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

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*, Defendants.	**CIVIL ACTION NO. 3:11-CV-00123-TCB**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, FOR FURTHER RELIEF

Plaintiffs[1] respectfully submit this Memorandum of Law in Support of their Motion for Preliminary Injunction or, in the Alternative, for Further Relief.

I. INTRODUCTION

On July 3, 2015, following a battle with cancer, Pota Coston, the first Black candidate ever to be elected to the Fayette County Board of Commissioners ("BOC"), passed away. This unexpected tragedy occurred

[1] Plaintiffs are the Georgia State Conference of the NAACP, Fayette County Branch of the NAACP, Henry Adams, Terence Clark, Alice Jones, John E. Jones, Daniel ("Dan") L. Lowry, Ali Abdur-Rahman, Aisha Abdur-Rahman, Lelia Richardson, Elverta Williams, and Bonnie Lee Wright.

merely seven months after a historic, remedial election, where—for the first time in Fayette County's nearly two-century history—Black voters had the opportunity to elect their candidates of choice to the BOC and the Fayette County Board of Education ("BOE"). Specifically, on November 4, 2014, after this Court ordered Defendants[2] to implement a district-based method of voting in which Black voters comprised the majority of voters in one of five districts ("District 5"), Ms. Coston and Leonard Presberg—the candidates of choice of Black voters—were elected to the BOC and the BOE, respectively. Underscoring the remarkable progress made in this remedial election, more than 61 percent of registered voters in Fayette County turned out to vote. This voter turnout exceeded that of all other 158 counties in Georgia.

The remedial election—and the historic outcomes it produced—occurred because this Court ordered Defendants to implement district-based voting to remedy the illegal vote dilution that took place in the at-large elections that were previously conducted in Fayette County. Doc. 179. In May 2013, this Court recognized, in an 81-page opinion granting summary judgment in Plaintiffs' favor, that the at-large system of voting violated

[2] County Defendants are the BOC and its individual members in their official capacities, the Fayette County Board of Elections and Voter Registration ("Board of Elections"), and Tom Sawyer, Department Head of the Board of Elections, in his official capacity. Board of Education Defendants are the BOE (under Georgia Law, the Fayette County School District) and its individual members in their official capacities.

Section 2 of the Voting Rights Act of 1965 ("Section 2") by denying Fayette County's Black voters of the opportunity to elect their candidates of choice to the BOC and the BOE and to participate equally in the political process. Doc. 152. As the Eleventh Circuit later observed on appeal, this Court "made abundantly clear in its comprehensive opinion that the substantial weight of the evidence favored [Plaintiffs]." *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1339 n.4 (11th Cir. 2015).

The November 2014 election stands as powerful evidence that a district-based voting method provides Black voters in Fayette County with the equal opportunity to elect their candidates of choice, where the previously relied-upon at-large voting structure did not. Yet, on July 14, 2015, less than two weeks after the death of Ms. Coston—and in complete disregard of the earlier rulings of this Court and the Eleventh Circuit—the Board of Elections, by divided vote of 2 to 1, resolved *not* to use district-based voting in the upcoming special election that will select Ms. Coston's successor. Instead, the Board of Elections plans to revert to the at-large method of voting that this Court previously held violates Section 2.

Consistent with the traditional function of a preliminary injunction, Plaintiffs now seek to maintain the status quo—district-based voting—and prevent irreparable harm prior to a trial on the merits. Given the substantial

likelihood that Plaintiffs will prevail at trial, the irreparable injuries that Plaintiffs will suffer in the absence of an injunction, the lack of any harm to County Defendants if they continue to implement district-based voting, and the public interest in vindicating the fundamental right to vote of Plaintiffs and other Black voters in Fayette County, a preliminary injunction should issue to enjoin County Defendants from reverting to its previous, discriminatory practice of at-large voting and, instead, require them to maintain district-based voting for the upcoming special election.

II. BACKGROUND

After exhausting non-judicial avenues over the course of 20 years to change the at-large electoral method for the BOC and the BOE, Plaintiffs filed the Complaint in this action on August 9, 2011, seeking to vindicate the rights of Black voters in Fayette County, including themselves, to elect their candidates of choice. Doc. 1; Doc. 152 at 7, 71. Plaintiffs sought a declaration from this Court that Fayette County's at-large method of election for both the BOC and the BOE violated Section 2, and asked for a permanent injunction enjoining Defendants from holding at-large elections and instead requiring elections for these bodies to be conducted using district-based voting. Doc. 1 at 25-26. In September 2012, following nine months of fact and expert

discovery, Plaintiffs and County Defendants cross-moved for summary judgment. Docs. 108, 110.

On May 21, 2013, this Court issued an 81-page opinion, granting Plaintiffs' motion for summary judgment and denying County Defendants' cross-motion. Doc. 152 at 80. In its ruling, this Court held that Plaintiffs satisfied their burden to establish each of the three preconditions for their vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* Doc. 152 at 80. Specifically, the Court determined that (1) "Plaintiffs have shown that the African-American voting-age population is sufficiently large and geographically compact to constitute a majority-minority district in Fayette County"; (2) "Fayette County's African-American population is politically cohesive"; and (3) "elections [in Fayette County] are characterized by racially polarized bloc voting." *Id.* at 42-43.

This Court also concluded that Plaintiffs demonstrated—under the totality of circumstances—that Black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 79-80 (quoting 42 U.S.C. § 1973(b)). While mindful that "Plaintiffs need not prove a majority of [the Senate factors used to evaluate the totality of circumstances ("Senate factors")]," *id.* at 6, this Court recognized that six factors supported a finding of vote dilution:

- The long history of discrimination in Georgia and its continuing effects on Black political participation, *see id.* at 52 ("In sum, based on Georgia's long history of discrimination, the Court finds that this factor weighs in Plaintiffs' favor.");
- The existence of racially polarized voting in Fayette County, *see id.* at 53 ("As the above discussion of the *Gingles* third precondition demonstrates, the evidence is sufficient that racial bloc voting exists in Fayette County such that the white majority usually defeats African-Americans' candidate of choice.");
- The use of election practices, including numbered posts, residency requirements, staggered terms, and majority-vote requirements, that enhance voting discrimination in Fayette County, *see id.* at 59 ("Because Fayette County employs multiple devices in its BOE and BOC elections that enhance the potential for vote dilution, this factor weighs heavily in favor of Plaintiffs.");
- The lack of Black electoral success in Fayette County, *see id.* at 64 ("Significantly, no African-American has ever been elected to the BOE or BOC. This weighs heavily in favor of vote dilution.");

- The BOC's lack of responsiveness to Black voters in Fayette County, *see id.* at 72 ("[T]he evidence is that the BOC is not politically responsive to African-American voters."); and
- The BOC's failure to appoint Black individuals to boards, committees, or commissions, *see id.* at 78 ("[T]he BOC's method of appointing board and commission positions has the potential to affect African-Americans' participation in the political process in Fayette County.").

Critically, this Court acknowledged that Plaintiffs' proof of two of the most important Senate factors—that (1) no Black person had ever been elected to the BOC or the BOE under at-large voting, and (2) voting is racially polarized in BOC and BOE elections—would have been sufficient to demonstrate vote dilution. *See id*. at 78-79. Ultimately, "[b]ased on the heavy weight of those two factors," the weight of the other four Senate factors, and "a searching practical evaluation of the past and present reality of the challenged electoral scheme," this Court held that the at-large electoral method for the BOC and the BOE impermissibly diluted the voting strength of Black voters in Fayette County. *Id.* at 79-80 (quoting *Gingles*, 478 U.S. at 45 (internal quotation marks omitted)). Accordingly, the Court granted summary judgment to Plaintiffs. *See id.* at 80 ("Because Plaintiffs have

satisfied all three *Gingles* preconditions as well as the totality of the circumstances test, the Court will grant summary judgment in Plaintiffs' favor on their claim of vote dilution, and deny the County Defendants' motion for summary judgment.").

Following this ruling, County Defendants moved the Court to certify its summary judgment order for interlocutory appeal. Doc. 153. The Court denied that motion, reiterating that Plaintiffs satisfied their Section 2 burden. *See, e.g.*, Doc. 161 at 13 ("The necessary showing [for the first precondition under *Gingles*] is that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Plaintiffs have made that showing."); *id.* at 17-18 (noting "the Court's clear identification of six factors that weighed in favor of Plaintiffs' favor" under the totality of circumstances analysis, and concluding that "County Defendants' contention that the Court's decision turned upon Plaintiffs' showing of only one factor is an indefensible mischaracterization of the Court's order").

On February 18, 2014, following a hearing, this Court entered an order adopting a remedial redistricting plan, which it developed in consultation with the Georgia Legislative and Congressional Reapportionment Office, to cure the existing vote dilution. Doc. 179. Under the remedial redistricting plan,

each of the five members of the BOC and the BOE is to be elected from a single-member district, and Black voters are to constitute a majority of the voters in one of the districts, District 5. *Id.* at 8 (noting that the Black voting-age population in District 5 was 50.13%); *see also id.* at 10-11.

In its order, the Court explained in detail how its remedial redistricting plan complied with all applicable legal requirements, including that the plan (1) offered a complete remedy for the Section 2 violation; (2) adhered to the principle of one person, one vote; (3) did not violate Section 2 or Section 5 of the Voting Rights Act; and (4) did not intrude on state policy any more than necessary. *Id.* at 6-32. In particular, the Court found that its remedial plan complied with the principle that judicial redistricting plans should reflect "de minimis variation" from population equality. *Id.* at 24-25 & n.13 (citation omitted). The Court also found that "race was not the dominate and controlling consideration in creating the remedial plan," and that "traditional districting principles [had not been] subordinated to racial considerations." *Id.* at 19. The Court held that, even if race had predominated, "the remedial plan would pass constitutional muster." *Id.* at 20.

On March 13, 2014, the Court entered its final judgment in favor of Plaintiffs' claim. Doc. 183. The Court enjoined Defendants from qualifying candidates and conducting any elections using the then-existing at-large

method of election. *Id.* at 1. The Court further ordered that its remedial redistricting plan be used "for all future Fayette County BOC and BOE elections." *Id.*

On March 19, 2014, County Defendants filed their notice of appeal. Doc. 184. While the appeal was pending, the Fayette County Board of Elections administered three separate elections—the primary election on May 20, 2014, the primary runoff election on July 22, 2014, and the general election on November 4, 2014—for two seats on the BOC and two seats on the BOE in accordance with the Court's remedial order. *See* Ex. 1 (Mar. 25, 2014 Minutes of Board of Elections meeting adopting district-based voting for 2014 elections); Ex. 2 (May 20, 2014 Election Summary Report); Ex. 3 (July 22, 2014 Election Summary Report); Ex. 4 (Nov. 4, 2014 Election Summary Report).

Following the implementation of district-based elections in 2014, Ms. Coston defeated the incumbent Allen McCarty in District 5 to become the first Black member of the BOC in the nearly two-century history of Fayette County. *See* Ex. 4; *see also* Ex. 5 (Fayette County Government webpage for Ms. Coston). Reflecting the remedial and historic nature of this election, voter turnout in Fayette County was 61.1 percent, exceeding voter turnout in all of

the other 158 counties in Georgia for that November election. *See* Ex. 6 (Ga. Sec'y of State Office, Official Results for Nov. 4, 2014 Elections).

On January 7, 2015, the Eleventh Circuit issued an opinion vacating this Court's grant of summary judgment and remanding the case for trial. *See Ga. State Conference of NAACP*, 775 F.3d at 1349. In its decision, the Court of Appeals emphasized that the only error that this Court made was *procedural* in nature—namely, that this Court weighed the evidence that the parties presented at summary judgment. *See id.*; *see also id.* at 1339.

The Eleventh Circuit explicitly rejected County Defendants' argument that this Court had misconstrued the law in ruling in Plaintiffs' favor. *See id.* at 1343-44 ("[W]e cannot say that the district court misconstrued our precedent or reached its conclusion based on a misunderstanding of the applicable law."). To the contrary, the Court of Appeals pointedly observed that County Defendants misunderstood the law and offered a legal framework that was "clearly foreclosed by precedent, as recognized by the district court." *Id.* at 1348; *see also id.* at 1348 n.10 (discussing with approval this Court's order denying County Defendants' request for interlocutory appeal).

The Eleventh Circuit noted that this Court "made abundantly clear in its comprehensive opinion that the substantial weight of the evidence favored [Plaintiffs]". *See id.* at 1339 n.4. The Court of Appeals further acknowledged

that "no African-American candidates had ever been elected to the BOC or the BOE, regardless of the candidates' respective qualifications or *party affiliation*," under the challenged at-large method of election. *Id.* at 1340 (emphasis added).[3] This lack of Black electoral success, combined with the presence of racially polarized voting, "pointed commandingly in [Plaintiffs'] favor." *Id.* at 1347 n.9. Consistent with this recognition, the Court of Appeals declined to disturb the results of the 2014 district-based elections. *Id.* at 1349.

This case is before this Court on remand "so that [this Court] may conduct a trial." *Id.* at 1349. In accordance with this Court's Amended Scheduling Order, the parties have been preparing this case for trial. *See* Doc. 224; *see also id.* at 5 (trial date to be set at pretrial conference); Doc. 259 at 1 (pretrial conference has been continued).

On July 3, 2015, Ms. Coston passed away from cancer, creating a vacancy on the BOC. Ex. 7 (Board of Elections call for special election); Ex. 8 (July 9, 2015 Action Agenda for BOC meeting). On July 14, 2015, the Board of Elections, by a divided vote of 2 to 1, called for a special election to take place on September 15, 2015, with candidate qualification to begin on August 10, 2015 and voter registration to occur on or before August 17, 2015.

[3] As an example, the Eleventh Circuit cited the 2006 special election for the BOC in which a white Republican candidate defeated two Black Republican candidates and two Black Democratic candidates without a runoff. *See id.* at 1340 n.5.

See Ex. 7; Ex. 9 (Board of Elections 2015 Election Event Dates); Ex. 10 (Elly Yu, *Fayette Residents Continue Fight Against At-Large Voting*, WABE 90.1 FM, July 16, 2015). The Board of Elections announced that it will use the at-large method of voting to conduct the special election, even though this Court previously held that this voting practice violates Section 2. *See* Ex. 7; Ex. 10.

III. ARGUMENT

A preliminary injunction is warranted if: (1) the moving party has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the opposing party; and (4) if issued, the injunction would be consistent with the public interest. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005). As set forth in further detail below, all four factors are present here. Accordingly, a preliminary injunction should issue to enjoin the use of at-large voting for the upcoming special election and prevent the dilution of the voting strength of Black voters in Fayette County in that election. *See, e.g.*, *Chatman v. Spillers*, 44 F.3d 923, 924-25 (11th Cir. 1995) (reversing denial of preliminary injunction and directing that city council elections be conducted using district-based voting); *United States v. Dallas Cnty. Comm'n*, 791 F.2d 831, 831-33 (11th Cir. 1986) (reversing

denial of preliminary injunction to enjoin the use of at-large voting for school board elections).

A. There Is a Substantial Likelihood that Plaintiffs Will Succeed on the Merits of their Section 2 Claim Against County Defendants.

1. Prior Rulings by this Court and the Court of Appeals Demonstrate the Substantial Likelihood of Plaintiffs' Success on the Merits.

Given the strength of the evidence that Plaintiffs offered at summary judgment, and this Court's ruling based on that evidentiary showing, there is no question that Plaintiffs are substantially likely to succeed on the merits of their Section 2 claim against County Defendants.

At summary judgment, Plaintiffs and County Defendants submitted an extensive evidentiary record to the Court, which reflected more than nine months of fact and expert discovery. *See* Docs. 108, 110. After a careful review of this voluminous record, this Court held that the use of at-large voting for BOC and BOE elections violated Section 2 by impermissibly diluting the voting strength of Black voters in Fayette County. Doc. 152 at 79-80. In so ruling, this Court "made abundantly clear in its comprehensive opinion that the substantial weight of the evidence favored [Plaintiffs]." *Ga. State Conference of NAACP*, 775 F.3d at 1339 n.4.

Specifically, this Court concluded that Plaintiffs satisfied their burden to establish each of the three *Gingles* preconditions for their vote-dilution claim. *See* Doc. 152 at 80.[4] This Court further recognized that Plaintiffs carried their burden to demonstrate—under the totality of circumstances—that Black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 79-80 (quoting 42 U.S.C. § 1973(b)).[5] This Court granted summary judgment to Plaintiffs based on this review of the extensive record. *See id.* at 80 ("Because Plaintiffs have satisfied all three *Gingles* preconditions as well as the totality of the circumstances test, the Court will grant summary

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[4] As noted above, this Court determined that (1) "Plaintiffs have shown that the African-American voting-age population is sufficiently large and geographically compact to constitute a majority-minority district in Fayette County"; (2) "Fayette County's African-American population is politically cohesive"; and (3) "elections [in Fayette County] are characterized by racially polarized bloc voting." Doc. 152 at 42-43.

Plaintiffs' expert, William S. Cooper, developed Plaintiffs' illustrative single-member redistricting plan for the BOC and the BOE to satisfy the first *Gingles* precondition. Doc. 152 at 14. This Court recognized in its summary judgment order that Mr. Cooper had "testified at trial as an expert witness on redistricting and demographics in federal courts in thirty-four voting rights cases," and that "[s]ince the release of the 2010 census, he has developed several statewide legislative plans, including plans for Georgia, and has developed sixty local redistricting plans, primarily for groups working to protect minority rights." *Id.* at 14 n.7.

[5] As noted above, as part of its "searching practical evaluation of the past and present reality of the challenged electoral scheme," Doc. 152 at 79 (quoting *Gingles*, 478 U.S. at 45 (internal quotation marks omitted)), this Court recognized that six factors, including two of the most essential factors, support a finding of vote dilution. *See id.* at 52 (the long history of discrimination in Georgia); *id.* at 53 (the presence of racially polarized voting in Fayette County); *id.* at 59 (the use of voting practices that enhance discrimination); *id.* at 64 (the absence of Black electoral success in Fayette County); *id.* at 72 (the BOC's lack of responsiveness to Black voters); *id.* at 78 (the BOC's failure to appoint Black individuals to boards, committees, or commissions).

judgment in Plaintiffs' favor on their claim of vote dilution, and deny the County Defendants' motion for summary judgment.").

In later denying County Defendants' request for interlocutory appeal, this Court reiterated that Plaintiffs satisfied their Section 2 burden. *See, e.g.*, Doc. 161 at 13 ("The necessary showing [for the first precondition under *Gingles*] is that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Plaintiffs have made that showing."); *id.* at 17-18 (noting "the Court's clear identification of six factors that weighed in favor of Plaintiffs' favor" under the totality of circumstances analysis, and concluding that "County Defendants' contention that the Court's decision turned upon Plaintiffs' showing of only one factor is an indefensible mischaracterization of the Court's order").

Although the Eleventh Circuit subsequently vacated the grant of summary judgment, it emphasized that it did so "strictly [on] *procedural* grounds." *Ga. State Conference of NAACP*, 775 F.3d at 1349 (emphasis added). The Court of Appeals firmly rejected County Defendants' argument that this Court "misconstrued [Eleventh Circuit] precedent or reached its conclusion based on a misunderstanding of the applicable law," *id.* at 1343-44, and disapproved of County Defendants' proposed legal framework as

"clearly foreclosed by precedent, as recognized by the district court." *Id.* at 1348; *see also id.* at 1348 n.10 (discussing with approval this Court's order denying County Defendants' request for interlocutory appeal).

The Court of Appeals also recognized that the weight of the evidence is in favor of Plaintiffs' claims. *See id.* at 1339 n.4. In particular, the Eleventh Circuit observed that "no African-American candidates had ever been elected to the BOC or the BOE, regardless of the candidates' respective qualifications or party affiliation." *Id.* at 1340. The Court of Appeals made clear that this absence of Black electoral success, combined with the presence of racially polarized voting in Fayette County, "pointed commandingly in [Plaintiffs'] favor." *Id.* at 1347 n.9.

In view of Plaintiffs' overwhelming evidence, this Court's summary judgment decision, and the ruling of the Eleventh Circuit on appeal, Plaintiffs are substantially likely to succeed on the merits of their claim against County Defendants. Unlike most cases where plaintiffs seek a preliminary injunction, this case involves a substantial evidentiary record developed through an extensive discovery process that took place over nine months, and both this Court and the Court of Appeals have recognized, after careful review of this record, that the substantial weight of the evidence points in Plaintiffs' favor.

2. Evidence from Defendants' Newly Proffered Experts Does Not Affect Plaintiffs' Substantial Likelihood of Success on the Merits.

This Court recently granted Defendants' motion to designate Ms. Linda Meggers and Dr. Karen Owen as new expert witnesses in this case, Doc. 260, and the parties are in the process of engaging in further expert discovery to ascertain the scope and bases of these individuals' opinions. Nevertheless, it is clear, even from the face of these individuals' reports, that neither of their testimony diminishes the substantial likelihood that Plaintiffs will succeed on the merits.

a. Linda Meggers

Ms. Meggers's opinion is only relevant to the first precondition under *Gingles*, and it is not materially distinguishable from that of John Morgan, whose testimony this Court considered and rejected in granting summary judgment to Plaintiffs. In her declaration, Ms. Meggers opines that: (1) it is impossible to draw a majority-minority district in Fayette County without subordinating population equality and other redistricting principles to race, (2) race predominates in the Illustrative Plan, and (3) the Black population in Fayette County is not geographically compact to constitute a majority of the voting-age population in a single-member district. *See* Doc. 238-2, Meggers Decl. ¶¶ 29-62.

Ms. Meggers's opinion as to the first precondition under *Gingles* is essentially the same as that of Mr. Morgan, whose initial expert report states the following:

> I have concluded (1) that it is not possible to draw a majority voting-age African-American district without using race as the guiding principle; (2) that the [Illustrative] Plan uses race as the guiding principle in the creation of a majority voting-age (Any Part) African-American district; and (3) that the African-American population is [not] . . . geographically compact to allow for the drawing of a properly apportioned single member district . . . where the African-American voting-age population constitutes a majority of the district.

Doc. 108-5 at ¶ 8.[6]

At summary judgment and on appeal to the Eleventh Circuit, County Defendants relied upon Mr. Morgan's opinion to argue that the Illustrative

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[6] Unlike Mr. Morgan, Ms. Meggers also opines on the origin of the Any-Part Black Census category and suggests that it is inappropriate to use. *See* Doc. 238-2, Meggers Decl. ¶¶ 63-67. However, the Supreme Court, in a Voting Rights Act case arising out of Georgia, has already resolved the legal question of whether it is appropriate to use that Census category. *See Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003). The Court held that that, where, as here, "only one minority group's effective exercise of the electoral franchise" is at issue, "it is proper to look at *all* individuals who identify themselves as [B]lack" *Id.*

This Court has appropriately and carefully adhered to this Supreme Court decision. *See* Doc. 152 at 21 (holding that "the 50.22% [Any-Part] African-American voting-age population in District 5 of the Illustrative Plan is sufficiently large to constitute a majority in a single-member district"); Doc. 179 at 7 & n.6 (using the Any-Part Black Census category to craft the remedial redistricting plan).

Ms. Meggers cannot, by her opinion, displace the Supreme Court's ruling. *See Durkin v. Platz*, 920 F. Supp. 2d 1316, 1332 (N.D. Ga. 2013) (excluding expert testimony "because it addresses a pure issue of law and therefore is not helpful to the [finder of fact]"); *see also Specht v. Jensen*, 853 F.2d 805, 810 (10th Cir. 1988) (en banc) ("In no instance can a[n] [expert] witness be permitted to define the law of the case.").

Plan constituted an unconstitutional racial gerrymander, and that, as a result, Plaintiffs could not establish the first *Gingles* precondition for their Section 2 claim. *See, e.g.*, Doc. 108-2 at 2-9, 12-20; Doc. 140 at 5-20; *see also* BOC Appellants' Br. at 14-42, *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336 (11th Cir. 2015) (No. 14-11202). This Court firmly rejected that argument as both legally flawed and factually erroneous. *See* Doc. 152 at 22-42. Similarly, on appeal, the Eleventh Circuit criticized County Defendants' argument as "clearly foreclosed by precedent, as recognized by the district court," *Ga. State Conference of NAACP*, 775 F.3d at 1348. Because Ms. Meggers's testimony suffers from the exact same flaws, it does not affect Plaintiffs' substantial likelihood of success on the merits.[7]

b. Dr. Karen Owen

Dr. Owen's testimony regarding the role of partisanship in Fayette County elections likewise makes no material difference in this case. Dr. Owen

[7] In particular, as Plaintiffs previously pointed out, County Defendants' reliance on Ms. Meggers's opinion that the Illustrative Plan constitutes a racial gerrymander reflects a continuing—and inappropriate—attempt to conflate compactness for Section 2 purposes with compactness for equal protection purposes. *See* Doc. 245 at 20 n.11, Pls.' Br. in Opp. to Mot. for Permission to Designate Linda Meggers as an Expert Witness.

This Court has repeatedly explained that this attempt is contrary to Supreme Court and Eleventh Circuit precedent. *See, e.g.*, Doc. 152 at 30-31; Doc. 161 at 5-13; Doc. 239 at 5. In particular, at summary judgment, this Court made clear that "[it] will *not* determine as part of the first *Gingles* inquiry whether Plaintiffs' Illustrative Plan subordinates traditional redistricting principles to race." Doc. 152 at 28 (emphasis added). On appeal, the Eleventh Circuit confirmed that this ruling was correct. *Ga. State Conference of NAACP*, 775 F.3d at 1348.

does not dispute Plaintiffs' proof of racially polarized voting under *Gingles*, and her testimony fails to rebut Plaintiffs' showing, under the totality of circumstances, that at-large voting prevents Black voters from electing their candidates of choice.

First, Dr. Owen's testimony does not contradict Plaintiffs' proof of racially polarized voting under the second and third preconditions of *Gingles*. As this Court recognized at summary judgment, Plaintiffs' expert, Dr. Richard L. Engstrom,[8] analyzed an array of elections in Fayette County featuring at least one Black and one white candidate (*i.e.*, biracial elections) competing against each other for an at-large elected position and found that while Black voters vote cohesively, bloc voting by white voters consistently leads to the defeat of Black voters' candidates of choice. *See* Doc. 152 at 43-44; Doc. 110-11, Engstrom Report ¶¶ 29-30. Among other contests, Dr. Engstrom analyzed *four* separate at-large elections in different election seasons in which white Republican candidates defeated Black Republican candidates in Fayette

[8] This Court recognized in its summary judgment order that Dr. Engstrom is "an expert on the relationship between election systems and the ability of minority voters to participate fully in the political process and to elect representatives of their choice," and that "[h]e has written multiple articles related to § 2, three of which were cited with approval in *Gingles*, and has testified as an expert witness in numerous cases." Doc. 152 at 43 & n.22.

By contrast, Dr. Owen admits that she has not testified as an expert witness at trial over the past four years. *See* Doc. 240-1, Owen Substitute Decl. ¶ 4. Her substitute declaration does not otherwise identify any other case in which she has served as an expert witness. *See id.*

County: (1) the 2006 special election for the BOC in which a white Republican candidate defeated four Black candidates, including two Republicans; (2) a 2006 Republican primary for the BOE in which a white Republican candidate defeated a Black Republican candidate; (3) another 2006 Republican primary for the BOE in which a white Republican candidate defeated a Black Republican candidate; and (4) a 2008 Republican primary for Sheriff in which three white Republican candidates defeated a Black Republican candidate, who finished last among the four candidates. *See* Doc. 110-11, Engstrom Report ¶¶ 23, 26, 27.

Dr. Owen does not challenge Dr. Engstrom's methodology or the results of his racially polarized voting analysis. *See* Doc. 240-1, Owen Substitute Decl. Unlike Dr. Engstrom, Dr. Owen did not analyze whether the candidate preferences of voters in Fayette County diverge by race or whether Black voters' candidates of choice are usually defeated by white bloc voting. *See id.* Thus, there remains no dispute that Black voters in Fayette County are cohesive behind their candidates of choice, that most white voters do not support those candidates, and that, as a result, Black voters' preferred candidates tend to be defeated under an at-large system. *See* Doc. 152 at 43-44.

That Plaintiffs' showing of racially polarized voting under the second and third preconditions of *Gingles* remains undisputed is significant because both this Court and the Eleventh Circuit have recognized that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors [including racially polarized voting] but still have failed to establish a violation of § 2 under the totality of the circumstances." *Ga. State Conference of NAACP*, 775 F.3d at 1342 (citation and quotation marks omitted); *see also* Doc. 152 at 44-45.

Second, Dr. Owen's testimony regarding the role of partisanship does not defeat Plaintiffs' showing of racial bloc voting under the totality of circumstances analysis. While evidence of partisan politics may be considered as part of that inquiry, *see Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000) (en banc), courts have repeatedly rejected such evidence if it fails to "indisputably prove" that partisanship explains divergent voting patterns among minority and white voters. *See, e.g.*, *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1009 (D.S.D. 2004) (quoting *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc)); *see also Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176, 1224-25 (D. Wyo. 2010). Dr. Owen's testimony fails to meet this high

threshold. Indeed, her opinion is hardly credible given the several fatal deficiencies that are apparent from the face of her report.

As a threshold matter, Dr. Owen narrowly focuses on the outcomes of certain elections in an effort to suggest that Black electoral defeat is due to partisanship rather than race. *See* Doc. 240-1, Owen Substitute Decl. ¶ 29. In particular, Dr. Owen concedes that she conducted a regression analysis only with respect to elections in 2010, 2012, and 2014. *See id.* ¶ 25. Remarkably, Dr. Owen ignored *all four* of the 2006 and 2008 elections that Dr. Engstrom analyzed in which white Republican candidates defeated Black Republican candidates in Fayette County. *See id.* ¶¶ 14-25. These contests are highly probative in assessing whether party affiliation is more important than race in Fayette County elections, and Dr. Owen's unexplained decision to ignore them lays bare her failure to give serious and adequate consideration to the subject that she purports to address.

In granting summary judgment to Plaintiffs, this Court specifically highlighted the 2006 special election for the BOC as (1) one of seven BOC elections in which Black candidates have been defeated and (2) an example of Black electoral defeat regardless of party affiliation. *See* Doc. 152 at 12-13. This Court further recognized that the lack of Black electoral success across the political spectrum has likely discouraged Black candidates from

running for office under at-large voting in Fayette County. *See id.* at 68 & n.30. On appeal, the Eleventh Circuit also cited the 2006 special election for the BOC in noting that "no African-American candidates had ever been elected to the BOC or the BOE, regardless of the candidates' respective qualifications or *party affiliation*." *Ga. State Conference of NAACP*, 775 F.3d at 1340 & n.5 (emphasis added). Despite the significance of these elections, they appear nowhere in Dr. Owen's report. Dr. Owen's refusal to even acknowledge these contests renders her methodology highly suspect and undermines the credibility of her claim that Black electoral defeat is due to partisanship rather than race.

Furthermore, Dr. Owen's attempt to eliminate the role of race as a factor in Fayette County elections is not credible because she does not address the critical connection between party affiliation and race. Courts have widely recognized that, in modern politics, these two factors are intertwined. *See, e.g., United States v. Charleston Cnty., S.C.*, 365 F.3d 341, 352 (4th Cir. 2004) (noting that partisanship and race were "inextricably intertwined"); *see also Clements*, 999 F.2d at 860 (recognizing that "even partisan affiliation may serve as a proxy for illegitimate racial considerations"). Dr. Owen's report fails to address this important relationship. *See* Doc. 240-1, Owen Substitute Decl. ¶¶ 14-25.

Taken together, Dr. Owen's failure to (1) account for multiple elections in which white Republican candidates defeated Black Republican candidates and (2) disentangle race from party affiliation undermines her claim that party affiliation rather than race explains the divergent voting patterns of white and Black voters in Fayette County elections, and that Black electoral losses are due to partisanship rather than race. Given these shortcomings, Dr. Owen's testimony does not—and cannot—defeat Plaintiffs' showing of racially polarized voting under the totality of circumstances analysis. *See, e.g.*, *Bone Shirt*, 336 F. Supp. 2d at 1009.

Third, because Dr. Owen is unable to rebut Plaintiffs' proof of racial bloc voting, the totality of circumstances still points toward a finding of vote dilution. The Supreme Court, the Eleventh Circuit, and this Court have all recognized that the two most important factors in the totality of circumstances analysis are "[1] the extent to which minority group members have been elected to public office in the jurisdiction and [2] the extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 48 n.15 (internal citation and quotation marks omitted); *see also Ga. State Conference of NAACP*, 775 F.3d at 1347 n.9 (citing *Gingles*, 478 U.S. at 48 n.15); Doc. 152 at 78 (recognizing that "courts have found vote dilution based solely on the existence of these two factors").

Thus, notwithstanding Dr. Owen's opinion, it remains "undisputed that no African-American has ever been elected to the BOE or BOC [under at-large voting] and that voting in Fayette County is racially polarized in BOC and BOE elections." Doc. 152 at 79. Based upon these two factors alone, it is clear that the evidence continues to "point[] commandingly," if not decisively, "in [Plaintiffs'] favor." *Ga. State Conference of NAACP*, 775 F.3d at 1347 n.9. Thus, there is no doubt that Plaintiffs are substantially likely to succeed on the merits of their claims against County Defendants.

B. Plaintiffs Will Suffer Irreparable Injury in the Absence of the Preliminary Injunction.

There is no question that Plaintiffs will suffer irreparable injury if County Defendants are allowed to revert to at-large voting, which will dilute Plaintiffs' votes in the upcoming special election. The Supreme Court has long recognized that the right to vote is "fundamental," *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009), because it is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (noting that "the right of qualified voters . . . to cast their votes effectively . . . rank[s] among our most precious freedoms"). The Supreme Court also has made clear that "the right of suffrage can be denied by [means of] dilution . . . just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Adhering to

these precepts, courts have widely recognized that an infringement upon the right to vote (including by its dilution) constitutes an irreparable injury. *See, e.g.*, *Chatman*, 44 F.3d at 924-25; *Dallas Cnty. Comm'n*, 791 F.2d at 831-33; *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

Prior to the 2014 district-based elections ordered by this Court, at-large voting denied Plaintiffs of the opportunity to elect their preferred candidates to the BOC and the BOE and to participate equally in the political process in Fayette County. As a consequence, Plaintiffs were unable to elect politically responsive representatives to these important local bodies. *See* Doc. 152 at 71-72.[9] County Defendants' decision to revert to at-large voting threatens to again inflict the same injury upon Plaintiffs, and no amount of monetary compensation could undo these harms. *See, e.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) ("An injury is irreparable if it cannot be undone through monetary remedies.").

[9] In noting that voters in Fayette County had advocated to the BOC for district-based voting to no avail since at least 1993, this Court acknowledged that "the BOC is not politically responsive to African-American voters." Doc. 152 at 71-72.

C. The Balance of the Equities Weighs in Favor of the Preliminary Injunction.

The balance of the equities undoubtedly weighs in favor of a preliminary injunction. Plaintiffs are seeking to protect their right to suffrage—"one of [their] most fundamental rights." *Bartlett*, 556 U.S. at 10. As the Supreme Court has explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *see also Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

By contrast, County Defendants will not be harmed by using district-based voting for the upcoming special election. Pursuant to the Court's remedial order, County Defendants already have administered three sets of elections (primary, primary runoff, and general) for two seats on the BOC and two seats on the BOE using district-based voting. *See, e.g.*, Ex. 1; Ex. 2; Ex. 3; Ex. 4. Thus, voters in Fayette County already have elected four members of the BOC and the BOE under a district-based method of election that has

proven to afford Black voters with an equal opportunity to elect their preferred candidates. *See id.*

As a result of these elections, voters across Fayette County are now fully familiar with this district-based voting system, and any administrative costs and burdens associated with the shift from at-large voting to district-based voting already have been absorbed. *Cf. Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1340 (N.D. Ga. 2011) ("[B]y merely preserving the status quo, [the] injunction will impose no new and onerous burdens on the Defendants."), *aff'd in part and rev'd in part on other grounds*, 691 F.3d 1250 (11th Cir. 2012).

In fact, County Defendants would face *more* costs and *more* burdens by reverting to at-large voting, in lieu of district-based voting, in part because at-large voting would require County Defendants to conduct the special election across the entire county, not just District 5. *See* Doc. 158, County Defs.' Proposed Remedial Plan at 21 (noting, in the context of the November 2013 elections, that "[a]dding elections for areas [that are not scheduled to participate in] elections [that year] would entail a significant mobilization of county resources").[10]

[10] Moreover, reverting to at-large voting may require the Board of Elections to, among other things, expend time and resources to allocate voters to new BOC residency districts and to prepare and mail new precinct cards to inform the voters of the correct precincts in

Finally, even if district-based voting somehow were to impose more costs and more burdens on County Defendants than at-large voting, such burdens "cannot begin to compare with the further subjection of [Plaintiffs'] denial of their right . . . to full and equal political participation." *Dillard*, 640 F. Supp. at 1363; *see also Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (holding that the "irreparable harm to be incurred by plaintiffs" under at-large voting outweighed any "administrative and financial burdens" faced by the defendants).

In sum, the balance of the equities clearly weighs in favor of a preliminary injunction.

D. The Preliminary Injunction Will Serve the Public Interest.

The preliminary injunction undoubtedly will advance the public interest. "[T]he right of suffrage is a fundamental matter in a free and democratic society," *Reynolds*, 377 U.S. at 561-62, and "Section 2, as amended, represents 'a strong national mandate for the immediate removal of all impediments, intended or not, to equal participation in the election process.'" *Dillard*, 640 F. Supp. at 1363 (quoting *Harris*, 593 F. Supp. at 315). The preliminary injunction will further this mandate by enabling Black

which they are to vote. *See generally, e.g.*, Doc. 171-1, Def. Sawyer Decl. ¶ 13; Doc. 175-1, Def. Sawyer Decl. ¶ 6; Ex. 7. These changes would impose additional costs and burdens beyond those necessary to conduct the special election only in District 5.

voters in Fayette County to participate on an equal basis in a district-based election in the upcoming special election. *See Cox*, 408 F.3d at 1355 (holding that protection of "franchise-related rights is without question in the public interest").

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Preliminary Injunction or, in the Alternative, for Further Relief.

Respectfully submitted this 17th day of July 2015.

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CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with Civil Local Rules 5.1(B) and 7.1(D).

2. This brief was prepared in the processing system Microsoft Word 2013, with Times New Roman typeface, 14 point font (12 point footnotes).

Dated: July 17, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2015, I electronically filed *Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction or, in the Alternative, for Further Relief* on behalf of Plaintiffs with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record registered with the ECF system as required by this Court's Rules.

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