.3d at 1526 ("The standard we articulate today simply allows a defendant to rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to non-racial causes."); *City of Holyoke*, 72 F.3d at 983 (the second and third *Gingles* preconditions "give rise to an inference that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities . . . [which] will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system."). Because Defendants have not raised the issue of whether Plaintiffs' proofs as to the totality of the circumstances provide them with a basis for summary judgment, this Court may not reach the issue. In any event, Defendants have offered no evidence that the voting preferences of Georgian Black and/or Hispanic voters are attributable to non-racial causes.

Defendants also argue that "a view that racial bloc voting requires only that majority and minority voters vote differently would also make Section 2 unconstitutional" because Section 2 would no longer be a "congruen[t] and proportional[] . . . means" to remedying racial discrimination. Def. Mot. at 30-32. This argument is the epitome of hyperbole. The *Gingles* preconditions are just that

– preconditions. They are not, in and of themselves, ultimate proof of a Section 2 case. Rather, the ultimate proof is by way of the "totality of the circumstances." "[T]o ask not merely whether, but also why, voters are racially polarized . . . would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Charleston Cnty., S.C.*, 365 F.3d at 348.

D. Proportionality Does Not Bar Plaintiffs Section 2 Challenge to the Congressional Map.

Defendants seek summary judgment on Plaintiffs' Section 2 challenge to the enacted Congressional Map, because "the percentage of Black-preferred candidates being elected is more than roughly proportional to the percentage of Black individuals in Georgia." Def. Mot. at 36. But as Defendants concede, "proportionality is not a safe harbor for a jurisdiction." Def. Mot. at 36 (citing *LULAC*, 548 U.S. at 436). Indeed, as *LULAC* explains, proportionality is merely a "relevant consideration" to be weighed during the totality-of-circumstances analysis. *LULAC*, 548 U.S. at 426; *accord Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020).

Faced with adverse precedent, Defendants stretch it beyond recognition, quoting *Johnson v. De Grandy*, 512 U.S. 997 (1994), for the proposition that if "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population,"

no violation of Section 2 can be found. *Id*. at 1000. Defendants conveniently separate this quote from the very next sentence, which makes clear that such proportionality "is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances to be analyzed[.]" *Id.*

Defendants are also wrong on the facts. Proportionality as part of the totality analysis does not refer to "success of [the] minority candidates," but instead "links the number of majority-minority voting districts to minority members' share of the relevant population." *Id.* at 1014 n.11. Thus, the relevant comparison is a comparison of the percentage of majority-Black districts over the percentage of Any-Part Black VAP. Since there are at most four majority BVAP districts (Dr. Duchin calculates just two over 50.0% BVAP) in the enacted congressional plan—less than 29% of the total number of districts—and Black Georgians comprise approximately 31.73% of the population in Georgia, PSOF ¶ 73, 195, rough proportionality would not bar Plaintiffs claims even if it were dispositive (which it is not).

E. Defendants Are Not Entitled to Summary Judgment on Intentional Discrimination.

Defendants assert that that the Court should evaluate Plaintiffs' discriminatory purpose claim under the Fourteenth Amendment and Section 2 of the Voting Rights Act under the Supreme Court's standard in *Miller*, 515 U.S. at 915. Def Mot. at 37. Further, Defendants contend that "in cases regarding the types of evidence that could

be used in such a claim, it has never relied on *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) for the proper standard for evaluating intent claims in redistricting cases." *Id*.

Defendants are wrong. Indeed, the Court in *Arlington Heights* itself cited to a districting case, *Wright v. Rockefeller*, 376 U.S. 52 (1964), in its explanation of the need to prove intent to show a violation of the Equal Protection Clause. *Arlington Heights*, 429 U.S. at 265. This point was expressly recognized by the Court in *Rodgers v. Lodge*, 458 U.S. 613, 617 (1982) (referring to the *Arlington Heights* Court's reference to *Wright v. Rockefeller* in explaining that the *Arlington Heights* factors apply to claims of racially discriminatory purpose in voting cases).

Even were Defendants' legal argument correct and the *Miller* standard applicable to Plaintiffs' intentional discrimination claim, Plaintiffs have already demonstrated that there are material facts in dispute as to whether race predominated in the drawing of the lines. *See supra* Argument § II. Contrary to Defendants' fallback argument, their motion fares no better if *Arlington Heights* does apply. Def. Mot. at 37-38.

The *Arlington Heights* analysis "demands a sensitive inquiry into such circumstantial and direct evidence as may be available." 429 U.S. at 266. This inquiry involves a review of several non-exhaustive factors set out by the court. *See*

id. at 268. Specifically, the Court in *Arlington* Heights noted that the court evaluate: (1) the impact of the challenged law; (2) the historical background; (3) the specific sequence of events leading up to its passage; (4) procedural and substantive departures; (5) the contemporary statements and actions of key legislators. *See id.* at 266-268. The inferences to be drawn from evidence on these factors typically create a genuine dispute about the motivations of the legislature sufficient to defeat summary judgment. *See, e.g., Hunt*, 526 U.S. at 549-51. That is the case here.

Impact of the challenged law. Perhaps most important, Dr. Duchin's racial gerrymander analysis, shows, district by district, how certain districts were becoming competitive, how specific blocks of Black and Hispanic voters were moved, and demonstrates that more voters of color were moved than necessary to achieve partisan ends. PSOF at ¶¶ 88-177. And Dr. Duchin's Section 2 *Gingles* 1 analysis shows, district by district, how the legislature could have created additional majority-minority districts that could remedy the dilution of Black and Hispanic voters. PSOF at ¶¶ 189-258.

Historical background. Federal courts recognize the history of discrimination is relevant to the historical background factor. *See NAACP, Inc. by & through Myrtle Beach Branch v. City of Myrtle Beach*, 476 F. Supp. 3d 308, 323 (D.S.C. 2020) (recognizing that historical race segregation is relevant to this factor). Also, "[t]he

Eleventh Circuit has considered prior litigation as evidence when examining the historical background factor." *Banks v. McIntosh Cnty., Georgia*, 530 F. Supp. 3d 1335, 1374 (S.D. Ga. 2021), *on reconsideration on other grounds in part*, No. 2:16-CV-53, 2021 WL 3173597 (S.D. Ga. July 26, 2021).

There is a long history of discrimination in Georgia affecting voting. PSOF at ¶¶ 39-42. Since 1945, numerous redistricting plans in Georgia have been struck down as racially discriminatory. *Id*. at ¶ 40. Between 1965 and 2013, the Department of Justice blocked 177 proposed changes to election law by Georgia and its counties and municipalities Under Section 5 of the Voting Rights Act. *Id*. at ¶ 41. Of these Section 5 objections, 48 blocked redistricting plans. *Id*. Further, in 2018, a three-judge panel sitting in the Northern District of Georgia concluded that plaintiffs in a racial gerrymandering action had introduced "compelling evidence" that "race predominated the redistricting process," through testimonial and documentary evidence related to the conduct of Dir. Wright and others that work at the LCRO. *Id*. at ¶ 42.

Procedural and Substantive Departures. Contrary to Defendants' slant on the evidence, Def. Mot. at 37-38, Plaintiffs' expert, Dr. Joseph Bagley, found procedural and substantive departures in the 2021 redistricting process. Dr. Bagley opined that he found numerous public complaints in the town hall process held by

the legislature's joint Reapportionment Committee in the summer of 2021, and during the Committee Hearings held during the special session, sufficient to support a finding of procedural and substantive departures under *Arlington Heights*. *See* PSOF at ¶¶ 43-71. In light of these complaints, Dr. Bagley opined that the Committee's refusal to change the town hall process—and the special session process—in the face of these public complaints constitutes evidence of procedural and substantive departures. *See Id.* at ¶¶ 54, 66.

Additionally, "substantive departure[s] from redistricting criteria" satisfies this *Arlington Heights* factor. *LULAC v. Abbott*, 617 F. Supp. 3d 622, 632 (W.D. Tex. 2022). As explained *supra*, each district identified in the racial gerrymandering section subordinates traditional districting principles to sort citizens based on race. *See* PSOF at ¶¶ 88-177.

Contemporary statements and actions of key legislators. During the legislative process, Rep. Rich bemoaned that her committee had to oversee maps that comply with the Voting Rights Act. *See* PSOF at ¶ 66.

Sequence of events. Drawing maps "largely in secret such that minorities, and certain representatives, [are] shut out of the process . . . can support a case for discriminatory intent." *See Abbott*, 617 F. Supp. 3d at 632. In this case, Gina Wright, the director of the Legislative and Congressional Reapportionment Office,

was primarily responsible for the technical aspects of drawing the legislative maps and took direction from Republican leadership behind closed-doors working sessions for which racial data was projected on a monitor. *See* SOF in Opposition to Defendants' MSJ ¶¶ 95-103. Dir. Wright kept drafts for all three of her maps private in her office until the drafting process was completed. *See* PSOF at ¶ 79. Moreover, during the drafting process, Director Wright took steps to ensure that communications related to drawing the maps would be hard to disclose because she intentionally did not put them in writing. *See* PSOF at ¶ 78. Specifically, Director Wright testified during her deposition that she did not use email to communicate about redistricting maps because she did not want to "create… a record." *Id.*

Additional Circumstantial Evidence. There is additional circumstantial evidence of intentional discrimination in the record. Contrary to Defendants' assertion that politics and not race predominated the map drawing process is the fact that the legislature possessed racial data at the block level but not political data—which the legislature only possessed at the precinct level. *See* PSOF at ¶¶ at 79-87. In order to split precincts in such a way to achieve alleged partisan goal, Defendants necessarily had to consider racial data.

Further, Dan O'Connor, a data analyst with the LCRO, testified during his deposition that a district in Georgia that was roughly 30% black would tend to elect

Democrats and that the figure was consistent from 2014 to the present. *Id.* at ¶¶ 85-87. He also testified that if a legislator wanted to redraw such a district so that it was more likely to elect a Republican instead of a Democrat it would be necessary to lower the amount of BVAP in that district. *Id.* at ¶ 86. He further testified that in order to lessen the BVAP in such a district, one would need to either move BVAP out of the district and put it in another district or move WVAP into the district to dilute the amount of BVAP in the district. *Id.* at ¶ 87.

Summary judgment is not the appropriate vehicle for this Court to sift through these facts, determine the appropriate inferences to draw from them, and weigh them against each other, and against Defendants' proof.

CONCLUSION

For all the foregoing reasons, the Court should deny Defendants' motion for summary judgment.

Dated: April 26, 2023

Respectfully submitted,

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LOCAL RULE 7.1(D) CERTIFICATION OF COMPLIANCE

I certify that this pleading has been prepared with Times New Roman font, 14 point, as approved by the Court in L.R. 5.1(C), N.D. Ga.

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