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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

"[U]ntil a claimant makes a showing sufficient to support [an] allegation [of race-based decisionmaking], the good faith of a state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Plaintiffs' response makes clear that they lack any material facts to overcome that presumption in this case. After Defendants pointed out the lack of evidence to support their claims, Plaintiffs' only real argument is that they have put forward enough to reach trial. But they have not shown enough to prevent summary judgment on their constitutional claims or on their Section 2 claims. And this Court need not even reach these issues given Plaintiffs' approach to standing for organizations in redistricting cases that stretches Article III injuries beyond constitutionally permissible grounds.

While Plaintiffs clearly dislike the maps they challenge, they must come forward with evidence to demonstrate there is at least a triable issue of material fact for their claims. They have not and this case must be dismissed.

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 Conf. 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); *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Constitutional claims of racial gerrymandering can also be resolved at summary judgment to defendants. While it is logical that plaintiffs often do not prevail on summary judgment in redistricting cases because of the heavy burden they face, defendants can prevail because they can point out the absence of evidence supporting a plaintiff's claim. *Chen v. City of Houston*, 206 F.3d 502, 513 (5th Cir. 2000).

Facing this binding precedent, Plaintiffs attempt to create a new record on standing, point to district shapes and demographics that are not enough to even create circumstantial evidence of racial predominance on their constitutional claims, and argue incorrect legal standards for their Section 2 claims. Despite extensive discovery, Plaintiffs have come up short, and their claims should be dismissed because there is no issue of material fact to try.

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

A. The agreement among the parties regarding how many members the organizations needed to disclose in discovery did not supplant Plaintiffs' evidentiary obligations.

Plaintiffs accurately capture the substance of the e-mail exchange between counsel for the parties to this action, but draw a far more sweeping

conclusion about it. [Doc. 152, pp. 10-11]. Plaintiffs requested that "the State's challenge to that Plaintiff's associational standing will be limited to the identified member's individual standing," but that is not a concession that standing exists for every district challenged by Plaintiffs—only that Defendants would not inquire about other individual members because the requirement of *Ga. Republican Party v. SEC,* 888 F.3d 1198, 1203 (11th Cir. 2018) would be met. [Doc. 152, p. 12]. But Plaintiffs still had an obligation to verify that they had members in all the districts they challenge if they planned on rely on associational standing for this Court's jurisdiction.

Further, Plaintiffs' view of the discovery agreement does not make sense because Defendants cannot waive this Court's jurisdiction. *See, e.g., Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 270 (2015). Rather, Defendants' view on the agreement was that, to the extent a Plaintiff identifies a member (or members) for purposes of associational standing, Defendants would only ask personally identifying questions as to the identified member(s) (as distinct from asking their 30(b)(6) witness to name *all* members in the challenged districts and then probing into the standing of each one of those members). But Plaintiffs would still have to identify one member *for each challenged district* or at the very least engage in some process Defendants could test to ensure that the organizations had members in each challenged district. And that is

why Defendants conceded that Plaintiffs could replace an identified member if that member lacked individual standing to bring the claim.

But what developed was not what Defendants anticipated based on Plaintiffs' agreement. Rather than identifying member(s) in each challenged district or any process for determining whether such members existed, Plaintiffs repeatedly objected to the Defendants' standing inquiries on the basis of associational or attorney-client privilege. Defendants' Response to Statement of Material Facts (RSAMF), ¶¶ 6-7, 11, 15-16. This, of course, was Plaintiffs' prerogative. But they must live with the results of their decisions, and their attempt to seek shelter in *Ala. Legis. Black Caucus* is unavailing.

In that case, which included a full discovery period and complete trial, the defendants never requested information regarding the standing of the organization's individual members. 575 U.S. at 270. Instead, when the trial was complete, the district court raised standing *sua sponte,* and found that it lacked jurisdiction. When the Supreme Court eventually considered the issue, it ruled the facts and circumstances regarding the nature of the organization *and* the complete lack of inquiry by the defendants as to the plaintiffs' associational standing warranted an inference in the plaintiffs' favor. *Id.* at 270-271. The Court also held that the plaintiffs could establish (and defendants could rebut) evidence of standing on remand. *Id.* at 271.

This case is very different. Defendants have repeatedly inquired into the associational standing of Plaintiff organizations. RSAMF, ¶¶ 6-7, 11, 15-16. And the very existence of this motion and its challenge to standing removes it from the factual pattern that led to the Supreme Court's equitable decision in *Ala. Legis. Black Caucus*. In any event, Plaintiffs here are not entitled to any inference in their favor regarding standing because they had knowledge (and many opportunities) to amass evidence regarding their associational standing, and they chose instead to object. In that absence of evidence, this Court cannot simply rely on Plaintiffs' say-so that varies the 30(b)(6) testimony provided in discovery. *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984); RSAMF, ¶¶ 6-7, 11, 15-16.

As Plaintiffs have already pointed out, "[a]n association has standing to bring suit on behalf of its members ***when its members would otherwise have standing to sue in their own right***, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.,* 528 U.S. 167, 181 (2000) (emphasis added). But "under this theory, an organization must 'make specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm.'" *Ga. Republican Party,* 888 F.3d at 1203

(quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009)). And in the context of redistricting, that harm must occur in each challenged district. *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). Especially at this stage of the litigation, courts "cannot accept the organization's self-descriptions of [its] membership…" *Ga. Republican Party,* 888 F.3d at 1203. Yet that is exactly what Plaintiffs ask this Court to do: rely on a "a sworn statement that the organization had many members." [Doc. 152, p. 14].

For reasons already stated, this case is unlike *Ala. Legislative Black Caucus*. Plaintiffs instead request this Court establish a new rule for associational standing in redistricting cases that allows organizations to rely solely on their own statements. But the rules on the evidence necessary for associational standing do not allow this and the declarations proffered by Plaintiffs are insufficient to satisfy it.

B. Plaintiffs cannot establish organizational standing in redistricting causes of action.

Plaintiffs' fallback position is that they have organizational standing. But they cite only one redistricting case involving organizational standing, which comes from a district court in Texas, and it is highly unpersuasive under the facts of this case. In *Perez v. Abbott,* a district court determined an organization had organizational standing to challenge a local districting plan

because, "despite not dealing specifically with redistricting claims of the type asserted in this case, courts have consistently found standing under *Havens* [*Realty Corp. v. Coleman*, 455 U.S. 363 (1982)] for organizations to challenge alleged violations of § 2 of the VRA and the Fourteenth Amendment." 267 F. Supp. 3d 750, 772 (W.D. Tex. 2017). While that is true generally, the district court did not find any support for such organizational standing in other redistricting cases and instead leaned heavily on general election challenges. *See id.* (noting organizational challenges under the VRA in *Crawford v. Marion County Election Bd.,* 553 U.S. 181 (2008) (challenge to voter ID law); *Ne. Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (challenge to absentee ballot law); and *Lee v. Va. State Bd. Of Elections*, 155 F. Supp. 3d 572, 575-76 (E.D. Va. 2015) (separate voter ID challenge)).

The district court seemed cognizant that authority for organizational standing in the redistricting context was sparse (and probably nonexistent), drawing its legal reasoning for its decision more from the absence of authority contradicting the court's view rather than any authority supporting it. *Perez*, 267 F. Supp. 3d at 772. While that might have been enough then, *Gill*, *decided the very next year,* provides the definitive answer. 138 S. Ct. 1916 (2018). And it is unequivocal that "[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.* at 1930. This requirement of district-specific harm cannot avoided by filing a claim as an organization. Otherwise, the requirement of individualized harm would be illusory. *See, e.g., Nat'l Treasury Emps. Union v. U.S.*, 101 F.3d 1423, 1429 (D.C. Cir. 1996). Without a district-specific injury, Plaintiffs cannot rely on generalized organizational harms in a redistricting case.

Even if Plaintiffs could show an organizational harm was sufficient in a redistricting case, the evidence they put forward only demonstrates they are serving their purpose for existence in educating voters about redistricting. [Doc. 152, p. 16]. As a result, Plaintiffs have not shown any reason why this Court should not dismiss this case for lack of standing.

II. Plaintiffs have not put forward sufficient evidence on their racial gerrymandering claim.

Even if Plaintiffs have standing, their claims fail. In order to prevail on summary judgment, Defendants can cite to an absence of evidence, which requires Plaintiffs to put forward admissible evidence "showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiffs have not done so in response to Defendants' motion.

Plaintiffs agree that they can prove their racial gerrymandering claim by either direct evidence on motivation or "circumstantial evidence of a

district's shape and demographics." [Doc. 152, pp. 16-17] (quoting *Miller*, 515 U.S. at 916). Plaintiffs do not even attempt to offer direct evidence of improper racial motivation, because they cannot. They rely solely on possible circumstantial evidence. [Doc. 152, pp. 17-21]. But none of that evidence is sufficient to demonstrate there is a dispute over any material fact.

First, Plaintiffs now claim that there are disputes about the use of race in 8 of the 14 congressional districts (57%) but only in seven state Senate districts and five state House districts. [Doc. 152, p. 17]. This underscores the need for the Court to closely enforce standing as to which districts are actually being challenged, because racial gerrymandering claims can only target particular districts. *Ala. Legislative Black Caucus*, 575 U.S. at 263.

Next, Plaintiffs first rely on Dr. Duchin's analysis. But in so doing, they avoid the fact that Dr. Duchin specifically refused to opine that districts were drawn primarily based on race—only that some factfinder could possibly reach that conclusion. [Doc. 152-1, ¶¶ 67, 72, 93]. As Defendants predicted, Plaintiffs rely on core retention, racial swaps, and racial splits of counties and precincts. *Compare* [Doc. 141-1, pp. 17-18] *with* [Doc. 152, pp. 18-20]. But Dr. Duchin's analysis is not as comprehensive as Plaintiffs present, because she also acknowledged the presence of other factors besides core retention that she did not account for in her analysis, including politics. [Doc. 152-1, ¶¶ 68, 69].

Further, Dr. Duchin never reviewed any political data about the alleged racial splits, despite having access to that data.[1] *Id*.

Thus, the entirety of evidence on the shape and demographics of the districts presented by Plaintiffs is not enough. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that ***race for its own sake, and not other districting principles***, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913 (emphasis added). But the evidence Plaintiffs presented about the enacted congressional plan is far from this. Dr. Duchin does not testify that the state disregarded traditional redistricting principles in service of racial goals, such as in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller,* 515 U.S. at 913. She does not show that the General Assembly had a racial target, as in *Ala. Legislative Black Caucus*, 575 U.S. at 267. At most, Dr. Duchin has shown a *political goal* that had apparent racial impacts, but did not consider any method to rule out a political purpose—and in fact agreed that political goals were the likely cause. RSAMF, ¶¶ 106, 113, 121, 129, 137, 146, 148, 150.

[1] While political data is not generally available below the precinct level, Ms. Wright's office used a formula to place estimates of political data at the block level, so it would also appear on the screen. RSAMF, ¶ 77.

Left with this reality, Plaintiffs turn to a set of 100,000 maps using an algorithmic analysis that attempted to assess partisan goals. [Doc. 152, p. 21]. Not only are these maps insufficient because they do not consider any redistricting principles except for compactness, RSAMF, ¶¶ 164-173, they also miss the point of what Plaintiffs need to prove. The mere fact that the legislature could have achieved partisan goals without "moving so many voters of color," [Doc. 152, p. 21], ignores the reality that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt*, 526 U.S. at 551 (emphasis original); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

Facing a motion that points to the lack of evidence to support their constitutional claim, Plaintiffs must come forward with more than Dr. Duchin's report. And "[g]iven the fact that the plaintiffs bore the burden of proof on this issue, and the presumption in favor of the [legislature's] good faith, the plaintiffs needed to undercut the hypothesis that the [State's] plans were independently substantially justified by traditional districting factors" to survive summary judgment. *Chen*, 206 F.3d at 520. As a result, "the plaintiffs' circumstantial evidence is inadequate to allow a finding that race predominated." *Id.*

III. The State should be dismissed as a party.

In their response to Defendants' arguments about the application of sovereign immunity to the State, Plaintiffs cite only precedent from other circuits. [Doc. 152, p. 22]. Plaintiffs offer no other arguments beyond the claim that this Court should defer to other courts besides the Supreme Court on these issues. Plaintiffs have not shown any reason why this Court cannot dismiss the State of Georgia and continue this case (to the extent it finds standing for plaintiffs) with the remaining Defendants.

IV. Plaintiffs have not shown any *Gingles* preconditions, requiring dismissal of their Section 2 claim.

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 on Plaintiffs' Section 2 claims 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; *White v. Regester*, 412 U.S. 755, 769-70 (1983). 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 of dispute.

A. Plaintiffs have shown no issues of material fact regarding the first *Gingles* precondition.

1. Plaintiffs have not shown that coalition districts are required by Section 2.

Plaintiffs begin by going beyond what the Supreme Court has said about coalition districts. They claim that the reference in *Bartlett* to coalition districts is not to coalitions of minority voters, but to districts with coalitions of minority groups and white voters (usually called crossover districts). [Doc. 152, p. 25] (quoting *Bartlett v. Strickland,* 556 U.S. 1, 6 (2009)). But that misunderstands *Bartlett*. That case answered the question: "In a district that is not a majority-minority district, if a racial minority could elect its candidate of choice with support from crossover majority voters, can § 2 require the district to be drawn to accommodate this potential?" in the negative. *Bartlett*, 556 U.S. at 6. After

carefully using the term "crossover" district throughout, Plaintiffs claim that the plurality swapped its language. But even if it did, the point remains: combining minority groups is not what is required by Section 2.

Further, Plaintiffs incorrectly state that the Eleventh Circuit held that coalition districts are required in *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526 (11th Cir. 1990). In that case, there was no evidence of cohesion, and the sole issue on appeal was whether Black voters could rely on white crossover support to meet the first *Gingles* prong. *Id.* at 527. Thus, any statements about coalition districts are *dicta*, even if Eleventh Circuit precedent bound this Court.

Tellingly, Plaintiffs do not point to any appellate decision actually holding that coalition districts were required by Section 2, nor do they even address the prohibition on federal courts drawing coalition districts on remedial plans. *Perry v. Perez*, 565 U.S. 388, 399 (2012). Plaintiffs also do not cite any evidence that Black and Latino voters are cohesive except when they vote for the same party's candidates in general elections.

Plaintiffs cannot show that coalition districts are required by Section 2, and thus Defendants are entitled to summary judgment on all claims on an alleged failure to draw coalition districts under the first *Gingles* precondition.

2. Plaintiffs' remedial plans cannot be remedies.

Plaintiffs next seek to oversimplify their burden on the first *Gingles* precondition. [Doc. 152, pp. 26-29]. 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 courts have been treating them. And the fact the same Plaintiffs claim that the State relied too much on race underscores the need for the Court to provide clarity on exactly what the law of Section 2 required of the legislature.

Plaintiffs attempt to sidestep their proof on the first precondition by emphasizing that the maps they propose are merely demonstrative and that some other configuration could be created. But 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.

Plaintiffs then attempt to create disputes about facts by listing out various factors related to the creation of the illustrative plans. [Doc. 152, pp. 27-30]. But Plaintiffs ignore Dr. Duchin's inability to identify the reasons for connecting various communities and rely on her "heat maps" for evidence of minority communities. Reviewing her deposition and these maps makes clear that there is no dispute of fact on these points—neither demonstrates that

there are specific minority communities that are being adversely affected by the enacted plans. Dr. Duchin's plans are drawn primarily based on race and traditional principles do not defeat that fact because "[r]ace was the criterion that, in the [map-drawer's] view, could not be compromised, and race-neutral considerations came into play only after the race-based decision had been made." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017).

At the end of the day, "the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Bush v. Vera*, 517 U.S. 952, 978 (1996). While the State's enacted plans receive this kind of deference, the proposed plans from Dr. Duchin do not—and her inability to explain how she would follow traditional districting principles given her lack of knowledge of the communities in the state is fatal to Plaintiffs' claims even at summary judgment.

B. Plaintiffs have shown no issue of material fact regarding legally significant racially polarized voting.

1. The second and third Gingles *preconditions are not satisfied by showing differential voting patterns.*

Establishing racial polarization requires something more than just different races voting for different parties. Plaintiffs attempt to counter this,

saying that "proof of the second and third Gingles factors will *ordinarily create* a sufficient inference that racial bias is at work." [Doc. 152, p. 32] (quoting *Nipper*, 39 F.3d at 1525 (emphasis added)). But this is not the "ordinary case," because Plaintiffs' evidence regarding the second and third *Gingles* preconditions demonstrates one thing: that Georgia elections reveal a pattern of *partisan* polarization among the races. And while the Eleventh Circuit held in the past that "[t]he surest indication of race-conscious politics is a pattern of racially polarized voting," *United States v. Marengo Cnty. Comm'n,* 731 F.2d 1546, 1567 (11th Cir. 1984), the record before the Court here reveals this as somewhat of a tautology. Plaintiffs are saying that we have racially polarized voting because we see differential voting by race, and we have race-conscious politics for the same reason. But courts cannot reach an "inference of racial bias" until plaintiffs first establish legally significant racially polarized voting. And to do so they need more than just differential voting patterns among the races, *especially* when those patterns precisely mirror partisan patterns.

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. Dem. Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021). Thus, 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. RSAMF, ¶ 304. 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 determined that it does not establish racial polarization. *See* [Doc. 142, ¶ 82].

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. Schneer's isolated analysis: the different races are voting for different candidates because those candidates

subscribe to a particular political party. *Id*. In other words, we have partisan polarization that happens to coincide with race. But, without more, this does not satisfy *Gingles* or any controlling precedent.

Plaintiffs attempt to bypass this material requirement, insisting Dr. Schneer's evidentiary offering satisfies the *Gingles* preconditions. As a result, Plaintiffs claim, they are entitled to an inference in their favor that "'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. 152, p. 35] (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.

2. 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 suggest this Court should forego Defendants' legal argument until trial because it is more appropriately considered as rebuttal evidence at

the totality of circumstances inquiry, which is fact-intensive. [Doc. 152, p. 35]. And this would be true *if there were any evidence in the record to rebut.* But, as explained above, Plaintiffs have not yet met their initial burden to show legally significant racially polarized voting. And while there is some dispute among the circuits about when is best to analyze this issue, *see, e.g.*, [Doc. 141-1, pp. 32-33 n. 10], the third *Gingles* precondition is best suited for it. And because this is specially empaneled three-judge court whose decisions are reviewed directly by the Supreme Court, it need only treat precedent from this (or any) circuit as potentially persuasive, as opposed to precedentially binding.[2] The totality of circumstances is better suited for rebuttal evidence by Defendants and the response to that rebuttal evidence by Plaintiffs.

V. Proportionality forecloses Plaintiffs' Section 2 claims.

As Defendants stated in their opening brief, proportionality is not a safe harbor. [Doc. 141-1, p. 39]. 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,

[2] A different three-judge court sitting in this circuit has held Eleventh Circuit precedent binding. *See, e.g. Ga. State Conference of NAACP v. Georgia,* 269 F. Supp. 3d 1266, 1278 (N.D. Ga. 2017 (three-judge court). But that three-judge court has no authority to bind this separately constituted court. *See*, *e.g. Parker v. Ohio,* 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (three-judge court) (Gwin, J., concurring).

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 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*). Thus, this Court must determine whether Black voters *in the challenged districts* 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

[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).

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 two districts out of 14 on the enacted plan (14.3%) would count for purposes of proportionality because Plaintiffs say only two districts have majority-Black citizen voting-age populations. [Doc. 152, p. 37]. This is where the interplay of race and politics again cuts against Plaintiffs—they can already point to five districts in Georgia where Black-preferred candidates succeed, including two U.S. Senators, and now want to use the VRA to compel the creation of another congressional 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.

Further, if this Court requires the creation of a sixth district, Black voters will be able to elect candidates of choice in 42.9% of all congressional districts in Georgia. And using the VRA to compel political outcomes raises

serious questions about its constitutionality. [Doc. 141-1, pp. 33-35]; *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

VI. Plaintiffs have not provided evidence to support their discriminatory purpose claim.

Plaintiffs claim that *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977), applies in redistricting cases. [Doc. 152, p. 38]. But this is not correct. If Plaintiffs' claims fail under *Miller*, as discussed above, then Count III must also be dismissed because *Arlington Heights* does not apply. Plaintiffs still cannot cite a single case where a court used the *Arlington Heights* factors in a case challenging district boundaries—the sole case they cite involved only whether an at-large system of election violated the Constitution, which is far afield from whether particular district boundaries do so. *Rogers v. Lodge*, 458 U.S. 613, 614 (1982). Further, while *Arlington Heights* relied on a redistricting case for part of its standard, Plaintiffs cannot escape the fact that they ask this Court to apparently become the first court to apply *Arlington Heights* to a district plan separately from *Miller*. Indeed, it would be strange if the Court found no direct evidence of racial intent and no circumstantial evidence of

racial intent as a result of the shape and demographics under *Miller*, 515 U.S. at 916, but then found racially improper intent under *Arlington Heights*.[4]

But even with this wrong view of the law, and apparently recognizing the fact that none of their experts would opine on the intent of the General Assembly, Plaintiffs next attempt to cobble together evidence of racial purpose. After recapitulating their view of the district boundaries, they discuss Georgia's history, omitting the fact that Georgia's 2011 statewide redistricting plans were approved by the Department of Justice on the first attempt and were never found unconstitutional or illegal in any final judgment of a court.

Plaintiffs next attempt to recast the testimony of Dr. Bagley, who testified that the 2021 redistricting process entirely consistent with the 2011 and 2001 redistricting processes in Georgia. RSAMF, ¶ 67. Plaintiffs pretend as if a single stray comment by Chair Rich was "bemoan[ing]" having to comply with the Voting Rights Act, when the actual quote was explaining to constituents who were upset about a Republican incumbent being drawn out of his district: "No matter how much anybody here on this committee or in this

[4] Plaintiffs' reliance on *Hunt*, 526 U.S. at 549-51, [Doc. 152, p. 39], illustrates how confusing this would be if the Court proceeds with an *Arlington Heights* analysis. That citation does not involve the Supreme Court considering evidence under the *Arlington Heights* factors, but rather evidence about the shape and demographics of the districts—exactly what *Miller* requires. *Id.*

room thinks that the application is unfair here, this is just not the body that has any authority to change the Federal Voting Rights Act." RSAMF, ¶ 66.

The selective quoting continued with an attribution that Ms. Wright was working to intentionally avoid creating a record, when the actual exchange in the deposition was discussing Ms. Wright's preference for in-person communication when talking with the committee chairs. RSAMF, ¶ 78. This is far from the accusation made against Ms. Wright and ignores Plaintiffs' own evidence about the map-drawing process functioning largely the same in 2021 as in prior redistricting cycles regardless of the party in power.

Finally, Plaintiffs ignore the reality that Georgia had political data displayed at the block level, RSAMF, ¶ 77, and ignore Ms. Wright's unequivocal testimony that Mr. O'Connor does not draw maps and had absolutely no role in creating any statewide maps. RSAMF, ¶ 85-86.

CONCLUSION

In a case with no individual voter plaintiffs, this Court should dismiss the entirety of this case for lack of standing by the organizational Plaintiffs. But even if Plaintiffs have standing, there is no issue of material fact because Plaintiffs do not have evidence sufficient to carry their burden. This Court should grant summary judgment to Defendants and dismiss the entirety of Plaintiffs' claims.

Respectfully submitted this 10th 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 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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