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N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

THE ALABAMA STATE CONFERENCE OF THE NAACP, et al., *Plaintiffs*, v. CITY OF PLEASANT GROVE, et al. *Defendants*.	Civil Case No. 2:18-cv-02056-LSC

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

I. FACTUAL BACKGROUND 3

II. ARGUMENT 7

A. Plaintiffs Adequately State Claims Under Section 2 of the Voting Rights Act 7

1. Plaintiffs' Complaint Pleads a Viable Section 2 Results Claim and, on a 12(b)(6) Motion, Defendants Cannot Rely on Extrinsic Evidence. 7

a. The Complaint's allegations are sufficient. 10

b. Defendants' evidence is unreliable or not subject to judicial notice. 13

c. The Complaint pleads an adequate Section 2 remedy. 15

2. Even if this Court were to Consider Defendants' Extrinsic Information, the Text of Section 2 and Binding Precedent are Clear that Black Voters who are Majorities of a Jurisdiction's Total, Voting-Age, or Registered Voter Populations have Cognizable Section 2 Vote Dilution Claims. 18

a. Text of Section 2 and precedent foreclose Defendants' arguments. 20

b. Evidence extrinsic to the Complaint supports Plaintiffs' allegations. 26

B. Plaintiffs Adequately State Fourteenth and Fifteenth Amendment Claims 30

1. Fifteenth Amendment Vote Dilution Claims are Cognizable. 32

2. Plaintiffs Plead Discriminatory Effect and an Adequate Remedy. 33

C. Official-Capacity Defendants Are Liable for Voting Rights Violations 35

CONCLUSION 40

TABLE OF AUTHORITIES

PAGE(S)

CASES

Adinolfe v. United Techs. Corp.,
768 F.3d 1161 (11th Cir. 2014) 13

Ala. State Conf. of the NAACP v. Alabama,
264 F. Supp. 3d 1280 (M.D. Ala. 2017) 8, 11, 16

Anderson v. Martin,
375 U.S. 399 (1964) 35

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 7

Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr,
518 U.S. 668 (1996) 37, 38

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 7

BFI Waste Sys. of N. Am. v. Dekalb Cty.,
303 F. Supp. 2d 1335 (N.D. Ga. 2004) 37

Bogan v. Scott-Harris,
523 U.S. 44 (1998) 36, 38

Bonner v. City of Prichard,
661 F.2d 1206 (11th Cir.1981) 23

Brooks v. Miller,
158 F.3d 1230 (11th Cir. 1998) 35

Broward Citizens for Fair Districts v. Broward County,
No. 12-60317-CIV, 2012 WL 1110053 (S.D. Fla. Apr. 3, 2012) 12

Busby v. City of Orlando,
931 F.2d 764 (1991) 35

City of Pleasant Grove v. United States,
479 U.S. 462 (1987) 35

City of Port Arthur v. United States,
459 U.S. 159 (1982).....33, 35

Clark v. Calhoun County,
88 F.3d 1393 (5th Cir. 1996)..... 9-10

Connor v. Finch,
431 U.S. 407 (1977).....22

Crymes v. DeKalb County,
923 F.2d 1482 (11th Cir. 1991).....39

Curling v. Secretary of State of Georgia,
__ F. App'x. __, 2019 WL 480034 (11th Cir. Feb. 7, 2019).....40

Democratic Exec. Comm. of Fla. v. Lee,
__ F.3d ___, No. 18-14758, 2019 WL 638722.....10
(11th Cir. Feb. 15, 2019)a

Dillard v. Crenshaw County,
640 F. Supp. 1347 (M.D. Ala. 1986).....5

Dillard v. Crenshaw County,
649 F. Supp. 289 (M.D. Ala. 1986).....31, 35

Fabela v. City of Farmers Branch,
No. 3:10-CV-1425, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012) 36

Ga. State Conf. of the NAACP v. Fayette County,
118 F. Supp. 3d 1338 (N.D. Ga. 2015).....36

Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm'rs,
775 F.3d 1336 (11th Cir. 2015).....8, 9, 10

Garcia v. Guerra,
744 F.2d 1159 (5th Cir. 1984).....30

Garza v. Cty. of Los Angeles,
918 F.2d 763 (9th Cir. 1990).....34

Graves v. Barnes,
343 F. Supp. 704 (W.D. Tex. 1972) 22

Greater Birmingham Ministries v. Merrill,
250 F. Supp. 3d 1238 (N.D. Ala. 2017).....13

Hale County v. United States,
496 F. Supp. 1206 (D.D.C. 1980) 17, 24, 27, 33

Hall v. Holder,
117 F.3d 1222 (11th Cir. 1997).....31

Johnson v. De Grandy,
512 U.S. 997 (1994).....*passim*

Johnson v. DeSoto Cty. Bd. of Comm'rs,
204 F.3d 1335 (11th Cir. 2000).....*passim*

Johnson v. DeSoto Cty. Bd. of Comm'rs,
72 F.3d 1556 (11th Cir. 1996).....31

Ketchum v. Byrne,
740 F.2d 1398 (7th Cir. 1984).....18, 27

Kirksey v. Bd. of Supervisors,
554 F.2d 139 (5th Cir. 1977).....18

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006).....*passim*

League of Women Voters of Fla. v. Detzner,
314 F. Supp. 3d 1205 (N.D. Fla. 2018) 2, 27

Leal v. McHugh,
731 F.3d 405 (5th Cir. 2013).....7

Leatherman v. Tarrant County,
507 U.S. 163 (1993).....40

Lodge v. Buxton,
639 F. 2d 1358 (5th Cir. 1981).....21

Lopez v. Abbott,
No. 2:16-CV-303, 2017 WL 1209846 (S.D. Tex. Apr. 3, 2017).....11

Luna v. County of Kern,
No. 116-CV-00568, 2016 WL 4679723 (E.D. Cal. Sept. 6, 2016) 11

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011).....7

McIntosh Cty. Branch of the NAACP v. City of Darien,
605 F.2d 753 (5th Cir. 1979).....27

Meek v. Metro. Dade County,
908 F.2d 1540 (11th Cir. 1990).....2, 22, 23

Metts v. Murphy,
363 F. 3d 8, 11 (1st Cir. 2004) 12

Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.,
201 F. Supp. 3d 1006 (E.D. Mo. 2016) 29

Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.,
894 F.3d 924 (8th Cir. 2018).....15, 29

Moore v. Leflore Cty. Bd. of Elect. Comm'rs,
502 F.2d 621 (5th Cir. 1974).....*passim*

Morrison v. Amway Corp.,
323 F.3d 920 (11th Cir. 2003).....26

N.C. State Conf. of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016).....34

NAACP v. Hampton Cty. Elect. Comm'n,
470 U.S. 166 (1985).....29

NAACP v. Snyder,
879 F. Supp. 2d 662 (E.D. Mich. 2012) 12

Negron v. City of Miami Beach,
113 F.3d 1563 (11th Cir. 1997).....14

Osburn v. Cox,
369 F.3d 1283 (11th Cir. 2004).....33

Perkins v. City of West Helena,
675 F.2d 201 (8th Cir.) 32

Reno v. Bossier Par. Sch. Bd.,
528 U.S. 320 (2000).....32, 34

Rogers v. Lodge,
458 U.S. 613 (1982).....30

Salas v. Sw. Tex. Jr. College Dist.,
964 F.2d 1542 (5th Cir. 1992)..... 14, 19, 20, 21

Scott v. Taylor,
405 F.3d 1251 (11th Cir. 2005).....37, 39

Solomon v. Liberty County,
899 F.2d 1012 (11th Cir. 1990).....27

Speaker v. U.S. Dep't. of Health & Human Serv. Ctr.,
623 F.3d 1371 (11th Cir. 2010).....26

Stout v. Jefferson Cty. Bd. of Educ.,
882 F.3d 988 (11th Cir. 2018).....23, 34

Supreme Court of Virginia v. Consumers Union
446 U.S. 719 (1980).....37

Teague v. Attala County,
92 F.3d 283 (5th Cir. 1996).....27

Thomas v. Bryant,
No. 3:18-CV-441, 2019 WL 654314 (S.D. Miss. Feb. 16, 2019) 17

Thornburg v. Gingles,
478 U.S. 30 (1986).....8, 9, 11

United States v. Brown,
561 F. 3d 420 (5th Cir. 2009).....20

United States v. Dallas County,
739 F.2d 1529 (11th Cir. 1984).....24, 28, 30

United States v. Dallas Cty. Comm'n,
850 F.2d 1433 (11th Cir. 1988) 17, 22

United States v. Marengo Cty. Comm'n,
731 F.2d 1546 (11th Cir. 1984) ..... *passim*

United States v. Mozie,
752 F.3d 1271 (11th Cir. 2014) 32

United States v. Port Chester,
704 F. Supp. 2d 411 (S.D.N.Y. 2010) 30

United States v. Town of Lake Park,
No. 09-80507, 2009 WL 3667071 (S.D. Fla. Oct. 23, 2009) 15, 36

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 30, 31

Woods v. Bocz,
2011 WL 4368831 (E.D. La. Sept. 19, 2011) 12

Wright v. Sumter Cty. Bd. of Elect. & Reg.,
2015 WL 4255685 (M.D. Ga. July 14, 2015) 25

Wright v. Sumter Cty. Bd. of Elect. & Reg.,
301 F. Supp. 3d 1297 (M.D. Ga. 2018) 17, 23, 25

Wright v. Sumter Cty. Bd. of Elect. & Reg,
657 F. App'x 871 (11th Cir. 2016) 24, 25

STATUTES, RULES AND CONSTITUTIONS

42 U.S.C. § 1983 ..... 36, 37, 38, 40

52 U.S.C. § 10301 ..... 8, 20

Ala. Code 1975 § 11-46-21 ..... 29, 28

Fed. R. Civ. P. 12(d) 13

U.S. Const. Art. I, § 2 14

INTRODUCTION

Plaintiffs the Alabama State Conference of the NAACP, Eric Calhoun, and Jennifer Ford (collectively, "Plaintiffs"), have pled a straightforward vote dilution claim under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, and the Fourteenth and Fifteenth Amendments to the United States Constitution against Defendants, the City of Pleasant Grove, Alabama ("City" or "Pleasant Grove"), Mayor Jerry Brasseale, and the City Councilors, William Bullion, James Crumpton, Kenneth Hatfield, Philip Houston, and Paula Johnson (collectively, "Defendants"). Plaintiffs allege that the City's at-large election system, including its numbered-place requirement, in combination with racially polarized voting, have prevented Black voters from electing their candidates of choice to the City Council.

According to the Complaint, and based on the presumptively accurate 2010 Census, Black people are a minority of the total and voting-age population in the City. Racially polarized voting has ensured that no Black candidate has ever been elected to the City Council. If the City were to change its method of election to five single-member districts, however, three of those districts could include Black voter majorities. In addition, among other relevant facts, the Complaint alleges that the City, as well as the State of Alabama, has a history of racial discrimination in voting, education, employment and other areas of life, which continues to depress Black voter turnout; and that the City uses numbered-place requirements, which a federal

court has found to be intentionally discriminatory. These facts adequately state valid constitutional and Section 2 claims.

Defendants' motion to dismiss, however, ignores the Complaint's allegations in favor of a variety of extrinsic evidence, including voter registration data that is not subject to judicial notice. Defendants aver that this unreliable data shows that the majority of the City's registered voters and voting-age population is Black. According to Defendants, this slim Black voter majority precludes Plaintiffs' claims.

Binding precedent forecloses Defendants' argument. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*"); *Meek v. Metro. Dade Cty*., 908 F.2d 1540, 1546 (11th Cir. 1990); *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1568 (11th Cir. 1984) ("*Marengo*"); *Moore v. Leflore Cty. Bd. of Elect. Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974).

Moreover, Plaintiffs' own extrinsic evidence shows that Black voters bear the effects of past discrimination; were a minority of registered voters in the City's 2016 elections; and, because of structural barriers caused by past discrimination and off-cycle elections, turned out at lower rates than whites in the City's 2016 elections.

Defendants' motion exemplifies the need for discovery. Examining and testing the reliability of evidence is best left for discovery, not a 12(b)(6) motion.

Accordingly, Plaintiffs respectfully request that this Court deny Defendants' motion.

I. FACTUAL BACKGROUND

On December 12, 2018, Plaintiffs filed their Complaint against Defendants challenging Pleasant Grove's at-large method of electing the City Council. Complaint (ECF No. 1) ¶¶ 12-14. The Complaint alleges that the City's at-large method of election, including its numbered-place and majority vote requirements, has the purpose and the result of diluting Black voting strength in violation of Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the Constitution. *Id*. ¶¶ 25-44, 46-59.

Pleasant Grove is located in Jefferson County, Alabama. *Id*. ¶ 12. According to the 2010 Census, the City's total population is 10,110. *Id*. ¶ 15. Of that, 53.7% is white and 44.8% is Black. *Id*. The voting-age population is 40.35% Black and 58.53% white. *Id*. at 23, Ex. A.

Pleasant Grove's City Council includes five council members and the Mayor, all of whom are elected at-large. *Id*. ¶ 16. Each of the five council members is elected from one of five numbered places and must win a majority of the vote. *Id*. ¶ 17.

Black people in Pleasant Grove continue to suffer from a well-documented history of state-sponsored and private racial discrimination in voting, education, housing, and other areas of life. *Id*. ¶¶ 34-39. For example, Alabama has used "poll taxes, literacy tests, felony disfranchisement laws, and discriminatory redistricting schemes to restrict the access of Black voters to the franchise." *Id*. ¶ 39. As a result

of Jefferson County's past and recent acts of racial discrimination, it remains subject to federal court orders governing its schools and employment practices. *Id*. ¶ 37.

The City has also engaged in various acts of discrimination against Black people including, but not limited to, discriminatory annexations, zoning decisions, and an attempted school secession. *Id*. ¶¶ 34-35. In 1985, a three-judge district court concluded that the City had an "astonishing hostility to the presence and the rights of black Americans," and found that the City "has attempted to exclude blacks from becoming residents of the City in all facets of City life, including voting in municipal elections, and that it has, in fact, succeeded in doing so." *Id*. ¶ 34 (quoting *City of Pleasant Grove v. United States*, 623 F. Supp. 782, 787088 (D.D.C. 1985), *aff'd* 479 U.S. 462, 469 (1987)). Black residents of the City continue to bear the present-day effects of this discrimination, which hinders their ability to participate effectively in the political process. ECF No. 1 ¶ 43.

Racially polarized voting prevails in the City's elections. *Id*. ¶¶ 28-31. Black voters are politically cohesive in the City Council elections. *Id*. But white voters have consistently voted as a bloc to defeat every Black candidate who was preferred by Black voters, including in the 2008 and 2016 mayoral and City Council elections. *Id*. ¶¶ 30-31, 42, 44. No Black candidate ever has been elected to the City Council. *Id*. ¶ 44. In 2016, Black-preferred candidates ran and lost elections for mayor and three City Council seats. *Id*. ¶ 29. One of these candidates was the only Black person

ever appointed to the City Council; despite running thereafter as an incumbent, she lost to a white candidate. *Id*. ¶¶ 29-30. In 2008, Black-preferred candidates ran unsuccessfully for mayor and two City Council seats, all losing to white voters' preferred candidates. *Id*. ¶ 31.

The City's at-large electoral system includes practices and procedures that further impair Black voters' ability to achieve electoral success. *Id*. ¶¶ 41-42. These practices include, but are not limited to, numbered-place requirements and a majority vote requirement. *Id*. Black voters might be able to elect one or more City Council members, even in an at-large system, if the election were by a plurality without numbered places. For example, a Black candidate could have a fair opportunity to be elected by a plurality of the vote if the Black voters concentrate their vote behind one candidate or a limited number of candidates, while the white voters divide their votes among a number of candidates. *Id*. ¶ 42.

In *Dillard v. Crenshaw County*, a federal court found that Alabama had intentionally enacted state laws requiring the at-large election systems of the City and nearly every other local government in the State to use numbered-posts to facilitate the dilution of Black voting strength. 640 F. Supp. 1347, 1356-60 (M.D. Ala. 1986); ECF No. 1 ¶¶ 38, 47. While the *Dillard* litigation led to nearly all municipalities in Alabama with a Black population of over 20% to change to single-

member districts or alternate methods of election that comply with the VRA, Pleasant Grove has maintained its at-large method of election. ECF No. 1 ¶ 52.

The City's Black population is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the City Council can be drawn in which Black voters would constitute an effective majority of the total population, voting-age population, and citizen voting-age population in at least three districts. *Id*. ¶¶ 1, 27. Attached to the Complaint as exhibits are three illustrative maps based on the 2010 Census showing the feasibility of three single-member districts with Black voting-age population majorities. *Id*. at 21-29

The City's Black community has advocated for the adoption of single-member districts. For example, Plaintiffs and other Black residents have repeatedly met with Defendants in good faith and advocated that they adopt a single-member district method of election for the City Council. Despite these efforts, Defendants have failed to use their authority to adopt single-member districts. *Id*. ¶ 49.

Defendants' stated rationales for maintaining the at-large election system are pretexts for intentional racial discrimination. *Id*. ¶ 50. Defendants' stated purpose for refusing to adopt single-member districts is a desire to protect white incumbent City Council members. *Id*. Plaintiffs have presented demonstrative maps to Defendants that both contain majority-Black single-member districts and protect incumbents from having to compete against each other by placing them in different

single-member districts. *Id*. Yet, Defendants have refused to adopt these maps or present their own alternative districts. *Id*.

II. ARGUMENT

To survive a motion to dismiss, Plaintiffs "need only allege 'enough facts to state a claim to relief that is plausible on its face.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 n.12 (2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A motion to dismiss should be denied when the complaint's "factual content . . . allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) ("'[A] motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted.'") (citation omitted).

Plaintiffs are not required to set out "detailed factual allegations," but instead need only set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

For the reasons set forth below, the Complaint plainly satisfies this standard.

A. Plaintiffs Adequately State Claims Under Section 2 of the Voting Rights Act

1. Plaintiffs' Complaint Pleads a Viable Section 2 Results Claim and, on a 12(b)(6) Motion, Defendants Cannot Rely on Extrinsic Evidence.

To succeed on a Section 2 discriminatory results claim, the Complaint must adequately allege the existence of the "*Gingles* factors" that (1) Black voters are "sufficiently large and contiguous to constitute effective voting majorities in single-

member districts;" (2) Black voters are "politically cohesive," and (3) non-Black voters usually vote as a bloc to defeat Black voters' preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 38, 49-51.

Once the *Gingles* preconditions are met the Complaint must also allege that the "totality of circumstances" demonstrate a violation. 52 U.S.C. § 10301(b). This "other half of the analysis is heavily dependent on the facts of the case." *Ala. State Conf. of the NAACP v. Alabama*, 264 F. Supp. 3d 1280, 1284 (M.D. Ala. 2017) ("*Ala. NAACP*"). "Courts use factors drawn from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the VRA (the Senate Factors) to make the totality-of-the-circumstances determination." *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1342 (11th Cir. 2015) ("*Fayette*").

The Senate Factors include: (1) the history of official discrimination related to voting in the City and the State; (2) whether voting is racially polarized in the City; (3) whether the City's elections use voting practices, like numbered places, an unusually large district, or majority-vote requirements, that enhance the opportunity for discrimination; (4) whether Black-preferred candidates have access to slating processes; (5) whether Black voters bear the effects of discrimination in such areas as education, employment and other areas, "which hinder their ability to participate effectively in the political process;" (6) whether political campaigns have included

racial appeals; (7) the extent to which Black candidates have been elected to the City Council; (8) whether Defendants are responsive to Black voters; and (9) whether the policy underlying the at-large system is tenuous. *Gingles*, 478 U.S. at 36-37. The Senate Factors are not exhaustive, "other factors may also be relevant." *Id*. at 45. And "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.*

Importantly, the Section 2 analysis requires an "intensely local appraisal" of the design and impact of the at-large system. *Fayette*, 775 F.3d at 1349. Further, "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Id*. at 1342. "A discriminatory *result* is all that is required; discriminatory intent is not necessary." *Id*.

The Complaint's factual allegations satisfy the elements of a Section 2 claim. *See supra* at 1-2. Plaintiffs allege that the *Gingles* preconditions are satisfied. ECF No. 1 ¶¶ 1, 27-31; *see also id*. at Ex. A. They also allege facts showing that seven of the nine Senate Factors are met. *Id*. ¶¶ 33-44, 48-53. For instance, the Complaint adequately alleges the "two most important" Senate Factors in a vote dilution claim: racially polarized voting and the fact that no Black-preferred candidates have ever been elected to the City Council. *Clark v. Calhoun Cty.*, 88 F. 3d 1393, 1397 (5th Cir. 1996). These Senate Factors alone "point[ ] commandingly" in Plaintiffs' favor.

Fayette, 775 F. 3d at 1347 n.9. While Section 2 does not guarantee Black electoral success, "[o]ne may suspect vote dilution from political famine." *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994).

Nonetheless, Defendants seek dismissal on three grounds. First, Defendants claim that the Complaint fails to sufficiently allege racially polarized voting. Second, Defendants rely on evidence extrinsic to the Complaint to claim that Black voters are the majority of the voting-age and registered voter populations and, thus, not a "protected class" within the scope of Section 2. Third, assuming that Plaintiffs can satisfy liability, Defendants allege that Plaintiffs have not pled a viable remedy.

For the reasons explained below, Defendants' arguments are meritless.

a. The Complaint's allegations are sufficient.

The Complaint alleges that, because of at-large voting and enhancing features like the numbered-place and majority vote requirements, in combination with racially polarized voting, Black voters have never had the equal opportunity to elect any of the candidates of their choice to the City Council.[1]

Defendants, however, accuse the Complaint of drawing "legal conclusions" about the existence of racially polarized voting. Def.'s Mot. to Dismiss (ECF No.

[1] Defendants complain that Plaintiffs waited until 2018 to file the Complaint. ECF No. 15 at 11. But, following the defeat of several Black candidates in August 2016, including that of an appointed Black incumbent, and Plaintiffs' negotiations with Defendants in 2018, Plaintiffs were permitted to "catch [their] breath, take stock of [their] resources, and study the result of [their] efforts" before filing this lawsuit. *Democratic Exec. Comm. of Fla. v. Lee*, __ F.3d ___, No. 18-14758, 2019 WL 638722, at *11 (11th Cir. Feb. 15, 2019).

15) at 24. Defendants argue that Plaintiffs failed to allege "voting-age population statistics, demographic statistics on election returns, trends in voting data over multiple elections, or other potentially relevant facts" that Defendants contend bear upon the existence of racially polarized voting in Pleasant Grove. *Id*.

But Defendants ignore that the Complaint includes allegations about the voting-age population, ECF No. 1 at ¶ 23, Ex. A, and that it includes several specific examples of elections in 2008 and 2016, in which white-bloc voting prevented Black voters' preferred candidates from winning. *Id*. ¶¶ 29-31. At the motion to dismiss stage, this is enough to state a Section 2 claim. *See Luna v. Cty. of Kern*, No. 116-CV-00568, 2016 WL 4679723, at *5 (E.D. Cal. Sept. 6, 2016) (finding that the allegations that Latinx voters supported specific Latinx candidates and that white bloc voting defeated those candidates were sufficient to state a claim); *Lopez v. Abbott*, No. 2:16-CV-303, 2017 WL 1209846, at *6 (S.D. Tex. Apr. 3, 2017) (same).

Defendants also misstate the relevant inquiry at the motion to dismiss stage. Racially polarized voting is a *factual question*, and Section 2 claims are "peculiarly dependent upon the facts of each case." *Gingles*, 478 U.S. at 77-79 (citation omitted). The Section 2 analysis is "inherently fact intensive" and "requires the court to consider evidence that is not available at this stage in the litigation." *Ala. NAACP*, 264 F. Supp. 3d at 1289. "It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss."

Metts v. Murphy, 363 F. 3d 8, 11 (1st Cir. 2004) (en banc). Following discovery and at summary judgment or trial, Plaintiffs can offer expert analysis of election statistics and other evidence of racially polarized voting.

The cases cited by Defendants do not advance their arguments.[2] Unlike the Complaint here, in *Broward Citizens for Fair Districts v. Broward County*, the complaint lacked any examples of white-bloc voting defeating Black-preferred candidates. No. 12-60317-CIV, 2012 WL 1110053, at *7 & n.8 (S.D. Fla. Apr. 3, 2012). The court let the plaintiffs amend the complaint, and specifically "d[id] not conclude that Plaintiffs must present statistical evidence of political cohesion at this stage of the proceedings." *Id*. In *NAACP v. Snyder*, the plaintiffs failed to plead that non-Latinx people voted as a bloc to defeat Latinx candidates. In fact, the plaintiffs pled the opposite: that Latinx and non-Latinx voted together. 879 F. Supp. 2d 662, 674-75 (E.D. Mich. 2012). The Complaint here suffers from no such blatant defect.

Plaintiffs adequately allege racially polarized voting, as well as the *Gingles* preconditions and seven Senate Factors—including two of the most important factors (racially polarized voting and a lack of Black electoral success). Thus, on the face of the Complaint, Plaintiffs have stated a Section 2 claim.

[2] In *Woods v. Bocz*, the plaintiffs did not file an opposition to the motion to dismiss, thus abandoning their claim. 2011 WL 4368831, at *5 (E.D. La. Sept. 19, 2011).

b. Defendants' evidence is unreliable or not subject to judicial notice.

Faced with Plaintiffs' straightforward pleading, Defendants next erroneously rely on a variety of evidence from outside the Complaint in support of their motion. But, "[o]nly the complaint itself and any attachments thereto may be considered, even where the parties attempt to present additional evidence." *Greater Birmingham Ministries v. Merrill*, 250 F. Supp. 3d 1238, 1243 (N.D. Ala. 2017) (citing *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014); Fed. R. Civ. P. 12(d)).

This Court may only consider Defendants' extrinsic facts by converting Defendants' motion to dismiss to a motion for summary judgment. *Adinolfe*, 768 F.3d at 1168. "Critically, such a conversion requires notice to the parties and an opportunity for mutual discovery." *Id.*

This is important because Defendants' extrinsic evidence is not subject to judicial notice, or not sufficiently reliable to be the basis of a 12(b)(6) motion, or both. For example, Defendants rely heavily on voter registration data, but voter registration data is not subject to judicial notice. *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1342 (11th Cir. 2000) ("*Desoto II*"). This data's reliability *"*has to be determined on a case-by-case basis by the district court," which requires "expert testimony, from both sides, on the reliability of Defendants' evidence." *Id.*

Defendants contend Black people now constitute a majority of the City's registered voters. But Plaintiffs may use discovery and expert evidence to prove that

this numerical Black voter majority is "illusory" because of errors on the voter rolls or because practical impediments, like the effects of off-cycle elections and past discrimination, cause lower Black voter turnout. *Salas v. Sw. Tex. Jr. College Dist*., 964 F. 2d 1542, 1555-56 (5th Cir. 1992).

Defendants also rely on the 2013-2017 American Community Survey ("ACS") 5-Year Estimates,[3] but Plaintiffs were correct to rely on the 2010 decennial Census in the Complaint. The ACS is substantively different from the Census. The decennial Census is a constitutionally required door-to-door enumeration of *everyone* in the country. U.S. Const. Art. I, § 2. The ACS is a regular survey of a *sample* of people in the United States. Because it is a sample, the ACS has margins of error.[4] Through discovery, Plaintiffs may choose to rebut the ACS's reliability by showing that its "sample was skewed in a statistically significant way due to improper sampling method, small sample size, or sheer random error." *Negron v. City of Miami Beach*, 113 F.3d 1563, 1570 (11th Cir. 1997).

For that reason, the decennial Census—*not* the ACS—enjoys the presumption that it is an accurate accounting of the population for ten years for redistricting

[3] Defendants' calculation of the 2013-2017 ACS 5-year estimated Black voting age population (BVAP) is incorrect. ECF No. 15 at 9-10. The correct calculation of the percentage of the ACS 5-year estimated BVAP considers the total voting age population of 7799 and total BVAP of 3966, which is 50.8%.

[4] According to the U.S. Census Bureau, the margin of error for the 2013-2017 ACS 5-year Estimates is 90 percent. For the 2013-2017 ACS estimated total voting age population, specifically, the margin of error is +/- 295.

purposes. *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F. 3d 924, 932 (8th Cir. 2018), *cert. denied* No. 18-592, 2019 WL 113175 (U.S. 2019). "States operate under the legal fiction that their plans are constitutionally apportioned throughout a decade." *LULAC*, 548 U.S. at 405. In line with this presumption and the related requirement that the Census be used in local redistricting, the Complaint (and the attached exhibits) relies on the 2010 Census.

There is a "strong presumption that the most recent census data are accurate." *United States v. Town of Lake Park*, No. 09-80507, 2009 WL 3667071, at *4 (S.D. Fla. Oct. 23, 2009). This presumption is "rebuttable," but that requires evidence and discovery. *Id*. The appropriate method for Defendants to challenge the rebuttable presumption of the validity of Plaintiffs' 2010 Census data is "through a presentation of 'competent evidence to the contrary,' either at the summary judgment or trial stage of the litigation." *Id.* (quoting *Desoto II*, 204 F.3d at 1341) (citation omitted).

Defendants cannot seek to accomplish this on a motion to dismiss.

c. The Complaint pleads an adequate Section 2 remedy.

The Complaint alleges that, in a properly apportioned plan with five single-member districts, three of the districts would have Black voting-age majorities. The Complaint includes illustrative maps to support this allegation. Any questions about the merits of Plaintiffs' proposed districts "are issues that would benefit from full briefing on a developed factual record." *Ala. NAACP*, 264 F. Supp. 3d at 1287.

Relying on *Desoto II*, Defendants argue that, because Black residents comprise a majority of the voting-age and registered voter populations and "at-large elections provide the City's black electorate with the opportunity to choose the entirety of the City's leadership," ECF No. 15 at 33-34, Plaintiffs cannot "establish that 'an alternative election scheme exists that would provide better access to the political process'"; thus, they fail to make the requisite showing of causation. *Id*. (quoting 204 F.3d at 1346). This argument fails for many reasons.

First, the face of the Complaint satisfies the first *Gingles* factor ("*Gingles I*") and causation by alleging that Black people are a minority under the 2010 Census, and that three majority-Black districts can be drawn. ECF No. 1 ¶¶ 15, 27. In contrast, in *Desoto II*, there were simply not enough Black voters to draw even one majority-minority district to remedy the unconstitutional at-large system. 204 F.3d at 1346.

Second, even if the court accepts Defendants' extrinsic evidence reflecting that Black residents make-up slightly over 50 percent of the voting-age and registered voter populations, Plaintiffs are permitted to challenge an at-large system with an *ineffective* slim Black voter majority that has never led to the election of a single Black candidate. As discussed *infra* 26-29, these extrinsic facts demonstrate the discriminatory effect of the at-large system. Plaintiffs proposed alternative of "effective voting majorities" in three single-member districts, *Gingles*, 478 U.S. at

38, is a valid remedy.[5] *Cf. LULAC*, 548 U.S. at 439-40 (changing a "hollow" majority-Latinx district back into an effective one remedied a Section 2 violation).

Plaintiffs' allegations are sufficient to prove liability and a viable remedy. *See, e.g.*, *United States v. Dallas Cty. Comm'n*, 850 F. 2d 1433, 1440-41 (11th Cir. 1988) ("*Dallas II*") (finding that an at-large seat in a county with a 54.5% total Black population violated Section 2 and ordering a "swing" district with a 61% total Black population); *Thomas v. Bryant*, No. 3:18-CV-441, 2019 WL 654314, at *12 (S.D. Miss. Feb. 16, 2019) (finding that, in a challenge to a single-member district with a majority Black voting-age population, *Gingles I* was satisfied by maps that increased the district's Black population); *Wright v. Sumter Cty. Bd. of Elect. & Reg.*, 301 F. Supp. 3d 1297, 1325 (M.D. Ga. 2018) ("*Wright II*") (finding that, in a county with a Black registered voter majority, the plaintiff's proposal to replace two at-large seats with one single-member district with a higher Black population was a valid remedy); *Hale County, Ala. v. United States*, 496 F. Supp. 1206, 1216-17 (D. D.C. 1980) (three-judge court)("*Hale*") (finding that, in a county with a Black registered voter majority, but no Black elected officials, at-large elections violated the VRA given that districts would have led to the election of two Black candidates).

[5] According to Defendants, Black voters (who were 40% of the voting-age population in 2010) are now over 50% of the registered voters and voting-age population in 2018. Thus, it is safe to assume that Plaintiffs' demonstrative maps which, as of the 2010 Census show Black voting age majorities ranging from 51% to 55%, now also have substantially larger Black voter majorities.

The creation of effective districts that have the potential to offset the effects of low turnout and provide Black voters with a "realistic opportunity" to elect their candidates of choice is a proper Section 2 remedy. *See Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 150 (5th Cir. 1977) (en banc) (holding that districts with bare Black population majorities did not adequately remedy vote dilution and ordering districts with higher Black populations); s*ee also Ketchum v. Byrne*, 740 F. 2d 1398, 1415 (7th Cir. 1984) "The responsibility of the defendants to permit minority voters a proper role in democratic political life must be discharged by stronger stuff than gossamer possibilities of all variables falling into place." *Marengo*, 731 F.2d at 1569 (citation omitted).

Finally, the Supreme Court has expressly held that a racial group can challenge an election system under Section 2 even if that group holds a majority of districts in proportion with the group's population in the jurisdiction. *De Grandy*, 512 U.S. at 1017-18. That is, even if Black voters have a theoretical majority in all five at-large seats that does not preclude them from bringing a Section 2 claim.

2. Even if this Court were to Consider Defendants' Extrinsic Information, the Text of Section 2 and Binding Precedent are Clear that Black Voters who are Majorities of a Jurisdiction's Total, Voting-Age, or Registered Voter Populations Have Cognizable Section 2 Vote Dilution Claims.

Even if this Court does accept Defendants' improper extrinsic evidence, Defendants' proposed *per se* rule — that a Section 2 claim must fail in a city where

Black residents are a slim majority of the total, voting-age or registered voter population — is plainly barred by binding precedent and the text of Section 2. Indeed, "[n]o single statistic provides courts with a shortcut to determine whether a [challenged system] unlawfully dilutes minority voting strength." *De Grandy*, 512 U.S. at 1020-21. Rather "the textual command of § 2 [is] that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" *Id.* at 1017-18 (quoting 52 U.S.C. § 10301(b)).

Black voters in the City suffer from a total lack of electoral success in the at-large system and from past discrimination and other factors that have lowered Black voter turnout. ECF No. 1 ¶¶ 28-31, 43-44. This means that Black voters are a *minority* of the electorate in the City's at-large elections, which have categorically denied Black voters the opportunity to elect candidates of choice in violation of Section 2. "[A]ccess to the political process, aside from population statistics, is the criteria by which a court determines illegal or unconstitutional vote dilution." *Salas*, 964 F. 2d at 1549. Thus, the relevant question is not whether there is a slim Black majority of the City's voting-age or registered voter populations. Rather, this Court must decide whether, given the totality of circumstances, the at-large election system denies Plaintiffs a meaningful opportunity to elect their candidates of choice.

Here, under the relevant precedent, the answer is that it does not.

a. Text of Section 2 and precedent foreclose Defendants' arguments.

Section 2 states that Pleasant Grove may not impose any standard, practice, or procedure that results in the denial or abridgement of Plaintiffs' right to vote "on account of race or color." 52 U.S.C. § 10301(a). Nothing in the text of Section 2 speaks of Section 2 claims being limited to only "minority" voters, i.e., those voters who constitute a minority of registered voters in a particular jurisdiction.

Section 2 instead defines its scope as covering the "class of citizens protected by subsection (a)." *Id.* at § 10301(b). This protected class "is those persons whose vote is diluted based on their membership in a protected racial or language minority class, rather than in a voting group less populous in the district than the white majority." *Salas*, 964 F. 2d at 1548.[6]

Racial groups "do not lose the protection of the Voting Rights Act when they are no longer population or registered voter minorities in a political subdivision; the Act is directed at their status as a national racial or language minority." *Id.* at 1550. This is because it is "conceivable" that, as here, an at-large election structure can "dilute a registered voter majority's vote or that low turnout, among a [racial] group registered in high percentages, could result from a [VRA] violation." *Id.* at 1550-51.

[6] Defendants claim the Fifth Circuit has retreated from Salas. ECF No. 15 at 22. This is incorrect. *United States v. Brown*, 561 F. 3d 420 (5th Cir. 2009), involved intentional discrimination and vote denial claims brought on behalf of white voters. It has nothing to do with vote dilution claims.

Yet Defendants cherry pick language from *Gingles* to derive a *per se* "rule" that Black people cannot state a claim when they are a slight majority of voters. ECF No. 15 at 17-18. Defendants latch onto a statement in *Gingles* — that dilution occurs "where minority and majority voters consistently prefer different candidates, [and] the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters," 478 U.S. at 48 — to argue that the Court sought to limit Section 2 claims only to racial groups with a numerical minority.

In context, however, the Supreme Court was not laying down a foundational rule. It was merely describing the claim before it. In the challenged multi-member district, Black voters' preferred candidates had lost because the votes of Black people, who were a minority of the citizens in the relevant district, were subsumed by the white majority's votes against the Black-preferred candidates. *Id*. at 46.

Indeed, both before and after *Gingles*, the U.S. Supreme Court has affirmatively stated that racial groups that are a majority of a jurisdiction's voting-age population can bring vote dilution claims. *See LULAC*, 548 U.S. at 428 (stating that "it may be possible for a citizen voting-age majority to lack real electoral opportunity"); *Lodge v. Buxton*, 639 F. 2d 1358, 1361 & n. 4 (5th Cir. 1981) (finding vote dilution in a county with a "slight" Black majority of the total and voting-age populations), *aff'd sub. nom. Rogers v. Lodge*, 458 U.S. 613 (1982); *Connor v. Finch*, 431 U.S. 407, 421-25 (1977) (acknowledging that a district with a 51% Black

voting-age population might "impermissibly dilute[ ]" Black voting strength, as compared to the plaintiffs' proposed 55% Black district); *Graves v. Barnes*, 343 F. Supp. 704, 733 (W.D. Tex. 1972) (three-judge court) (finding that a county's multi-member district diluted the votes of Mexican Americans, even though Mexican Americans constituted a numerical plurality in the county), *aff'd in relevant part sub nom. White v. Regester*, 412 U.S. 755, 769 (1973).

The Supreme Court has rejected *per se* rules like the one that Defendants now propose because of "the demonstrated ingenuity of state and local governments in hobbling minority voting power . . . a point recognized by Congress when it amended the statute in 1982." *De Grandy*, 512 U.S. 1018. "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id*. at 1011.

Likewise, the Eleventh Circuit has expressly held that voters of color can state a Section 2 claim even where they are half—or more—of the voting-age or registered voter population.[7] *See Meek*, 908 F. 2d at 1546; *Dallas II*, 850 F. 2d at 1438; *Marengo*, 731 F. 2d at 1568; *Moore*, 502 F. 2d at 624; *Wright II*, 301 F. Supp. 3d at 1318.

[7] The Second, Fifth, Eighth, and D.C. Circuits have also rejected such *per se* rules that would stop voters of color who are a majority of registered voters in a certain location or district from bringing Section 2 claims. *See Ferguson-Florissant Sch. Dist.*, 894 F. 3d at 933 (collecting cases).

In *Meek*, the Eleventh Circuit reaffirmed, after *Gingles*, that an at-large system can dilute a group's voting strength even where that group is a majority of the total population. 908 F. 2d at 1546 (citing *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc));[8] *see also Meek v. Metro. Dade Cty.*, 805 F. Supp. 967, 988 (S.D. Fla. 1992) (finding, on remand, a Section 2 violation even though the county had a majority Latinx voting-age population), *aff'd* 985 F. 2d 1471 (11th Cir. 1993).

Defendants seek to distinguish *Meek* by noting that Latinx voters were a minority of *registered* voters. ECF No. 15 at 19. This argument too is barred by precedent.

In *Moore*, the Fifth Circuit rejected Defendants' proposed rule regarding Black registered voter majorities.[9] 502 F.2d at 624. There, the Court considered the validity of a remedial plan in which the plaintiffs in a county with a majority Black voting-age population had successfully challenged an at-large election system. *Id*. The county had proposed five single-member remedial districts each with majority Black voting-age populations. *Id*. Significantly, the Court found that, "in terms of registered voters, blacks would have exceedingly slim majorities in some of these

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[8] Defendants dismiss *Zimmer* and other pre-*Gingles* cases as "outdated." Doc. 15 at 18 & n.9. But, "[t]he age of these decisions does not diminish their precedential effect. If anything, their age enhances that effect." *Stout v. Jefferson Cty. Bd. of Educ*., 882 F.3d 988, 1014 (11th Cir. 2018). Indeed, the Senate Report — the "authoritative source for legislative intent" about Section 2, *Gingles*, 478 U.S. at 43 n.7 — identifies *Zimmer* as a foundational basis for Section 2 claims.

[9] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

districts and minorities in others." *Id*. Nonetheless, the Court rejected the county's plan and held that "[t]he mere existence of a black population majority does not preclude a finding of dilution." *Id*. (citing *Zimmer*, 485 F. 2d at 1305).

The Court stated that thin Black voter majorities might actually "enhance[ ] the possibility of continued black political impotence." *Id*. The Court adopted remedial districts with greater Black majorities where "Black voters [were] far more likely to be able to exercise their franchise in a full and meaningful way." *Id*. at 625.

Similarly, in *Marengo*, the Eleventh Circuit reversed the district court's holding that at-large elections could not dilute Black voting strength because "there were an estimated 7,040 black [registered] voters, and . . . the winners of most previous elections had received 5,000-6,000 votes." 731 F. 2d at 1568. The Court explained that "[p]ast discrimination may cause blacks to register *or vote* in lower numbers than whites." *Id.* at 1567 (emphasis added); *see also United States v. Dallas Cty.*, 739 F. 2d 1529, 1535-36 (11th Cir. 1984) ("*Dallas I*"); *Hale*, 496 F. Supp. at 1216-17.

More recently, the Eleventh Circuit reversed a district court's dismissal of a Section 2 case where the plaintiffs challenged the at-large seats in a county with a new Black registered voter majority. *Wright v. Sumter Cty. Bd. of Elect. & Reg.*, 657 F. App'x 871 (11th Cir. 2016). The district court had granted summary judgment for the defendants because "Wright's own expert agrees that black voters now make up

a majority of the registered voters in Sumter County and that black-preferred candidates have been able to succeed in districts where the voter make-up is very similar to that of the at-large voting population." *Wright v. Sumter Cty. Bd. of Elect. & Reg.*, No. 1:14–CV–42, 2015 WL 4255685, at *11 (M.D. Ga. July 14, 2015).

In reversing, the Eleventh Circuit acknowledged the Black registered voter majority, but stressed that the plaintiffs had offered evidence that the Black-preferred candidates had lost in recent racially polarized at-large elections. *Wright*, 657 F. App'x at 872-73. The Eleventh Circuit remanded the case to the district court to decide whether white bloc voting had prevented Black-preferred candidates from winning the at-large seats. *Id*.

On remand, the district court found a Section 2 violation. *Wright II*, 301 F. Supp. 3d at 1326. It rejected the defendants' argument — identical to the one here — that a Black registered voter majority precludes a Section 2 violation. *Id*. at 1317-18. Instead, the court held that, while it was true that if more Black voters "turn[ed] out to vote . . . they would likely be able to elect their preferred candidate," this Circuit "has roundly rejected any effort to blame African Americans' lack of electoral success on 'a failure of blacks to turn out their votes.'" *Id*. at 1318 (quoting *Marengo*, 731 F.2d at 1568).

Put simply, the relevant precedent holds that — even if Pleasant Grove has a small Black voter majority — Plaintiffs are still permitted to bring a Section 2 claim.

Defendants' arguments cannot be squared with the contrary and binding precedent.

b. Evidence extrinsic to the Complaint supports plaintiffs' allegations.

To the extent Defendants' extrinsic evidence could be considered, this Court should also consider Plaintiffs' additional evidence. *See Morrison v. Amway Corp*., 323 F. 3d 920, 924 (11th Cir. 2003); *Speaker v. U.S. Dep't. of Health & Hum. Serv*., 623 F. 3d 1371, 1379 (11th Cir. 2010).

The ACS, voter lists, and election returns all confirm the allegations that "Black residents of the City bear the effects of discrimination . . . , which hinder their ability to participate effectively in the political process," and that "[t]he City employs several practices and procedures that enhance the opportunity for discrimination against Black voters in the City Council elections." ECF No. 1 ¶¶ 41, 43.

The ACS shows that, among the City's total population, 10.2% of Black people, but only 7.2% of white people were on food stamps in the last year. Ross Decl., Ex. 1. Black people are more mobile, with 12.7% of Black residents as compared to only 7.8% of white residents, having moved into the City within just the last year. *Id.* The white population is also significantly older with 27.5% of white residents and just 5.3% of Black residents over age 65. *Id.* Also, among the City's working age population (18 to 64 years old), Black workers (7.3%) are more likely than whites (5.4%) to be unemployed. *Id.* Over 42% of white workers hold white

collar (management or professional) jobs compared to just 29.8% of Black workers. *Id.*

That the City's Black population is more likely to have moved to the City in recent years, and to be younger is in part because of the City's use of discriminatory tactics to exclude Black residents. ECF No. 1 ¶¶ 34-35 (citing *Pleasant Grove*, 479 U.S. at 465). Indeed, the ACS confirms that the shift in the racial demographics of the City occurred only recently. Newer or more mobile residents are less likely to be vote, particularly in local elections. *See Ketchum*, 740 F. 2d at 1413-14. Older registered voters are more likely to turn out to vote than younger voters. *See League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018).

Other socioeconomic disparities also result from past discrimination. ECF No. 1 ¶¶ 36-39.[10] The disparities in jobs and unemployment may hinder Black voters' political participation. For example, that Black people are more likely to be hourly wage-earning blue-collar workers with less flexibility in their working hours than salaried white-collar workers means that Black workers face more difficulties leaving work to vote. *See Teague v. Attala Cty.*, 92 F.3d 283, 294 (5th Cir. 1996); *Hale*, 496 F. Supp. at 1214.

[10] To the extent that Defendants suggest that it matters whether this discrimination was the result of the City's or State's or Jefferson County's actions, ECF No. 15 at 7-8, that argument too is foreclosed by precedent. *See Solomon v. Liberty Cty., Fla.*, 899 F.2d 1012, 1032 (11th Cir. 1990) (en banc) (Tjoflat, J., concurring); *Marengo*, 731 F.2d at 1567 n.36; *McIntosh Cty. Branch of the NAACP v. City of Darien*, 605 F.2d 753, 759 & n.5 (5th Cir. 1979).

Second, extrinsic evidence of voter lists and election results show that Black people remain a minority of the electorate, and indicates the persistence of racially polarized voting. Shortly after Defendants filed their motion, Plaintiffs requested, but Defendants refused to produce, the voter sign-in lists for the City's August 2016 municipal elections. Ross Decl., Ex. 2. Plaintiffs therefore went to considerable expense, Ex. 3, and energy to quickly acquire the Jefferson County ("JEFCO") voter list, Ex. 4, which contains data on which of the last ten elections every voter voted in.

Based on Plaintiffs' preliminary analysis of the JEFCO voter list, 1,916 registered voters in Pleasant Grove cast a ballot in the 2016 municipal general election. Of that total, 60.4% (1,157) were white and 38.3% (733) were Black voters. Black voters were therefore a *minority* of the 2016 municipal voters.[11] Ross Decl. ¶¶ 8-10; *see also Dallas I*, 739 F. 2d at 1538 (holding that, even where Black and white voters were registered at equal rates, racial disparities in turnout of 5% to 10% "may show that the effects of past discrimination still linger"). The percentage of Black voters in the 2016 electorate (38%) was actually *lower* than the 2010 Census's Black voting age population numbers (40%). Consistent with Plaintiffs' allegations of

[11] While this number does not match up perfectly with the 2016 election returns, which show that 2,136 people voted in 2016 (an additional 220 voters), even if all 220 of the unaccounted-for voters were Black (733 + 220 = 953), Black voters would still have been a minority (44.6%) of the 2016 municipal voters.

racially polarized voting, ECF No. 1 ¶¶ 28-30, the 38.3% Black voter turnout in 2016 closely mirrors the percentage of the vote received by the Black-preferred candidates for each numbered place (Place 1: Sellers 33%, Place 2: McWilliams 36%, Place 3: Lawson/McKinney 39%). Ross Decl., Ex. 6.

In addition, Defendants produced heavily redacted PDF copies of the 2016 city voter lists. Ross Decl., Ex. 5. Plaintiffs' counsel compared the names on the city voter list with the names and racial data the JEFCO voter lists. According to this rough preliminary analysis of the 4,475 voters on the 2016 city list who Plaintiffs could match to the 2019 JEFCO list by name, 2,331 are Black (49.13%). Ex. 1 ¶ 12. Thus, any alleged Black voter majority is extremely new and likely tenuous. *See Moore*, 502 F.2d at 624 ("the barest of black population majorities . . . enhance[s] the possibility of continued black political impotence").

Third, the disparities in Black and white voter turnout are greatly compounded by the requirement that the City hold elections in August. Ala. Code 1975 § 11-46-21. An off-cycle election date can have a discriminatory effect because it draws "significantly fewer voters than an election held simultaneously with a general election in November." *NAACP v. Hampton Cty. Elect. Comm'n*, 470 U.S. 166, 178 (1985). "[O]ff-cycle elections tend to generate unusually low voter turnout generally and disproportionately low turnout among African American voters." *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1080

(E.D. Mo. 2016), *aff'd* 894 F. 3d 924 (8th Cir. 2018). "[H]olding local elections at a time when only the most engaged and politically astute citizens — those citizens who feel the most enfranchised — are likely to vote will almost certainly result in the diminished influence of groups who feel generally excluded from the political fabric of the community." *United States v. Port Chester*, 704 F. Supp. 2d 411, 444 (S.D.N.Y. 2010); *see also Garcia v. Guerra*, 744 F.2d 1159, 1165 (5th Cir. 1984).

* * *

Here, past discrimination has led to "present socio-economic disadvantages, which in turn can reduce participation and influence in political affairs." *Marengo*, 731 F.2d at 1567. Because "there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination," *Defendants* have the burden of proving that "something else" is depressing Black turnout. *Id.* at 1569. Defendants cannot meet this high burden on a motion to dismiss.

B. Plaintiffs Adequately State Fourteenth and Fifteenth Amendment Claims

To succeed on their constitutional or Section 2 intentional discrimination claims, Plaintiffs must prove discriminatory intent in either the enactment or maintenance of the at-large election system. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). Plaintiffs do "not have to prove that racial discrimination was a 'dominant' or 'primary' motive, only that it was a motive." *Dallas I*, 739 F. 2d at 1541. This "demands a sensitive inquiry into such circumstantial and direct evidence of intent

as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977).

This Court can consider direct or circumstantial evidence about the racial impact of the at-large election system, including the numbered-post requirement; the historical background, the sequence of events, and procedural or substantive departures leading to enactment or the maintenance of the at-large system; and the legislative or administrative history. *Id*. at 266-68. This Court may also consider the "*Zimmer* factors." *Hall v. Holder*, 117 F. 3d 1222, 1225-26 (11th Cir. 1997). These factors largely track the Senate Factors listed above at 8-9. *Marengo*, 731 F. 2d at 1565-66.

Plaintiffs plausibly allege that the City's at-large elections are tainted with an intentionally discriminatory numbered post law enacted by the State of Alabama in 1961. ECF No. 1 ¶¶ 46-47. Plaintiffs also allege that Defendants are discriminatorily maintaining at-large elections. *Id*. ¶¶ 48-54. Because a federal court has already found that the State of Alabama "'openly and unabashedly'" discriminated against Black voters in the passage of numbered places laws, Defendants cannot question the plausibility of Plaintiffs' allegations that the City's continued operation of its at-large elections under this numbered place law states violates the Constitution.[12]

[12] While *Dillard* forecloses the Rule 12(b)(6) dismissal of Plaintiffs' constitutional claims, at trial, Defendants can offer new evidence that might contradict the court's findings in *Dillard*. *See Johnson v. DeSoto County Bd. of Com'rs*, 72 F. 3d 1556, 1561 (11th Cir. 1996).

Dillard, 649 F. Supp. 289, 294-98 (M.D. Ala. 1986) (citing 640 F. Supp. at 1356-59), *aff'd* 831 F. 2d 246, 256 (11th Cir. 1987).

Plaintiffs also adequately allege that Defendants are intentionally maintaining the at-large system to prevent the election of Black people to the City Council. In addition to the *Zimmer* Factors referenced above at 31, the Complaint explains that, despite the Black community's support for single-member districts, Defendants are maintaining the at-large system to protect white incumbents. This is enough to state a claim. *See LULAC*, 548 U.S. at 441; *Perkins v. City of West Helena*, 675 F.2d 201, 213-14 (8th Cir.), *aff'd mem*., 459 U.S. 801 (1982).

Defendants claim that vote dilution claims are not cognizable under the Fifteenth Amendment and that the at-large system has no discriminatory effect.

Each of these contentions is without merit.

1. Fifteenth Amendment Vote Dilution Claims are Cognizable.

The Eleventh Circuit has "concluded that the Fifteenth Amendment, as well as the Fourteenth, protects not only against denial of the right to vote but against dilution of that right as well."[13] *Marengo*, 731 F. 2d at 1555. To the extent the Eleventh Circuit's earlier opinion in *Marengo* conflicts with its later opinion in *Osburn v. Cox*, 369 F. 3d 1283, 1288 (11th Cir. 2004), this Court is "obligated" to

[13] In *Reno v. Bossier Parish*, the Court merely stated that it had yet to hold that Fifteenth Amendment claims are cognizable. It did not resolve the issue. 528 U.S. 320, 334 n.3 (2000).

follow the earlier opinion. *United States v. Mozie*, 752 F. 3d 1271, 1285 (11th Cir. 2014).

Like Section 2, the Fifteenth Amendment prohibits both denial or *abridgment* of the right to vote. U.S. Const. Amend. XV. In any event, vote dilution claims are plainly cognizable under the Fourteenth Amendment. *See LULAC*, 548 U.S. at 440.

2. Plaintiffs Plead Discriminatory Effect and An Adequate Remedy.

Because, as discussed above at 16, Plaintiffs' Section 2 claims meet the first *Gingles* precondition, there is no question that Plaintiffs also state the requisite causation to demonstrate a discriminatory effect under the Constitution. It is simply not true that an at-large system with a bare Black voter majority cannot have a disparate impact. The discriminatory effect of the at-large system is obvious where, as here, *not a single* Black candidate has ever been elected to the City Council. *Hale*, 496 F. Supp. at 1216-17. Plaintiffs' proposal — replacing the at-large election system with three of five single-member districts where Black voters could finally have a real opportunity to elect their preferred candidates — is a viable remedy. *Id*.

Another remedy might be to eliminate the numbered post or majority-vote requirements as this might make it easier for Black-preferred candidates to win at-large elections with a plurality of the vote. *See City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982) (affirming that, while the election system reflected Black voting strength, an injunction against that system's intentionally discriminatory

majority-vote requirement was valid); *see also* ECF No. 1 ¶ 60(f).

Plaintiffs' constitutional claims also have a more relaxed effect requirement than Section 2 does. That is the discriminatory *effect* needed to prove a constitutional claim is *not* coextensive with the discriminatory *results* needed to prove a Section 2 violation.[14] While generally discriminatory effects claims are easier to prove than constitutional claims, "it may sometimes be" easier to prove discriminatory purpose than effect. *Bossier Par.*, 528 U.S. at 332 n.1. This is because "[w]hen plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not 'the sole touchstone' of the claim. Rather, plaintiffs asserting such claims must offer other evidence that establishes discriminatory intent." *N.C. State Conf. of the NAACP v. McCrory*, 831 F. 3d 204, 231 & n.8 (4th Cir. 2016); *see also Stout*, 882 F. 3d at 1006 (listing the "impact of the official action" only as one of many facts "[c]ourts *may* consider") (emphasis added). "Showing disproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent." *McCrory*, 831 F. 3d at 231; *see also Garza v. Cty. of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (holding that the effects element is relaxed for intentional discrimination claims).

Courts in voting cases have long recognized that any amount of discriminatory

[14] The Eleventh Circuit has reserved the question of whether a case that is insufficient under Section 2 would necessarily also fail under the Constitution. *See DeSoto II*, 204 F.3d at 1344-45.

effect is sufficient to show a constitutional violation. *See, e.g., Pleasant Grove*, 479 U.S. at 471-72 & n.11; *Port Arthur*, 459 U.S. at 168; *Anderson v. Martin*, 375 U.S. 399, 403-04 (1964); *Dillard*, 649 F. Supp. at 297; *see also* *Brooks v. Miller*, 158 F. 3d 1230, 1241 (11th Cir. 1998) (affirming that a law did not violate Section 2's intent or results tests, but then separately considering whether it violated the Constitution).

C. Official-Capacity Defendants Are Liable for Voting Rights Violations

The Mayor and City Council members, named as Defendants in their official capacities ("Official-Capacity Defendants"), advance two meritless arguments for why the claims against them should be dismissed. ECF No. 15 at 34-38.

First, the official-capacity Defendants wrongly contend that they cannot be held liable under the VRA because of "the *Busby* rule." *Id*. at 36. But, neither *Busby* nor any case cited by Defendants establishes a categorical rule forbidding civil rights suits against both a municipality and its officials in their official-capacities.

Rather, in *Busby v. City of Orlando*, the Supreme Court found that because a Title VII suit against a city and its municipal officers in their official capacities were functionally equivalent there was no need for the official-capacity actions against the local officials to continue. 931 F.2d 764, 776 (1991). The Court reasoned that this was necessary because "[t]o keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury." *Id*.

But, the Court's concern about jury confusion does not apply where, as here, the District Court will sit as the finder of fact. There is no concern about lay jury confusion. *See Lake Park*, 2009 WL 3667071, at *4 (declining to dismiss city officials as duplicative in a Section 2 case). "Defendants rely primarily on cases brought under 42 U.S.C. § 1983, which the Court finds are not instructive in this matter. The elements, defenses, and remedies available in § 1983 cases bear no resemblance to a Section 2 voting rights case." *Id*. at *4 n.1. Indeed, local officials are regularly named as defendants in their official capacities in Section 2 cases. *See, e.g., Ga. State Conf. of the NAACP v. Fayette Cty.*, 118 F. Supp. 3d 1338, 1340 (N.D. Ga. 2015) (enjoining the members of the county commission in their official capacities under Section 2 in a challenge to the county's at-large election system); *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425, 2012 WL 3135545, at *15 (N.D. Tex. Aug. 2, 2012) (finding that the at-large system of electing members of the city council violated Section 2 and enjoining the city and city council members).

Second, Defendants argue that Plaintiffs' constitutional claims under 42 U.S.C. § 1983 against the official-capacity Defendants are due to be dismissed because these Defendants enjoy absolute legislative immunity. ECF No. 15 at 36. The Supreme Court does recognize that municipal officials are entitled to absolute immunity in their personal capacities for actions taken as legislators. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). Yet the Court also recognizes that municipal

legislators are *not* protected from § 1983 suits when sued in their official capacities. *See Bd. of Cnty. Comm'rs, Wabaunsee County, Kansas v. Umbehr,* 518 U.S. 668, 677 n. * (1996) ("Because only claims against the Board members in their *official* capacities are before us, and because immunity from suit under § 1983 extends to public servants *only* in their *individual* capacities . . . the legislative immunity claim is moot.") (emphasis added); *see also BFI Waste Sys. of N. America v. Dekalb Cty.*, 303 F. Supp. 2d 1335, 1358 (N.D. Ga. 2004) (declining to address local legislators' legislative immunity defense because they were sued in their official capacities).

Defendants rely on *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005), to support their argument that legislative immunity protects municipal or local legislators from suit in their official legislative capacities. Yet, Defendants fail to mention that the Court in *Scott* expressly limited the scope of its holding to *state* legislators sued in their official capacities. 405 F.3d at 1255 n.6. Recognizing that the Supreme Court in *Umbehr* stated that local legislators could still be sued in their official capacity, the Eleventh Circuit declared: "we are not concerned in this case with local legislators, and therefore we leave to another day issues relating to scope and breadth of their legislative immunity."[15] *Id.* Given the Eleventh Circuit's silence,

[15] In *Scott v. Taylor*, the Eleventh Circuit also relied on *Supreme Court of Virginia v. Consumers Union* 446 U.S. 719 (1980), to find that legislative immunity was available to state legislator defendants who were sued in their official legislative capacities and further noted that *Umbehr* is "entirely consistent" with the holding in *Consumers Union*. 405 F.3d at 1254-55 n. 6.

Umbehr controls here because the Mayor and City Councilors were sued in their official capacities pursuant to § 1983.

The official-capacity Defendants' claim of absolute legislative immunity also fails for another reason: Plaintiffs are not challenging Defendants' legislative acts. Rather, Defendants are being sued due to their roles as city election administrators. When evaluating whether local legislators are entitled to absolute immunity for their legislative actions, this Court must determine whether the official action is legislative in nature by examining whether the action is legislative in form (i.e., where the action followed a traditional legislative process) and legislative in substance (i.e., where the action reflected a discretionary policy-making decision with prospective implications). *Bogan*, 523 U.S. at 55-56. For example, in *Bogan*, the Court found that the defendants' actions of introducing a budget, voting for an ordinance, and signing it into law were "quintessentially" legislative in form and substance and thus provided the defendants with absolute legislative immunity. *Id.*

Plaintiffs are suing the Mayor and City Councilors in their roles as election administrators. The official-capacity Defendants have numerous non-legislative duties related to the administering the City's at-large elections, including preparing voter rolls, providing public notice about elections, designating polling places, appointing poll officials, providing election supplies, and canvassing and certifying returns. *See, e.g.*, Ala. Code 1975 §§ 11-46-22, 11-46-24, 11-46-27, 11-46-32, 11-

46-36, 11-46-37, 11-46-55. The official-capacity Defendants' continued administration of the challenged at-large election system is not legislative in form, nor does it reflect a discretionary policy-making decision. It is purely administrative. *See Scott*, 405 F. 3d at 1256-57 (explaining that, rather than state legislators, the proper defendants in a voting case are election administrators); *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1486 (11th Cir. 1991) (holding that local legislators lack absolute immunity when executing policy decisions that are largely administrative).

Defendants argue that the alleged "failure to enact legislation to redistrict" the City is precisely the sort of function that is subject to legislative immunity." Doc. 15 at 38. However, while Plaintiffs did note that the City Council has the power to switch to single-member districts, ECF No. 1 ¶ 13, the Complaint also alleges that the City Council "provides local government services" and that City Councilors "are charged with ensuring the City's compliance with the United States Constitution and Section 2," *id*. ¶¶ 12-13, and that the Mayor is the "chief executive officer of the City" *id*. ¶ 14. Thus, the Complaint alleges that the official-capacity Defendants' responsibilities for executing elections in compliance with federal law are the reasons that Plaintiffs sued them under § 1983—not their legislative duties.

The Complaint does, of course, allege intentional racial discrimination in the Mayor and City Council's maintenance of the at-large system. ECF No. 1 ¶¶ 48-54. But that allegation is not the reason Plaintiffs seek an injunction against these

Defendants. While it is in the City Council's power to do so, Plaintiffs are not asking this Court to order Defendants to pass an ordinance changing the method of election to single-member districts. Rather, the Complaint asks this Court to enjoin Defendants "from administering, implementing, or conducting any future elections in the City under the current at-large method of electing the members of the City Council." *Id*. at ¶ 60; *see Curling v. Secretary of State*, __ Fed. Appx. __, 2019 WL 480034, at *5 (11th Cir. Feb. 7, 2019) (holding that state election officials were not entitled to legislative immunity for their role in the execution of state election rules).

In any event, should this Court find that the official-capacity Defendants are due to be dismissed, there is no question that the City is an appropriately named defendant and that it can be held liable for the Plaintiffs' constitutional and statutory claims. *See Leatherman v. Tarrant Cty.*, 507 U.S. 163 (1993). (holding that municipalities do not enjoy immunity, either absolute or qualified, under § 1983).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss.

Respectfully submitted on February 21, 2019,

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CERTIFICATE OF SERVICE

I certify that on February 21, 2019, I filed the foregoing Plaintiffs' Opposition to Defendants' Motion to Dismiss electronically via the Court's CM/ECF system, which will send a copy to all counsel of record.

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