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

COAKLEY PENDERGRASS, *et al.*,	
Plaintiffs,	
v.	CIVIL ACTION
BRAD RAFFENSPERGER, *et al.*,	FILE NO. 1:21-CV-05339-SCJ
Defendants.	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In their response, Plaintiffs rely heavily on this Court's prior rulings at the preliminary-injunction phase without recognizing the development—or at times lack thereof—of evidence since that point. As discussed in the various filings related to summary judgment in this action, this case should be resolved now in Defendants' favor without the need for a trial because Plaintiffs have not shown a dispute over any material fact necessary to this Court's decision on Defendants' motion.

ARGUMENT AND CITATION OF AUTHORITIES

While "it is unusual to find summary judgment awarded to the plaintiffs in a vote dilution case . . . there have been cases before this Court and the

Supreme Court where summary judgment was granted to the *defendants*." *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015) (emphasis original); *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (granting summary judgment to defendants in Section 2 case). As explained by all parties, a plaintiff bears the burden of first proving each of the three *Gingles* preconditions to show a Section 2 violation. *Nipper v. Smith*, 39 F.3d 1494, 1510 (11th Cir. 1994). After a plaintiff establishes the three preconditions, a court then reviews the "Senate Factors" to assess the totality of the circumstances. *Id.* at 1512; *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *Johnson v. De Grandy*, 512 U.S.997, 1011 (1994).

This is why a grant of summary judgment to Defendants in this Section 2 case is required. For Plaintiffs to succeed, they must show vote dilution based on an "intensely local appraisal" of the facts in the local jurisdiction. *De Grandy*, 512 U.S. at 1020-21 (no statistical shortcuts to determining vote dilution); *Gingles*, 478 U.S. at 45, 78 (stating that courts must conduct a "searching practical evaluation of the 'past and present reality'" of the challenged electoral system and whether vote dilution is present is "a question of fact"); *White v. Regester*, 412 U.S. 755, 769-70 (1983) (assessing the impact "in light of past and present reality, political and otherwise"). But Defendants

can succeed in this case by pointing out Plaintiffs' failure to establish one of the *Gingles* preconditions. *See Johnson v. DeSoto Cnty. 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). That is exactly what Defendants have done here, despite Plaintiffs' failed efforts to create areas for dispute. In addition, Plaintiffs have also failed to show any reason why this Court should not dismiss the members of the State Election Board (SEB).

I. Plaintiffs have put forward no evidence that members of the State Election Board are proper defendants.

In claiming that members of the SEB are proper defendants in this case, Plaintiffs rely solely on their view of the legal structure governing the SEB. But their obligation as the nonmoving party "requires [them] to go beyond the pleadings and by [their] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiffs have not done that here because they have not even cited a single paragraph from their Statement of Additional Material Facts or any fact in this case in their argument on this point. [Doc. 189, pp. 4-6].

But even if the legal structure was enough, Plaintiffs' arguments fall far short. They claim the SEB has "the legal responsibility to ensure the fair and lawful administration of Georgia's elections," [Doc. 189, p. 4], but then provide no facts about how those responsibilities relate to the administration of any particular election. They point to no authority that the SEB builds ballots or that the SEB plays any role in the counties' implementation of the challenged congressional map.

The cases they cite also do not save their claims against the SEB. *Brown v. Jacobsen*, 590 F. Supp. 3d 1273, 1284-85 (D. Mont. 2022), involved claims solely against the Montana Secretary of State, not any other state officials. *La. State Conference of the NAACP v. Louisiana*, 490 F. Supp. 3d 982, 1028-31 (M.D. La. 2020) was decided on a motion to dismiss and relied on a number of decisions specifically about the role of the Louisiana Secretary of State in finding that the potential injury was traceable to and redressable by the Secretary. And while *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), evaluated whether officials were presumed to be discharging their official duties, it does not answer the question of how the SEB could redress any of the claims brought by Plaintiffs in this case.

Defendants have not contested that the Secretary of State of Georgia is a proper defendant in this case. But after Defendants stated that "Plaintiffs

have produced no evidence in discovery that any of the individually named SEB members . . . implement the maps in any substantive way," [Doc. 175-1, p. 14], Plaintiffs were required to come forward with some facts to show why SEB members are properly defendants in this case. *Celotex Corp.*, 477 U.S. at 324. Without that evidence, this Court must dismiss the members of the SEB from this case.

II. Plaintiffs have not shown a dispute about any material fact regarding the first *Gingles* precondition.

Plaintiffs desperately want this Court to review their claims in isolation. If the sole question before this Court for the first *Gingles* precondition is "can more majority-Black districts be drawn," then Section 2 cases are far simpler than the Supreme Court has been treating them. And the fact the State faces claims from plaintiffs alleging that it considered race too much[1] underscores the need for the Court to provide clarity on exactly what the law of Section 2 required of the legislature.

Plaintiffs also seek to reduce the meaning of *Miller v. Johnson*, 515 U.S. 900 (1995), so that any map-drawer stating they did not pursue a policy of

[1] Plaintiffs in the constitutional cases claim the State used race on the enacted congressional plan more than necessary to comply with Section 2 and that it split counties on a racial basis. *See Ga. State Conf. of the NAACP, et al. v. State of Georgia, et al.*, Case No. 21-cv-5338-SCJ-SDG-ELB (Doc. No. 59, ¶¶ 28, 201); Duchin Report, (*Ga. NAACP* Doc. No. 142-2, pp. 2-9).

maximization was not drawing primarily based on race. [Doc. 189, pp. 7-8]. Plaintiffs' focus on Mr. Cooper drawing a new district for purposes of serving as an illustrative plan under Section 2 quickly becomes a chicken-and-egg problem for them. How do Plaintiffs say they can show a Section 2 violation? By drawing a map using race to create new districts, so long as they do not adopt a policy of maximization. [Doc. 189, pp. 9]. But this oversimplifies the analysis because if the state legislature had used a similar approach, it would be accused of racial gerrymandering—which it has been in the constitutional cases.[2]

Plaintiffs' reliance on *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998), overreads the statements by the Eleventh Circuit. In that case, no party challenged that the plaintiffs' proposed district map adhered to all traditional districting principles—the sole basis for the finding of racial predominance was the alleged motivation of the expert mapdrawer. *Id.* at 1426. The panel also emphasized the law in this Circuit—that "a plaintiff must demonstrate the existence of a proper remedy" as part of their Section 2 case. *Id.* at 1419.

[2] Plaintiffs ignore evidence of race-conscious county splits when that is precisely the evidence provided to this Court on the alleged racial predominance of the enacted plans. Duchin Report, (*Ga. NAACP* Doc. 142-2, pp. 2-9).

The evidence before this Court demonstrates that Mr. Cooper's plan is configured in ways he could not explain—and that the only majority-Black portion of any county in illustrative District 6 is in Fulton County. [Doc. 175-1, pp. 8-10]. Plaintiffs also ignore the interconnected nature of line-drawing, focusing on District 6 in isolation from every other portion of Mr. Cooper's illustrative plan. [Doc. 189, p. 13].

It is Plaintiffs' burden to show their illustrative plan constitutes a proper remedy, meaning that it can be implemented by this Court or the General Assembly. *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."). Plaintiffs attempt to sidestep that burden by proposing that the General Assembly could create some other configuration. But the "impossibly stringent" standard of perfection Plaintiffs cite is based on the State's interest in its own districts—a deference this Court should apply to the enacted plans. *Bush v. Vera*, 517 U.S. 952, 977-78 (1996).

III. Plaintiffs have not shown a dispute about any material fact regarding the second and third *Gingles* preconditions.

Plaintiffs claim to have satisfied the second and third *Gingles* preconditions and established racial polarization for essentially three reasons. First, they believe they have satisfied their initial burden of proof with the data

presented by their racial polarization expert, Dr. Palmer. Second, they suggest that Defendants have misconstrued the relevant case law and put an unnecessary burden on Plaintiffs by requiring them to *prove* causation as to voting patterns. Third, Plaintiffs claim that even if this Court were to view racial polarization along the lines of what Defendants advocate, the appropriate time to do so is under a totality-of-circumstances analysis.

For the reasons that follow, each of Plaintiffs' proffered arguments fails. But even if they did not, Plaintiffs have not adequately addressed or resolved constitutional problems with their proposed interpretation of Section 2 highlighted by Defendants in their Motion for Summary Judgment.

A. The second and third *Gingles* preconditions are not satisfied merely by showing differential voting patterns between the majority and the minority electorate.

As Defendants explained in their principal brief, establishing racial polarization requires something more than just different races voting for different parties. Plaintiffs attempt to counter this, saying that "as the Eleventh Circuit has explained, satisfaction of the *Gingles* preconditions *creates an inference of racial bias*, since '[t]he surest indication of race-conscious politics is a pattern of racially polarized voting.'" [Doc. 189, p. 17] (emphasis added) (quoting *United States v. Marengo Cnty. Comm'n,* 731 F.2d 1546, 1567 (11th Cir. 1984)). While that is true enough, the lingering issue for

Plaintiffs is that their understanding of racial polarization is flawed. Courts cannot reach an "inference of racial bias" until plaintiffs establish legally significant racially polarized voting. And to do so they need more than just differential voting patterns among the races.

Indeed, the Eleventh Circuit recently explained that "the Supreme Court has warned against conflating discrimination on the basis of party affiliation with discrimination on the basis of race." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State,* No. 22-11143, 2023 U.S. App. LEXIS 10350, at *25 (11th Cir. Apr. 27, 2023). In other words, "partisan motives are not the same as racial motives." *Brnovich v. Democratic Nat'l Comm*., 141 S. Ct. 2321, 2349 (2021). Accordingly, courts "must be careful not to infer that *racial* targeting is, in fact, occurring based solely on evidence of partisanship. Evidence of *race-based* discrimination is necessary to establish a constitutional violation." *League of Women Voters of Fla., Inc.,* 2023 U.S. App. LEXIS 10350, at *25 (emphasis original).

Rather than look at voting behavior holistically to determine, for instance, whether white voters are *refusing* to vote for Black candidates regardless of party or platform, Plaintiffs' expert instead looks exclusively at general elections between Democrats and Republicans. And with this limited dataset, only one thing is *certain:* that Black Georgians vote with dramatic

regularity for Democrats and that white voters vote with somewhat less—though still substantial—regularity for Republican candidates. Indeed, we see *no change* in voter behavior as the race of the candidate changes. And because of this "remarkable stability," Defendants' expert, Dr. Alford, looks at the very same data Plaintiffs look at and determines that it does not establish racial polarization. This is not a factual dispute because everyone agrees on the facts. It is only the conclusion drawn from those facts that is at issue. And Dr. Alford draws the *only* conclusion one can draw from Dr. Palmer's isolated analysis: the different races are voting for different candidates because those candidates subscribe to a particular political party. In other words, we have partisan polarization that happens to coincide with race. But as Defendants pointed out in their principal brief, this does not satisfy *Gingles* or any controlling precedent without more.

Plaintiffs attempt to bypass this material requirement, insisting Dr. Palmer's meager evidentiary offering satisfies the *Gingles* preconditions. As a result, Plaintiffs claim, they are entitled to an inference in their favor that Defendants must now rebut. "[T]he 'inference [of] racial bias' created by the *Gingles* preconditions '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.'" [Doc. 189, p. 20] (emphasis original) (quoting *Vecinos de Barrio Uno v. City of Holyoke,* 72 F.3d 973, 983 (1st Cir. 1995)). However, because Plaintiffs never satisfied the appropriate standard under *Gingles,* they are entitled to no inference in their favor, and Defendants therefore have no obligation to rebut evidence that has not yet been provided. And in this evidentiary vacuum, this Court cannot infer racial bias. *League of Women Voters of Fla., Inc.,* 2023 U.S. App. LEXIS 10350, at *25.

Finally, Plaintiffs mischaracterize the conclusion Dr. Alford draws from his review of Dr. Palmer's data. "In short, Dr. Alford's conclusion that party and not race explains the stark voting polarization reported by Dr. Palmer is based on nothing more than speculation." [Doc. 189, p. 23]. This is exactly backwards. The *only* data available to the Court shows that political party preference explains the polarization present in the voting behavior examined. Dr. Palmer did not analyze primaries, and he offers no evidence of vote switching on either the Republican or Democratic side of the ticket when the race of the candidates is different. All we see is that, regardless of race, Black voters vote nearly exclusively for the Democrat on the ballot. And white voters vote generally for the Republican.

There is no evidence from Dr. Palmer, for instance, that white Democratic voters will refuse to vote for a Black Democrat if their preferred

candidate fails to gain the party nomination. And there is no evidence from Dr. Palmer that white Republican voters will refuse to vote for a Black Republican. To the contrary, the highest profile statewide Republican contest this Court has obtained data on—the 2022 United States Senate race—reveals that the Black Republican won every county in Georgia in the Republican primary. [Doc. 176, ¶¶ 57-58]. In other words, a Black candidate *commanded* the white Republican vote. More problematic for Plaintiffs is that when Black voters had a chance to vote for either a Black Democrat or a Black Republican, they voted in *precisely* the same manner for the Black Democrat, as if race had absolutely no bearing whatsoever on their vote.

Perhaps there is some amount of data that Plaintiffs could offer that would establish race-conscious politics sufficient to show legally significant racial polarization. But the data they have presented here is not enough.

B. The burden of proof on Plaintiffs is well in line with relevant Section 2 precedent.

Plaintiffs claim Defendants improperly require them to "prove [that] race, not party, is the cause of polarization." [Doc. 189, p. 19]. But this is precisely their burden of proof because Section 2 provides relief for minority voters that suffer an injury of some kind. Defendants do not contend, for instance, that Plaintiffs must disprove any and all nonracial explanations for

voting patterns. But Plaintiffs must still prove that *race* is the basis for voting patterns, which ordinarily would mean excluding partisan divergence, since, as already explained, we would *expect* partisan divergence to explain voting patterns. [Doc. 175-1, pp. 28-30]. *Cf., e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978) (opinion of Powell, J.) ("[G]ood faith [sh]ould be presumed in the absence of a showing to the contrary."). Likewise, Defendants do not assert that Section 2 claims must fail where race and partisanship are "correlated." If race is the explanatory factor and *also* correlated with party, Section 2 can apply. The question is what happens when partisan disagreements, *not race*, explain voting patterns. Here, the only evidence before the Court is that partisan disagreements alone explain the voting patterns. Thus, Plaintiffs have not carried their burden.

C. Based on the evidence in the record, there is no need for this Court to wait until totality of circumstances analysis to consider whether Plaintiffs have established racial polarization.

Plaintiffs cite to this Court's prior order denying their motion for preliminary injunction for the proposition that the Court should consider evidence *rebutting* Plaintiffs' demonstration of racial polarization at the totality of circumstances phase. And this would be true *if there was any evidence in the record to rebut.* But, as explained above, Plaintiffs have not yet

met their initial burden to show racial polarization. Plaintiffs' brief relies on a footnote in a Fourth Circuit case to push the analysis back, where the court stated, "[w]e think the best reading of the several opinions in *Gingles* … is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of circumstances inquiry." [Doc. 189, p. 19] (quoting *Lewis v. Alamance Cnty.,* 99 F.3d 600, 615 n.12 (4th Cir. 1996)).

First, that footnote dealt with an explanation of what the *Gingles* plurality said regarding the statistical analysis required to determine racial polarization, not the majority of justices that, to varying degrees, rejected it. *See, e.g., Lewis,* 99 F.3d at 615 ("The *Gingles* plurality explicitly rejected such a requirement in the context of assessing the second and third *Gingles* preconditions."). But more to the point, Defendants are not asking for proof of "causation" in a statistical sense. Rather, the Defendants merely assert that there must be some way to differentiate between race-based voting and voting that is occurring for other reasons. And it cannot be simply showing that voters of different races are voting differently. As earlier stated, the clear rejection of minority candidates by white voters through evidence of vote-switching among parties might suffice to demonstrate this. And to be sure, this is not a "causal" inquiry into voting behavior, which would indeed be ill-advised. It is a purely

objective evidentiary inquiry that shows up not in the motivations or intent of voters, but in the raw numbers.

This step must occur at the preconditions phase of the analysis, because Plaintiffs must carry their burden on the *Gingles* preconditions before reaching the totality. The totality of circumstances is better suited for rebuttal evidence by Defendants and the response to that rebuttal evidence by Plaintiffs.

IV. Proportionality is necessary to this Court's analysis.

As Defendants stated in their opening brief, proportionality is not a safe harbor. [Doc. 175-1, p. 32]. But it has been the basis of a grant of summary judgment in a case upheld on appeal that Plaintiffs do not even address in their response. *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).[3]

The fact that Georgia already elects five Black candidates and five candidates of choice of Black voters to Congress is important to this Court's consideration, because the text of Section 2 says so: "The extent to which members of a protected class have been elected to office in the State or political

[3] Defendants inadvertently cited *Fairley v. Hattiesburg Miss.*, 662 F. App'x 291, 301 (5th Cir. 2016), in their brief as a case involving a grant of summary judgment based on proportionality. But the case was decided after a bench trial (even though most facts were uncontested).

subdivision is one circumstance which may be considered." 52 U.S.C. § 10301(b). Further, it is a necessary step in this Court's analysis—if an additional district can be drawn, this Court must determine "whether the absence of that additional district constitutes impermissible vote dilution." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (*LULAC*). Plaintiffs cannot limit this analysis to a particular geographic region, because *LULAC* forecloses that option. *Id.* Thus, this Court must determine whether Black voters *in the challenged district* have their voting strength diluted. *Id.*

De Grandy requires that when "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population," it is relevant to whether those voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 512 U.S. at 1000 (quoting 52 U.S.C. § 10301(b)). Plaintiffs are correct that *De Grandy* only credited districts that had a "clear majority" or "supermajorities" of the relevant racial minority. *Id.* at 1023. *LULAC* also looked to "opportunity districts" using citizen voting-age population. 548 U.S. at 438.

But applying this same analysis to the Georgia congressional plan would mean that only three districts out of 14 on the enacted plan (21.4%) would

count for purposes of proportionality because only three districts have majority-Black citizen vote-age populations. [Doc. 189-2, ¶ 50]. This is where the interplay of race and politics again cuts against Plaintiffs—they already have five districts in Georgia where Black-preferred candidates succeed, including two U.S. Senators that are Black-preferred candidates, and now want to use the VRA to compel the creation of another district. But when this Court evaluates whether the failure to create that district "constitutes impermissible vote dilution," *LULAC*, 548 U.S. at 437, the consistent political success of Black-preferred candidates demonstrates there is no such dilution and entitles Defendants to summary judgment.

Further, if this Court requires the creation of a sixth district where Black-preferred candidates succeed, Black voters will be able to elect candidates of choice in 42.9% of all congressional districts in Georgia. As discussed in Defendants' principal brief, using the VRA to compel political outcomes raises serious questions about its constitutionality. [Doc. 175-1, pp. 26-28].

CONCLUSION

Plaintiffs make significant, but irrelevant, efforts to create issues of fact in their response. The facts demonstrate that, on issues material to this Court's ruling, Plaintiffs have not shown disputes of fact that would prevent this Court

from granting summary judgment to Defendants. This Court should grant summary judgment to Defendants and dismiss this case.

Respectfully submitted this 3rd day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing Reply 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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