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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.* *Plaintiffs*, v. STATE OF GEORGIA, *et al.* *Defendants*.	CIVIL ACTION FILE NO. 1:21-CV-5338-ELB-SCJ-SDG

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants the State of Georgia; Brian Kemp, in his official capacity as Governor of Georgia; and Brad Raffensperger, in his official capacity as Secretary of State of Georgia (collectively, "Defendants"), move this Court for summary judgment in their favor pursuant to pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1. As shown by the attached Defendants' Brief in Support of Motion for Summary Judgment, the Exhibits attached to and filed with the Statement of Material Facts accompanying the Brief, and the deposition testimony filed with this Court, there are no material issues of fact in dispute and, as a matter of law, Defendants are entitled to summary judgment on all of Plaintiffs' claims.

WHEREFORE, Defendants respectfully request that this Court enter summary judgment in their favor and cast all costs against Plaintiffs.

Respectfully submitted this 27th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Motion has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/Bryan P. Tyson
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DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

"Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). This is because "reapportionment is primarily the duty and responsibility of the State." *Id.* Federal courts thus "have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide [them] in the exercise of such authority." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019).

When the Georgia General Assembly undertook the "duty and responsibility" of drafting districts for Congress, state Senate, and state House following the 2020 Census, it followed the same process that it had used in prior redistricting cycles. The resulting maps split fewer counties than prior plans, paired very few incumbents, and increased or maintained the number of majority-Black districts. Plaintiffs dislike these plans, but their evidence does not support their sweeping attacks on all three maps, nor could Plaintiffs' evidence support a ruling overturning these maps.

First, Plaintiffs do not have standing because they are all organizations, so they cannot bring the district-specific claims required in a redistricting case. Or if they can, they are limited in the number of districts they can challenge.

Second, even if some Plaintiffs have standing, they have not presented evidence of violations of Section 2 of the Voting Rights Act (VRA), which prohibits "a denial or abridgement of the right . . . to vote on account of race or color," 52 U.S.C. § 10301(a).[1] Plaintiffs have not presented evidence of additional majority-minority districts drawn consistent with traditional redistricting principles or that legally significant racially polarized voting exists. Further, proportionality in the congressional map bars their claims.

Finally, Plaintiffs have not presented evidence of racial intent or unconstitutional racial gerrymandering—in fact, their only evidence shows just the opposite. None their experts have opined that the Georgia General Assembly actually acted with racially discriminatory intent. The lack of evidence of intentional racial discrimination is fatal to Plaintiffs' claims.

FACTUAL BACKGROUND

I. Georgia's redistricting processes generally.

To create redistricting maps following the decennial Census, Georgia has followed a consistent process for more than two decades. First, it held town hall

[1] Ironically, while Plaintiffs claim in some places that Georgia drew too many majority-Black districts in this case, *see*, *e.g.*, [Doc. 59, ¶ 13], plaintiffs in the Section-2-only cases say the same maps did not include enough majority-Black districts. *See Grant v. Raffensperger, Alpha Phi Alpha v. Raffensperger, Pendergrass v. Raffensperger*.

meetings before redistricting maps were published in 2001, 2011, and 2021. Statement of Material Facts ("SMF") ¶ 1. Those meetings were all "listening sessions" that took community comment without legislators responding to questions. SMF ¶ 2. Second, redistricting has historically been conducted in special legislative sessions, SMF ¶ 3, with similar timelines for consideration of plans in 2001, 2011, and 2021. SMF ¶ 4. The 2021 redistricting process was "generally analogous" to the 2001 and 2011 cycle and the 2001, 2011, and 2021 redistricting processes were procedurally and substantively similar to each other. SMF ¶¶ 5-6.

II. Georgia's 2021 redistricting process specifically.

Following the delayed release of Census data in 2021,[2] the Georgia General Assembly began working on redistricting maps ahead of the November 2021 special session. SMF ¶ 8. Both chairs of the House and Senate committees with jurisdiction over redistricting sought to meet with all of their colleagues, both Republican and Democratic, to gain input on their areas of the state. SMF ¶ 9. For the first time in 2021, the General Assembly created a public comment portal to gather comments. SMF ¶ 10. After holding a committee education day

[2] That Census data showed that the increase in the percentage of Black voters in Georgia from 2010 to 2020 was slightly more than two percentage points statewide. SMF ¶ 7.

with stakeholder presentations, the committees adopted guidelines to govern the map-drawing process. SMF ¶ 11.

To prepare maps, Gina Wright, the longtime director of the Joint Reapportionment Office, took two approaches. For the congressional map, she worked with a group to finalize a plan based on an earlier draft plan from Sen. Kennedy. SMF ¶ 12. Political considerations were key, including placing portions of Cobb County into District 14 to increase political performance. SMF ¶ 13.

For the legislative maps, Ms. Wright first drafted "blind" maps for the House and Senate, drawing based on her own knowledge of Georgia and the historic districts.[3] SMF ¶ 15. The chairs of the House and Senate committees then met with Ms. Wright to adjust district boundaries based on the input they received.[4] SMF ¶ 16. The chairs and Ms. Wright also consulted with counsel about compliance with the VRA. SMF ¶ 19. Although racial data was available, the chairs of each committee focused on past election data to evaluate the

[3] Georgia's prior 2011 districts were precleared under Section 5 of the VRA on the first attempt by the U.S. Department of Justice and were never found by any court to be unlawful or unconstitutional. SMF ¶ 14.

[4] Some changes requested by Democrats were included. SMF ¶ 17. Information about draft maps was also shared with members of the Democratic caucus, and Democratic members were able to work with the Joint Reapportionment Office. SMF ¶ 18.

partisan impact of the new plans while drawing with awareness of Republican political performance. SMF ¶ 20.

When drawing redistricting plans, Ms. Wright never used tools that would color the draft maps by racial themes. SMF ¶ 21. The office included estimated election returns at the Census block level, so political data was available across all layers of geography. SMF ¶ 22. The past election data was displayed on the screen with other data. SMF ¶ 23. The chairs evaluated the political performance of draft districts with political goals. SMF ¶ 24.

After releasing draft maps, legislators received public comment at multiple committee meetings. SMF ¶ 25. Democratic leadership presented alternative plans for Congress, state Senate, and state House that were considered in committee meetings.[5] SMF ¶ 26. After the plans were considered, they were passed by party-line votes in each committee before passing almost completely along party lines on the floor of the Senate and House. SMF ¶ 27.

The enacted congressional map resulted in five districts that elected Black- and Latino- preferred candidates while reducing split counties from the 2011 plan. SMF ¶¶ 30-31. The enacted state Senate map reduced the number

[5] Plaintiffs' expert Dr. Bagley agreed that he couldn't say the 2021 redistricting maps were an abuse of power by Republicans. SMF ¶ 28. Another Plaintiffs' expert, Dr. Duchin, emphasized that she was not "criticizing Georgia for not doing enough" in her report. SMF ¶ 29.

of split counties from the prior plan, did not pair incumbents of either party running for re-election, and maintained the same number of majority-Black districts as the prior plan. SMF ¶ 32-34. Similarly, the enacted state House map also reduced the number of split counties and increased the number of majority-Black districts from the prior plan. SMF ¶¶ 35-36.

III. Plaintiffs' proposed maps.

In support of their claims, Plaintiffs presented one additional congressional plan, three additional Senate plans, and three additional House plans. Those plans treat racial categories in various ways, with one proposed Senate plan increasing the number of majority-Black voting age population (VAP) districts by three and another decreasing the number of majority-Black VAP districts by six when compared with the enacted plan. SMF ¶ 37. Similarly, the proposed House plans either increase the number of majority-Black VAP districts by one[6] or decrease them by 12 when compared with the enacted plan. SMF ¶ 38. Dr. Duchin's goal in creating the proposed plans was to create districts that "meet a 50 percent plus one threshold" for minority

[6] This is where the interplay between these cases and *Alpha Phi Alpha* and *Grant* is relevant—both of those cases claim the number of majority-Black districts should have increased by *five* districts in the House—not decreased by 12 or increased by only one. This report is also in conflict with Plaintiffs' Complaint, which said four additional majority-Black Senate and seven additional majority-Black House seats should have been drawn. [Doc. 59, ¶ 27].

voters. SMF ¶ 39.

Dr. Duchin's proposed congressional plan does not convert District 6 into a majority-Black district but instead converts District 3 to be majority-Black. SMF ¶ 40. When describing the process of drawing the congressional plan, Dr. Duchin was unable to identify a reason why she connected various rural and urban areas. SMF ¶ 41.

Dr. Duchin also could not explain the reasoning behind the various alternative configurations of her Senate and House plans, instead relying on various computer-drawn drafts. SMF ¶ 42. Some of her legislative plans included Senate districts with Black VAP percentages as high as 86.5% and multiple House districts with more than 80% Black VAP, including one over 90%. SMF ¶ 43. Dr. Duchin did not consider those districts "packed." SMF ¶ 44.

All of Dr. Duchin's legislative plans have population deviations higher than the enacted plans. SMF ¶ 45. Two of the three Senate plans have the same or more county splits than the enacted plan. SMF ¶ 46. All of the House plans split the same or more counties than the enacted plan. SMF ¶ 47. While all of the compactness scores are generally similar, Dr. Duchin also reviewed compactness reports while drawing her plans and modified them to improve the scores. SMF ¶ 48. Dr. Duchin was not able to categorize whether the

differences in the various compactness scores were significant. SMF ¶ 49.

The only consistent metric across all of Dr. Duchin's plans is that each one increases Democratic political performance over the comparable enacted plan. SMF ¶ 50. Those differences run from two additional Democratic-leaning seats on the congressional plan, to ten additional Democratic-leaning seats on the Senate plan, to 12 additional Democratic-leaning seats on the House plan. SMF ¶ 51.

ARGUMENT AND CITATION OF AUTHORITIES

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden but is not required to negate the opposing party's claims. Instead, the moving party may point out the absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Marion v. DeKalb Cty.*, 821 F. Supp. 685, 687 (N.D. Ga. 1993)..

I. Plaintiffs lack standing to challenge the 2021 redistricting plans.

A federal court is not "a forum for generalized grievances," and the requirement that plaintiffs have a personal stake in the claim they bring "ensures that courts exercise power that is judicial in nature." *Lance v.*

Coffman, 549 U.S. 437, 439, 441 (2007). Federal courts uphold these limitations by insisting that a plaintiff satisfy the familiar three-part test for Article III standing: (1) injury in fact, (2) traceability, and (3) redressability. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 338 (2016).

"Foremost among these requirements is injury in fact—a plaintiff's pleading and proof that he has suffered the 'invasion of a legally protected interest' that is 'concrete and particularized,' *i.e.*, 'which affect[s] the plaintiff in a personal and individual way.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 & n.1 (1992)). In most cases, organizations may establish injury under Article III either by showing they had to divert resources, *Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350 (11th Cir. 2009), or by associational standing, *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

But in redistricting cases alleging vote dilution, organizations can only have associational standing, because an organization does not "reside" in any particular district. "To the extent the plaintiffs' alleged harm is the dilution of their votes, **that injury is district specific.**" *Gill,* 138 S. Ct. at 1930 (emphasis added). In other words, "a plaintiff who alleges that he is the object of a racial gerrymander—a drawing of district lines on the basis of race—has standing to assert only that **his own** district has been so gerrymandered." *Id.*

(emphasis added). Thus, an organization's diversion of resources will not suffice in this context. "A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id.* (quoting *United States v. Hays*, 515 U. S. 737, 745 (1995)).

In *Gill,* the Supreme Court noted that "[a]n individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked." *Id.* at 1930. The Court further held that this apparent disadvantage to the voter "results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." *Id.* at 1931 (quoting *Lewis v. Casey*, 518 U. S. 343, 357 (1996)). Finally, the Court concluded that "[i]n this case the remedy that is proper and sufficient lies in **the revision of the boundaries of the individual's own district**." *Id.* at 1930 (emphasis added).

The plaintiffs in this action alleging an unlawful gerrymander are all organizations—there are no individual voters in this case. Thus, they can only rely on the residence of their members to establish standing to challenge the boundaries of the districts about which they are complaining. The Ga. NAACP

plaintiffs put forth only one member's name in discovery and could not identify how many members were affected by redistricting. SMF ¶ 52. But Ga. NAACP never identified any legislative districts and only that testified that the member had previously been in congressional District 6 and now was in District 7. SMF ¶ 53. Similarly, both the Georgia Coalition for the Peoples' Agenda plaintiffs and the GALEO plaintiffs each designated just one member to establish standing, and provided no information as to that member's residence, their voter-registration status, or a process by which they determine they had members in all districts named in the Complaint. SMF ¶ 54-55. These perfunctory designations are not enough for Plaintiffs to establish standing to sue on *every* district named in their Amended Complaint, particularly at this late stage of litigation. "The party invoking federal jurisdiction bears the burden of proving standing." *Bischoff v. Osceola Cty.*, 222 F.3d 874, 878 (11th Cir. 2000).

Because diversion of resources cannot establish standing for organizations in redistricting claims, and because each organization has failed in discovery to provide evidence that they have members in every challenged district, this Court must grant summary judgment in favor of Defendants. "Federal courts have an independent obligation to ensure that subject-matter jurisdiction exists before reaching the merits of a dispute." *Jacobson v. Fla.*

Sec'y of State, 974 F.3d 1236, 1245 (11th Cir. 2020). At the very least, Plaintiffs are limited to challenging only the districts where they have identified members.

II. Plaintiffs have adduced no evidence that race predominated in the creation of district maps in 2021, so their racial gerrymandering claim must be dismissed or limited (Count I).

Plaintiffs claim in Count I that the congressional, Senate, and House plans are racial gerrymanders. [Doc. 59, ¶ 314-315]. In order to succeed:

> The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.

Miller v. Johnson, 515 U.S. 900, 916 (1995). Critically, this is not an *overall* analysis of the congressional, Senate, and House plans. Rather, a racial gerrymandering claim "applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262 (2015).

Now that discovery is closed, Plaintiffs have failed to adduce evidence that *specific districts* in the plans are drawn as "race-based sorting of voters." *Cooper v. Harris*, 581 U.S. 285, 292 (2017). Plaintiffs could have made this

showing "through 'direct evidence' of legislative intent, 'circumstantial evidence of a district's shape and demographics,' or a mix of both." *Id.* at 291. They have not done so here, so this Court need not reach the second question of whether the State had a compelling interest, such as compliance with the VRA. *Id*. at 292.

First, there is no evidence of improper legislative intent. Despite taking the depositions of several legislators and Ms. Wright, Plaintiffs failed to adduce any evidence of a race-conscious sorting of voters in any particular districts. The evidence demonstrates that legislators were concerned about political performance, not race. SMF ¶ 56. Legislators had political data at all levels of geography and regularly evaluated the political performance of districts as they were drawn. SMF ¶ 57.

In fact, Plaintiffs did not even attempt to inquire about all the districts named in their Complaint that they said were racial gerrymanders. For Congress, Plaintiffs only asked about Congressional District 6, the boundary between Congressional Districts 4 and 10, Congressional District 13, and Congressional District 14. SMF ¶ 58. In each case, Ms. Wright or the chairs testified unequivocally about race-neutral or political goals for the creation of each district or did not testify as to any racial motivations. SMF ¶ 59.

For the Senate, Plaintiffs only asked about Senate District 17 and Senate

District 48. SMF ¶ 60. In both cases, Ms. Wright or Chairman Kennedy testified either unequivocally about race-neutral or political goals for the creation of each district or did not testify as to any racial motivations. SMF ¶ 61.

For the House, Plaintiffs asked about House District 44, House District 48, House District 49, House District 52, and House District 104. SMF ¶ 62. In each case, Ms. Wright and Chair Rich testified either unequivocally about race-neutral or political goals for the creation of each district or did not testify as to any racial motivations. SMF ¶ 63.

Second, Plaintiffs have provided no conclusive circumstantial evidence of racial gerrymandering because of a district's shape and demographics. In fact, Dr. Duchin's report[7] evaluates core retention and "racial swaps" only for Congressional Districts 6 and 14; Senate Districts 14, 17, and 48 (with a brief reference to Senate District 7); and House Districts 44, 48, 49, 52, and 104. SMF ¶ 65. Dr. Duchin acknowledges that there were "many other considerations" in play besides core retention. SMF ¶ 66. She also acknowledged that racial population shifts are not conclusive evidence of racial predominance and that she could not say that the various metrics she reviewed

[7] None of Plaintiffs' remaining experts provided opinions about district boundaries. SMF ¶ 64.

showed racial predominance. SMF ¶ 67.

Further, while Dr. Duchin provides information about what she says are racial splits of counties in Congressional Districts 2, 3, 4, 6, 8, 10, 13, and 14 and what she says are racial splits of precincts in Congressional Districts 4, 6, 10, and 11, she did not look at the political data behind those splits. SMF ¶¶ 68-69. The only state Senate districts she discusses are Senate Districts 1, 2, 4, and 26. SMF ¶ 70. She does not identify any state House districts with racial splits and declined to describe them as drawn "primarily" based on race. SMF ¶ 71-72.

As a result, Plaintiffs have not provided sufficient evidence that "the legislature subordinated" any traditional principles to racial considerations. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This is especially true because "States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA." *Cooper*, 581 U.S. at 306. At most, Plaintiffs can point to several examples where *political* splits of counties in specific districts also might have a racial effect. Dr. Duchin's core retention analysis does not demonstrate that "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests" were subjected to racial considerations because she did not analyze those traditional principles. *Miller*, 515 U.S. at 919. Because they have not shown any evidence

of racial gerrymandering, this count must be dismissed, or at the very least, Plaintiffs should be limited to challenging the districts that they actually identified in discovery should any of the Plaintiffs have standing.

III. Plaintiffs' Section 2 claims must be dismissed (Counts II and III).

Section 2 of the VRA prohibits jurisdictions from diluting the strength of minority voters through a "standard, practice, or procedure" "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Proof of illegal vote dilution is established through a "totality of the circumstances" analysis. *Id.* § 10301(b).

In order to show a Section 2 violation, a plaintiff bears the burden of first proving *each* of the three *Thornburg v. Gingles*, 478 U.S. 30 (1986), preconditions:

> Specifically, plaintiffs in vote dilution cases must establish as a threshold matter: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (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). Only after establishing the three preconditions does a court begin a review of 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 (1994). Failure to establish one of the *Gingles* prongs is fatal to a Section 2 claim because each of the three prongs must be met. *See Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567 (11th Cir. 1997). And of course, while these preconditions are *necessary* to proving a Section 2 claim, they are not *sufficient*. *De Grandy,* 512 U.S. at 1011 (*Gingles* preconditions are not "sufficient" to "prove a § 2 claim.").

A. Plaintiffs cannot state a claim against the State of Georgia for violations of Section 2, so the State must be dismissed as a Defendant.

This Court should dismiss Counts II and III of this action against Defendant the State of Georgia because the VRA did not abrogate the sovereign immunity of Georgia and the State has declined to do so itself. "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear in the language of the statute*." *Ala. State Conf. of the NAACP v. Alabama,* 949 F.3d 647, 656 (11th Cir. 2020) (Branch, J, dissenting) (emphasis original) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)) *dismissed as moot* by 141 S.Ct. 2618 (2021). As Judge Branch explained in her dissent in *Ala. State Conference of the NAACP*, "Congress did not unequivocally abrogate state sovereign immunity

under Section 2 of the Voting Rights Act ('VRA')." *Id.* at 655. And "[b]ecause evidence of congressional intent must be both unequivocal and textual in order to support a finding of abrogation, the absence of such language is fatal." *Id.* at 657 (cleaned up) (quoting *Dellmuth,* 491 U.S. at 230).

Other courts, having also taken a fresh look at the language of the VRA, have arrived at the same conclusion. *See, e.g.*, *Christian Ministerial All. v. Arkansas*, No. 4:19-cv-402, 2020 U.S. Dist. LEXIS 262252, at *17 (E.D. Ark. Feb. 21, 2020). And for purposes of this three-judge panel, the only precedent that this Court is bound by is what is directly on point from the Supreme Court:

> The doctrine of stare decisis in practice, commands that lower courts follow the precedent of courts who review their decisions. If our decision is reviewable only by the Supreme Court, logic suggests that we are not bound by circuit authority. While such authority may persuade, only Supreme Court holdings would seem to have controlling authority.

Parker v. Ohio, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (three-judge court). While three-judge panels sitting in this district have previously chosen to be bound by circuit precedent, *Ga. State Conference of NAACP v. Georgia,* 269 F. Supp. 3d 1266, 1278 n.7 (N.D. Ga. 2017) (three-judge court), the same *stare decisis* logic applies to the rulings of three-judge courts that similarly will not review this Court's decision. Accordingly, as a three-judge court that is not required to follow Eleventh Circuit precedent, this Court may review the text

of the VRA on immunity. And because congressional intent abrogating sovereign immunity is not manifestly "unequivocal" and "textual," this Court should dismiss the State of Georgia as a Defendant, because the only claims brought against it are brought under Section 2 of the VRA (Counts II and III).

B. Plaintiffs have not presented evidence that *Gingles* prong one is met.

1. Plaintiffs' proposed maps are racial gerrymanders and/or lack evidence they were drawn consistent with traditional redistricting principles.

The Eleventh Circuit prohibits the separation of the first prong of liability under *Gingles* and the potential remedy. *Nipper*, 39 F.3d at 1530-31; *see also Burton*, 178 F.3d at 1199 ("We have repeatedly construed the first *Gingles* factor as requiring a plaintiff to demonstrate the existence of a proper remedy."). Whatever plan is used to demonstrate the violation of the first prong of *Gingles* must also be a remedy that can be imposed by the Court. *Nipper*, 39 F.3d at 1530-31. In short, if a plaintiff cannot show that the plan used to demonstrate the first prong can also be a proper remedy, then the plaintiff has not shown compliance with the first prong of *Gingles*. *Id.* at 1530-31.

Dr. Duchin created her draft plans with the goal of drawing majority-minority districts and was unable to identify why particular counties were connected on her various plans. SMF ¶¶ 73-74. When asked about particular

districts, Dr. Duchin fell back to her maps being "demonstrations"—which is distinctly different from the "complex interplay" the legislature is required to undertake when drawing plans.[8] *Miller*, 515 U.S. at 915-16; SMF ¶ 75.

Dr. Duchin's plans do not attempt to wrestle with traditional redistricting principles beyond the ones she can represent numerically, and Dr. Duchin does not profess to have a knowledge of communities in Georgia. SMF ¶¶ 76-77. Thus, the maps could not be used as remedies because of their lack of any clear goals beyond racial ones—because they cannot be identified as drawn consistent with traditional district principles that are non-numeric (and their inferiority to the enacted plans on some of those metrics). This absence of evidence supports a grant of summary judgment to Defendants. *Marion*, 821 F. Supp. at 687. Further, the Supreme Court requires that the size and geographic compactness portions of the first *Gingles* prong relate to the *community*, not to any potential district created by a plaintiff: "The first *Gingles* condition refers to *the compactness of the minority population*, not to the compactness of the contested district." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (*LULAC*) (emphasis added) (quoting *Bush v.*

[8] The "intensely local appraisal" required by Section 2 does not mean the adopted plan has to beat Plaintiffs' maps in a "beauty contest." *Bush v. Vera*, 517 U.S. 952, 977 (1996) (O'Connor, J.).

Vera, 517 U.S. 952, 997 (1996)).

Dr. Duchin does not even attempt to identify with any precision the various communities for which she is creating districts, beyond the racial character of those districts. Without that evidence, Plaintiffs have failed to carry their burden under the first prong of *Gingles*.

2. Section 2 contains no requirement to create coalition districts and thus they cannot be used to demonstrate a violation of prong one of Gingles.

In seeking to show prong one of *Gingles*, Plaintiffs also offer a variety of plans that *decrease* the number of *majority-Black* districts while increasing the number of *majority-minority* districts, primarily by combining Black and Latino individuals as a "minority" category. SMF ¶ 78. But this is contrary to Section 2, which requires the minority group to be more than 50% in the *Gingles* prong one district: "In majority-minority districts, ***a minority group*** composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (emphasis added); *accord Cooper*, 581 U.S. at 305 ("When a minority group is not sufficiently large to make up a majority in a reasonably shaped district, §2 simply does not apply"). While not deciding

the coalition district issue directly,[9] the Supreme Court noted that "no federal court of appeals has held that § 2 requires creation of coalition districts. Instead, all to consider the question have interpreted the first *Gingles* factor to require a majority-minority standard." *Bartlett*, 556 U.S. at 19. Defendants have been unable to locate any appellate court that has found that Section 2 requires the creation of coalition districts.

Further, 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—in fact, they have offered no evidence of cohesion between Black and Latino voters except in general elections. *Compare* SMF ¶ 79 (did not study primaries) with *Perez v. Abbott*, 267 F. Supp. 3d 750, 760 (W.D. Tex. 2017), *re'vd sub nom. Abbott v. Perez*, 138 S.Ct. 2305 (2018). Thus, Plaintiffs have not provided evidence that the first prong of *Gingles* is met for any districts where they are relying on a coalition of voters to establish a remedy.

[9] Later, the Supreme Court clarified that federal courts cannot set out to create minority coalition districts when drawing remedial plans. *See Perry v. Perez*, 565 U.S. 388, 399 (2012) (per curiam).

C. Plaintiffs cannot establish the second and third *Gingles* preconditions.

Even if Plaintiffs have shown a proper remedy, they still cannot prevail because they have not shown legally significant racially polarized voting. The basis for a Section 2 vote-dilution claim must be more than a simple failure to win elections—because, in a majoritarian system, "numerical minorities lose elections." *Holder v. Hall,* 512 U.S. 874, 901 (1994) (Thomas, J., concurring) (citations omitted). In order to succeed, Plaintiffs must show that minority voters, although able to vote, are unable to elect their preferred candidates because their votes have been "submerge[ed]" in a majority that votes as a "racial bloc" against them. *Gingles,* 478 U.S. at 46, 49-52. And if racial bloc voting is attributable to race-neutral partisan politics, it is just *majority* bloc voting or, as Justice White put it, "interest-group" politics. *Id.* at 83 (White, J., concurring). And "Congress and the Supreme Court" have refused "to equate losses at the polls with actionable vote dilution where these unfavorable results owe more to party than race." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 860 (5th Cir. 1993).

1. To establish vote dilution "on account of race," a plaintiff must prove racial bloc voting, not majority bloc voting attributable to ordinary partisan politics.

Defendants recognize that courts in this district have previously relied on the plurality opinion in *Gingles* for the concept that the sole issue for prongs two and three is racial voting patterns. *See Rose v. Raffensperger*, Civil Action No. 1:20-cv-02921-SDG, 2022 U.S. Dist. LEXIS 140097, at *34 (N.D. Ga. Aug. 5, 2022), *appeal docketed*, No. 22-12593 (11th Cir. Aug. 8, 2022); *Alpha Phi Alpha Fraternity v. Raffensperger*, 587 F. Supp. 3d 1222, 1303 (N.D. Ga. 2022). But Defendants urge a closer review of the opinions in *Gingles*, which shows that a majority of the Justices declined to endorse an approach to majority-bloc voting that only looks at racial voting patterns. Justice O'Connor, writing for four Justices, declared flatly that "I agree with Justice White that Justice Brennan's conclusion that the race of the candidate is always irrelevant in identifying racially polarized voting conflicts with *Whitcomb* and is not necessary to the disposition of this case." 478 U.S. at 101 (O'Connor, J., concurring). And it is important to note that Justice O'Connor arrived at this conclusion after endeavoring to construe what she called the "compromise legislation" of the amended Section 2. That is, the calculated equivocation in Part B of Section 2 that expressly disclaims a right to proportional

representation cannot be given any substantive effect if all that matters when establishing racially polarized voting is whether minority voters and majority voters are voting differently. But the plurality view does just that:

> [T]he combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts. *In so doing, the Court has disregarded the balance struck by Congress in amending § 2* and has failed to apply the results test as described by this Court in *Whitcomb* and *White*.

Id. at 85 (emphasis added) (O'Connor, J., concurring in the judgment). Thus, while several courts have followed the view of what a plurality of justices in *Gingles* described as "racially polarized voting," it is just as true that an equally sized plurality of the *Gingles* Court rejected that view. When combined with Justice White's admonition against construing Section 2 as enshrining interest-group politics into law, the former plurality does not carry the day.

But even if this Court disagrees with Defendants on this point, there is a remaining issue: As discussed below, the contrary view—that racial bloc voting is present anywhere a minority happens to vote for a different candidate than the majority—would raise serious questions about the constitutionality of Section 2, which cannot be validly understood to require changes in districts solely because of partisan voting behavior.

2. Statutory text, history, and precedent establish that if the majority blocks the minority group's preferred candidates because of ordinary partisan politics, there is no "racial bloc voting."

Section 2 is designed to root out racially discriminatory laws. The text requires Plaintiffs to prove that there is a "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). It is Plaintiffs' burden to show that "the political processes . . . in the State or political subdivision are not *equally open* to participation by members of a class of citizens . . . in that its members have less opportunity *than other members of the electorate* to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b) (emphasis added). Section 2 thus requires Plaintiffs to show that the "challenged law… *caused*" them, "on account of race," to have less opportunity to elect their preferred candidates than members of other races. *Greater Birmingham Ministries v. Sec'y of Ala.,* 992 F.3d 1299, 1329 (11th Cir. 2021) (emphasis in original).

The text explicitly does *not* "guarantee" partisan victories or "electoral success." *LULAC,* 548 U.S. at 428 (citation omitted). If minority voters' preferred candidates lose for non-racial reasons, such as failing to elect candidates because they prefer Democrats in Republican-dominated areas,

they nonetheless have *precisely* the same opportunity as "other members of the electorate," and they have not suffered any "abridgement" of their right to vote "on account of race." 52 U.S.C. § 10301. Section 2 does not, in other words, relieve racial minorities of the same "obligation to pull, haul, and trade to find common political ground" that affects all voters. *De Grandy,* 512 U.S. at 1020.

This view is not some recent legal phenomenon, but rather was borne out in *Gingles* itself. As Justice O'Connor explained, the view espoused by the plurality in *Gingles* (and therefore, the view advocated by Plaintiffs here) would effectively overturn *Whitcomb v. Chavis,* one of the two Supreme Court precedents that the "[a]mended § 2 intended to codify." *Gingles,* 478 U.S. at 83 (citations omitted). In *Whitcomb,* the Court found that the failure of *Democrats* was insufficient to show illegality. 403 U.S. at 152. Thus, in *Gingles*, Justice O'Connor stressed that *Whitcomb* required courts to differentiate between situations where race explains voting patterns from those where the partisan "interests of racial groups" simply "diverge." 478 U.S. at 100.

Section 2 cannot be rationally interpreted as prohibiting certain election practices when Republicans are in the majority but requiring other election practices where Democrats dominate. "The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates." *Baird v. Indianapolis*, 976

F.2d 357, 361 (7th Cir. 1992). Instead, Section 2 applies only where "racial politics … dominate the electoral process." S. Rep. at 33.

The alternative view would mandate not only a partisan preference but a racial preference. Here, for instance, Black Democrats—like white Democrats, Asian Democrats, and Latino Democrats—ordinarily fail to elect their preferred candidates because the majority of Georgia voters generally choose Republicans. But when the majority of Georgia voters prefer Democratic candidates like Sen. Warnock, they are elected. Although Plaintiffs claim that minority voters are entitled to districts in which they are guaranteed electoral success, "Section 2 requires an electoral process 'equally open' to all, not a process that favors one group over another." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008). Section 2 does not require courts to mandate that minority Democrats vote more successfully than white Democrats. *Clements*, 999 F.2d at 861.

Moreover, to hold that there is no racial component beyond simply observing that majority and minority voters vote differently would also eviscerate another aspect of Section 2: its emphatic rejection of a right to proportional representation. 52 U.S.C. § 10301(b). Avoiding a *requirement* of proportionality was a central focus of Congress in amending Section 2. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring).

Given all this, it should be no surprise that circuits have rejected a view of Section 2 that showing polarization is enough. The Fifth Circuit, for instance, has held that Section 2 plaintiffs cannot succeed when they "have not even attempted to establish proof of racial bloc voting by demonstrating that race, not … partisan affiliation, is the predominant determinant of political preference." *Clements*, 999 F.2d at 855. Likewise, the First Circuit holds that "plaintiffs cannot prevail on a VRA Section 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to [race]." *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995). And Judge Tjoflat has opined that, even if a plaintiff has provided evidence of racial bloc voting, a "defendant may rebut the plaintiff's evidence by demonstrating the absence of racial bias in the voting community; for example, by showing that the community's voting patterns can best be explained by other, non-racial circumstances." *Nipper*, 39 F.3d at 1524 (plurality opinion).

The key point is that Plaintiffs, who bear the ultimate burden of proof, must establish that race is the reason they supposedly lack equal "opportunity." 52 U.S.C. § 10301(b).[10] And if voting patterns establish, instead,

[10] To be sure, the courts disagree on whether the third *Gingles* factor or the totality phase is the appropriate time to ensure racial, as opposed to merely

that Republicans always win (regardless of race), then non-Republican voters of *all* races have exactly the same opportunity to elect their candidates of choice, in every case. This is why this Court should require proof of racial bloc voting as part of the third *Gingles* factor, even if the analysis is ultimately the same. As discussed below, Plaintiffs' lack of evidence on this point is fatal to their claims here.

3. If § 2 allowed partisan bloc voting to form the basis of a claim, it would be unconstitutional.

Beyond being irreconcilable with the text or binding precedent, a view that racial bloc voting requires only that majority and minority voters vote differently would also make Section 2 unconstitutional. Congress enacted Section 2 under its power to enforce the Fifteenth Amendment, which prohibits only "purposeful discrimination," not laws that merely "resul[t] in a racially disproportionate impact." *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (citation omitted); *see also* U.S. CONST. amend. XV. Section 2's results test goes beyond the constitutional provision that it purports to enforce, which makes

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partisan, polarization exists. The Fifth Circuit, for instance, holds that there is no third *Gingles* factor without proof of racial, as opposed to partisan, polarization. *Clements*, 999 F.2d at 892. The Second Circuit holds that the inquiry should be conducted at the totality-of-the-circumstances phase of analysis. *Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir. 1999); *see also Lewis v. Alamance Cty.*, 99 F.3d 600, 615 n.12 (4th Cir. 1996) (noting differences among circuit courts).

sense to the extent that Section 2 can be understood as a tool for addressing invidious racial discrimination. But Congress certainly cannot place a particular political party in a favored electoral position. Congress may use its enforcement power only as a "congruen[t] and proportional[] ... means" to "remedy or prevent" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). The Fifteenth Amendment's enforcement power does not allow Congress to "alter[] the meaning" of the Constitution. *Id*. at 519. Accordingly, Section 2's results test must be "limited to those cases in which constitutional violations [are] most likely." *Id*. at 533 (citation omitted).

If Section 2 was interpreted in a way that plaintiffs can establish racial bloc voting merely by showing that minorities and majorities vote differently, it would not fit within those constitutional bounds. As Justice White explained in his dissent in *Bolden*, the original results test was designed to target "objective factors" from which discrimination "*can be inferred*." 446 U.S. at 95 (emphasis added). The amendments to Section 2 were meant to "restore" that test. *Gingles*, 478 U.S. at 43-44 & n.8 (citations omitted). And Plaintiffs' interpretation does not alter this "objective factors" test.

What is more, interpreting Section 2 to grant preferential treatment to particular racial groups would violate the Equal Protection Clause by

compelling state action to benefit one racial group at the expense of others. *See* U.S. CONST. amend. XIV, § 1. "[S]ubordinat[ing] traditional race-neutral districting principles" to increase minority voting strength violates the Constitution. *Miller*, 515 U.S. at 916. Where Section 2 is used not to undo racial bias but to undo a pattern of partisan voting, in favor of one (and only one) racial minority, that must be unconstitutional.[11]

4. There is no racial bloc voting here because partisan politics, not race, explains the voting patterns highlighted by Plaintiffs, and Plaintiffs' expert offers no evidence disputing this.

With the proper rule in place, Plaintiffs' claim fails under Section 2 because they "have not even attempted to establish proof of racial bloc voting by demonstrating that race, not ... partisan affiliation, is the predominant determinant of political preference." *Clements*, 999 F.2d at 855.

[11] At a minimum, such an interpretation of Section 2 raises constitutional questions and should be avoided if possible. "When a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (citation omitted). That is doubly true where the interpretation would "upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Courts should interpret statutes to do so only when congressional intent is "unmistakably clear." *Id.* (citations omitted).

One cannot determine whether the voting patterns of Georgia voters are due to *racial* politics when by only examining general elections because, as Plaintiffs' expert's own report clearly indicates, Black voters in Georgia overwhelmingly vote for Democrats. SMF ¶ 80. Dr. Schneer's decision not to review any primary election results in his report undermines the usefulness of the data and analysis he presents as purported evidence of racial polarization in Georgia's elections. SMF ¶ 81. But even without the benefit of viewing the stark drop-off in polarization once party is controlled for by examining primary elections, Dr. Schneer's data still only demonstrates two things: the race of the candidate *does not* change voting behavior of Georgia voters; and the party of the candidate *does*. SMF ¶ 82.

Plaintiffs' purported evidence of racial polarization is, in reality, nothing more than evidence of partisan polarization where a majority of voters support one party and a minority of voters support another party. This is, as Justice White described in *Gingles,* "interest group" politics. 478 U.S. at 83 (White, J., concurring). The consistent political impact of Plaintiffs' expert's plans further illustrate that the issues in this case are not a matter of race, but rather that

redistricting—"most political activity in America"[12]—had political consequences they do not like.

Moreover, Plaintiffs' own expert does not offer evidence from primaries, where the issue of polarization could be viewed apart from party. That is simply not enough for Plaintiffs to carry their burden of proving racial polarization sufficient to satisfy prongs two and three of *Gingles*. To the contrary, all the Court has before it is evidence establishing that party, rather than race, explains the "diverge[nt]" voting patterns. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring). Plaintiffs' failure to offer any other evidence ends this case.

D. Plaintiffs cannot succeed on their Section 2 claims regarding the congressional plan because proportionality bars their claims.

When applying Section 2 of the VRA to single-member legislative district challenges, 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. *De Grandy,* 512 U.S. at 1000. This is because when the minority group in question enjoys "rough proportionality," there is no evidence that "voters in either minority

[12] *See, e.g.*, Charles S. Bullock III, *Redistricting: The Most Political Activity in America* (2nd Ed. 2021).

group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id*. at 1024 (quoting 52 U.S.C. § 10301(b)). The VRA "was passed to guarantee minority voters a fair game, not a killing." *Bartlett*, 556 U.S. at 29 (Souter, J., dissenting). This is why the Supreme Court has generally looked to the "rough proportion of the relevant population." *Id*.

Proportionality in this context is analyzed by comparing "the number of districts where minority voters can elect their chosen candidate with the group's population percentage." *Id.*[13] Because Section 2 focuses on "equal political opportunity," district lines that provide political effectiveness in proportion to population do not "deny equal political opportunity." *De Grandy*, 512 U.S. at 1014.

The relevant geographic area for a proportionality analysis is the entire state. *LULAC,* 548 U.S. at 437. In *LULAC*, the Supreme Court explained that

[13] The proportionality analysis that is part of the totality-of-the-circumstances review in Section 2 cases is distinct from the *language* in Section 2 regarding proportional representation. *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1223 n.5 (11th Cir. 2000) (en banc) ("it is important to keep the concepts of 'proportionality' and 'proportional representation' distinct"). While no minority group has a *right* to proportional representation under Section 2, the degree of *achievement* of proportional representation may be relevant to evaluating whether minority voters have formed effective voting majorities in districts roughly proportional to their population. *Id*.

the proportionality inquiry entails "comparing the percentage of total districts that are [Black] opportunity districts with the [Black] share of the citizen voting-age population." *Id*. at 436. This is because this Court must determine "whether the absence of that additional district constitutes impermissible vote dilution." *Id*. at 437.

While proportionality is not a safe harbor for a jurisdiction, *LULAC*, 548 U.S. at 436, it is an extremely relevant factor to consider whether an equal opportunity to participate in the political process exists. *See*, *e.g*., *African Am. Voting Rights Legal Def. Fund v. Villa*, 54 F.3d 1345, 1355 (8th Cir. 1995) (evidence of "persistent proportional representation" sufficient to support grant of summary judgment to jurisdiction); *Fairley v. Hattiesburg Miss*., 662 F. App'x 291, 301 (5th Cir. 2016) (same).

The 2021 congressional plan has five districts where Black-preferred candidates succeed. SMF ¶ 83. That constitutes 35.7% of the Georgia congressional delegation. The Any-Part Black VAP for Georgia as a whole is 31.73%. SMF ¶ 84. Thus, the percentage of Black-preferred candidates being elected is more than roughly proportional to the percentage of Black individuals in Georgia.

Given the rough proportionality in Congress, along with the fact that both of Georgia's U.S. senators are Black-preferred candidates because they

are Democrats (Sen. Ossoff was elected in 2021 and Sen. Warnock was re-elected in 2022), SMF ¶ 85, Plaintiffs' claim that Black voting strength in Georgia's congressional races was diluted by the 2021 congressional redistricting plan is without merit. Black voters in Georgia have demonstrated that they have an equal opportunity to participate and to elect representatives of their choice. Consequently, Plaintiffs' claim for Section 2 violations on the congressional plan fail as a matter of law.

IV. Plaintiffs have adduced no evidence of intentional racial discrimination in the drafting process, so their discriminatory purpose claim must be dismissed (Count III).

In Count III of their Amended Complaint, Plaintiffs assert a discriminatory purpose claim under the Fourteenth Amendment and Section 2 of the VRA regarding the creation of all three redistricting plans. [Doc. 59, ¶ 336-341]. In the redistricting context, this Court must assume the good faith of the legislature and "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16. This means that inquiries into racial purpose in redistricting under the Fourteenth Amendment are governed by the standard in *Miller*: "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a

significant number of voters within or without a particular district." *Id*. at 916. While the Supreme Court has cited *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252, 266 (1977), in cases regarding the types of evidence that could be used in such a claim, it has never relied on *Arlington Heights* for the proper standard for evaluating intent claims in redistricting cases. *See*, *e.g.*, *Cooper*, 581 U.S. at 319; *Shaw*, 509 U.S. at 643; *accord S.C. State Conf. of the NAACP v. Alexander*, No. 3:21-cv-03302-MGL-TJH-RMG, 2023 U.S. Dist. LEXIS 4040, at *44 (D.S.C. Jan. 6, 2023) (three-judge panel).

For all the reasons that Plaintiffs have not shown racial predominance in support of Count I of their Amended Complaint, they have not shown that they met the *Miller* standard here. But even if *Arlington Heights* applies, Plaintiffs have not met their burden of proof.

Plaintiffs' own experts refuse to opine that the General Assembly acted with racially discriminatory intent. Dr. Bagley found no "obvious discriminatory intent." SMF ¶ 86. While he analyzed the second, third, fourth, and fifth *Arlington Heights* factors, he did not opine that discriminatory intent was the driving factor of the legislature or that there was discriminatory intent in the legislative process of redistricting. SMF ¶ 87.

Dr. Bagley did not opine that the specific sequence of events leading to the adoption of the plans was discriminatory, but only that it would "lend

credence" to a finding of discriminatory intent. SMF ¶ 88. He did not opine that the district lines were drawn to deny voters of color their equitable right to participate in the political process, although he believed a court could make that finding. SMF ¶ 89. He found no procedural or substantive departures in the 2021 redistricting process when compared to the 2001 and 2011 processes and agreed that the process was not rushed when compared to those prior cycles. SMF ¶ 90. And he only found one contemporary comment that concerned him, when Chair Rich stated in committee that there was not a "magic formula" for compliance with the VRA. SMF ¶ 91.

Likewise, Dr. McCrary did not offer any opinion about discriminatory intent or about the design of the districts. SMF ¶ 92. Neither did Dr. Duchin, who only offered that she could provide "evidence that might be persuasive in terms of discerning intent" but that she could not "make hard and fast conclusions about what was in the hearts and minds of the legislators or . . . staff." SMF ¶ 93. This lack of evidence supports a grant of summary judgment to Defendants on Count III.

CONCLUSION

After discovery, there remains no issue of any material fact in this case. Plaintiffs do not have standing because they can only rely on associational standing and have not presented sufficient evidence to survive summary

judgment. But even if they have, Plaintiffs have not shown sufficient evidence of racial gerrymandering or discriminatory intent to overcome summary judgment on any of their constitutional claims. Further, they cannot carry their burden on the *Gingles* preconditions, because their proposed remedial maps cannot function as remedies and the lack of evidence of legally significant racially polarized voting is fatal to their claims. This Court should grant summary judgment to Defendants and dismiss this case in its entirety.

Respectfully submitted this 27th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Brief has been prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

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