

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE,
SPRING VALLEY BRANCH; JULIO
CLERVEAUX; CHEVON DOS REIS; ERIC
GOODWIN; JOSE VITELIO GREGORIO;
DOROTHY MILLER; HILLARY MOREAU;
and WASHINGTON SANCHEZ,

Plaintiffs,

v.

EAST RAMAPO CENTRAL SCHOOL
DISTRICT and MARYELLEN ELIA, IN
HER CAPACITY AS THE
COMMISSIONER OF EDUCATION OF
THE STATE OF NEW YORK,

Defendants.

17 Civ. 8943 (CS) (JCM)

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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OTHER AUTHORITIES

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1. Plaintiffs brought a claim against the East Ramapo Central School District (the “District”) under Section 2 of the Voting Rights Act (“VRA”) alleging that the at-large method of electing members to the District’s Board of Education (the “Board”) affords minorities “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Thornburg v. Gingles*, 478 U.S. 30, 36 (1986). For the below reasons, the Court finds in favor of Plaintiffs.

I. BACKGROUND

A. The Parties

1. Plaintiffs

2. Plaintiff National Association for the Advancement of Colored People, Spring Valley Branch (“NAACP”) is a local affiliate of the National Association for the Advancement of Colored People. The NAACP’s mission is to ensure the political, educational, social, and economic equality of rights of all persons, eliminate racial hatred and discrimination, and remove the barriers of racial discrimination through democratic processes. NAACP members include black and Latino residents of the District. The NAACP does not endorse political candidates for elections, but hosts a yearly candidate forum and invites candidates for the Board to attend. PX288 (Trotman) ¶ 37; Tr. 1316:25-1317:4 (Trotman); PX342 (Cohen) ¶ 23; Tr. 1926:2-14 (Cohen).

3. Plaintiffs Dos Reis, Goodwin, Miller, and Clerveaux are black and Latino registered voters in the District. Under the current at-large method of electing Board Members, they have been denied the opportunity to elect candidates of their choice. Since 2008, no candidate for whom any of these Plaintiffs voted won a contested election for a seat on the Board. PX282 (Miller) ¶¶ 11-15; PX280 (Clerveaux) ¶¶ 8-9; PX279 (Dos Reis) ¶ 11; PX281 (Goodwin) ¶ 9.

4. In 2017, Ms. Dos Reis and Mr. Goodwin ran for the Board. They participated in an open and public process to seek the support of advocates from the public school community and

campaigned extensively for the support for minority voters. Both received support from an overwhelming majority of black and Latino voters. Nevertheless, Ms. Dos Reis lost to Joel Freilich and Mr. Goodwin lost to Harry Grossman (and Ms. Manigo lost to Mark Berkowitz). Mr. Freilich and Mr. Grossman, who won with support from a large majority of white voters. PX279 (Dos Reis) ¶¶ 25, 54-65; PX242A ¶¶ 16-17; PX281 (Goodwin) ¶¶ 23, 56-61; PX242A ¶¶ 16-17.

2. *East Ramapo Central School District*

5. The District is a political subdivision of the State of New York that serves approximately 8,843 public school students at 14 schools, as well as approximately 29,279 private school students. JPTO A.2; PX204; PX372 ¶ 24. The District is approximately 65% white, 19% black, 10% Latino, and 3% Asian. PX244A ¶ 4, 16. The District's citizen voting age population ("CVAP") is 61% white, 24% black, 9% Latino, and 5% Asian. Black and Latino voters constitute 33% of the CVAP in the District. PX244A ¶ 4; Tr. 510:4-17 (Cooper).

6. According to Plaintiffs' expert demographer, Bill Cooper, the District's "population is highly segregated." Tr. 514:19-21 (Cooper). Over two-thirds (69.4%) of whites live in block groups that are 80% or more white and one-third (33.03%) of whites live in block groups that are 95% or more white. By contrast, over half (55.7%) of the minority population lives in highly segregated block groups with minority populations in the range of 83.6% to 98.2%. PX244A ¶ 28-29, 32-33; *see* Tr. 512:14-23; 514:14-16 (Cooper). Minorities are concentrated in and around Spring Valley, as illustrated in the map at Appendix A. Tr. 512:7-12 (Cooper).

7. For the voting-age population, 54.4% of blacks and 73.7% of Latinos are foreign-born, compared to just 16.5% of whites. 21.9% of blacks and 53.6% of Latinos speak English "less than very well." PX244A ¶ 51; Tr. 510:23-511:14; 516:20-23 (Cooper).

8. Although the District is approximately 61% white, only 4% of the District's public school student population is white. 92% of the District's public school students are black or Latino;

89% are classified as “economically disadvantaged;” 70% qualify for a free or reduced-price lunch; 19% have disabilities; and 37% are classified as English Language Learners. JPTO A.3. According to data from the New York State Education Department (“NYSED”), in the 1999-2000 school year, 22.5% of the students in public schools were white. By 2017-18, the percentage dropped to 4%. PX204D, H (showing a drop from 2026 to 349 students). For the 2018-19 school year, 98% of the District’s approximately 29,279 private school students are white. PX372 ¶ 24.

9. The District is governed by a nine-member Board, which is “responsible for the scope, depth and quality of education” and “is the policy making body for the school district.” PX259. In their role as elected officials, the Board Members: “[1)] Select a Superintendent of Schools ...; [2)] Adopt goals and objectives; [3)] Evaluate the effectiveness of District programs and services; [4)] Establish policies for the operation of the District; [5)] Appoint professional and non-certificated personnel and set salaries; [6)] Develop a budget consistent with educational needs and community resources; [7)] Levy taxes; [8)] Set educational policy; [9)] Approve the appointment of all school district personnel and contracts; [10)] Communicate the progress and needs of the District to the community, educational governing boards and legislators.” PX259; Tr. 1417:23-1419:1(Grossman).

10. State law gives the District responsibility for running its Board elections. N.Y. EDUC. LAW § 2017(1). The nine members of the Board are elected in staggered cycles of three members at a time for three year terms. JPTO B.2. Although Board Members are elected according to numbered posts (that is, each candidate runs for one particular seat), each seat is elected at-large. JPTO B.3. The candidates are not required to reside in any particular area of the District. *See* PX257 at 38:5-8. Elections take place on the third Tuesday of May and are not held with other local, state, or federal elections. N.Y. EDUC. LAW § 2022(6).

11. Board elections are racially polarized: the white majority votes as a bloc, such that no minority-preferred candidate has won a contested election since at least 2007. Tr. 399:9-14, 288:12-289:1, 155:6-12, 161:10-15, 1648:14-24 (Barreto).

- In 2013, the minority-preferred candidates, Margaret Tuck, Eustache Clerveaux, and Robert Forrest, were defeated by the white-preferred candidates, Maraluz Corado, Pierre Germain, and Bernard Charles, respectively. PX242A ¶¶ 8-9.
- In 2014, there were no contested elections.
- In 2015, the minority-preferred candidates, Sabrina Charles-Pierre, Natashia Morales, and Steve White, were defeated by the white-preferred candidates, Jacob Lefkowitz, Yonah Rothman, and Juan Pablo Ramirez, respectively. PX243 ¶¶ 31-32.
- In 2016, the minority-preferred candidates, Kim Foskew, Jean Fields, and Natashia Morales, were defeated by the white-preferred candidates, Messrs. Charles, Germain, and Yehuda Weissmandl, respectively. Ms. Charles-Pierre ran as an unopposed incumbent and won. PX242A ¶¶ 10-11.
- In 2017, the minority-preferred candidates, Ms. Manigo, Mr. Goodwin, and Ms. Dos Reis, were defeated by the white-preferred candidates, Mark Berkowitz, Harry Grossman, and Joel Freilich, respectively. PX242A ¶¶ 16-17.
- In 2018, the minority-preferred candidates, Miriam Moster and Jose Cintron, were defeated by the white-preferred candidates, Yoel Trieger and Ephraim Weissmandl. Ms. Charles-Pierre won in 2018, but ran as an unopposed incumbent. PX242A ¶¶ 12-13, _0037 (Appendix A)
- In 2019, under special circumstances, minority-preferred candidate Ashley Leveille won, as did white-preferred candidates Messrs. Weissmandl and Charles. *See infra* Section III.A.

B. Legal Standard For Analyzing Section 2 Claims

12. Section 2 prohibits any voting practice or procedure that “results in a denial or abridgement of the right . . . to vote on account of race or color” 52 U.S.C. § 10301(a). “The essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.” *Gingles*, 478 U.S. at 47. There is a two-step process for determining whether a Section 2 violation exists, both of which a plaintiff must

prove by a preponderance of the evidence. *See Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cty. of Albany*, 281 F. Supp. 2d 436, 443 (N.D.N.Y. 2003) (*Arbor Hill II*), *rev’d in part on other grounds*, 357 F.3d 260 (2d Cir. 2004).

13. First, the Court must determine whether plaintiffs have met the three preconditions to establishing a claim: (1) whether the minority group is “able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;” (2) whether the minority group is “able to show that it is politically cohesive;” and (3) whether the minority group is “able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.” *Gingles*, 478 U.S. at 50-51.

14. Second, upon finding that the *Gingles* preconditions have been satisfied, the Court must then evaluate the “totality of the circumstances” and determine “whether the political process is equally open to minority voters.” *Id.* at 79 (quotation omitted). The Supreme Court has identified nine factors to assist the Court in this inquiry: (1) whether there is a history of official discrimination; (2) whether voting is racially polarized; (3) whether current electoral mechanisms enhance vote dilution; (4) if there is a candidate slating process, whether access to such a process is denied to minorities; (5) the extent to which members of the minority group bear the effects of discrimination in education, employment, and health, that hinder their ability to participate in the political process; (6) whether overt or subtle racial appeals have formed part of political campaigns; (7) whether minorities have been elected to public office in the jurisdiction; (8) whether elected officials have failed to respond to minority needs; and (9) whether the policy underlying the contested structure is tenuous. *Id.* at 44-45 (citing S. REP. NO. 97-417 (1982)).

15. “[I]n deciding whether [Section] 2 has been violated, courts are to engage in a

searching practical evaluation of the past and present reality” of the political process. *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1008 (2d Cir. 1995). The Court need not find that all or even any particular number of factors have been met or that a majority point “one way or the other” to find a violation. *Gingles*, 478 U.S. at 45. Nor is the Court limited to this set of factors. *Niagara Falls*, 65 F.3d at 1020. (“The list of factors ‘is neither comprehensive nor exclusive.’”) (quoting *Gingles*, 478 U.S. at 45). For example, anecdotal evidence of voter futility, although not expressly discussed as a factor, may be considered as part of the totality of circumstances analysis. *See, e.g., Fabela v. City of Farmers Branch*, 2012 WL 3135545, at *14 (N.D. Tex. Aug. 2, 2012).

16. As this Court has previously held, politically cohesive minority groups may be combined for purposes of Section 2. Tr. of Nov. 19, 2019 Hr’g at 26-27 (“[D]iverse minority groups can be . . . combined to meet Voting Rights Act litigation requirements,’ and it’s therefore ‘appropriate . . . to combine Black and Hispanic populations’ in VRA analysis.”) (citing *Arbor Hill II*, 281 F. Supp. 2d at 445). In so doing, the Court followed the weight of “[t]he law in this Circuit.” Tr. of Nov. 19, 2019 at 26. For purposes of analyzing Plaintiffs’ claim under Section 2, the Court will consider both minority groups together.

17. The Second Circuit has held “it will be only the very unusual case in which the plaintiff can establish the existence of the three *Gingles* factors but still have failed to establish a violation of [Section] 2 under the totality of circumstances.” *Niagara Falls*, 65 F.3d at 1019 n.21.

II. THE GINGLES PRECONDITIONS

A. Gingles One

18. As the Court has previously observed, “[t]he parties in this case don’t dispute that the Plaintiffs have satisfied the first *Gingles* precondition.” Tr. of Nov. 19, 2019 Hr’g at 35. In the Joint Pretrial Order, the parties stipulated that black and Latino voters in the District are sufficiently large and geographically compact to constitute a majority in several single-member districts under

a ward system. JPTO at 14. Thus, the Court holds that the first *Gingles* precondition is satisfied.

B. Gingles Two and Three

1. Legal standards for Gingles 2 & 3

19. The second *Gingles* precondition is satisfied where minority groups are politically cohesive—i.e., when a “significant number of minority group members usually vote for the same candidates.” *Gingles*, 478 U.S. at 56. “The second *Gingles* precondition . . . explores the extent to which a group of voters shares the same beliefs, ideals, principles, agendas, and concerns such that they generally unite behind or coalesce around particular candidates and issues.” *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 754 (S.D. Tex. 2013). “Political cohesion can be demonstrated through both statistical and non-statistical evidence.” *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302, 333 (N.D.N.Y. 2015) (*Pope III*). Although there is no bright-line test for cohesion (*Flores v. Town of Islip*, 382 F. Supp. 3d 197, 230 (E.D.N.Y. 2019)), patterns of racial bloc voting that extend over a period of time are probative. *Gingles*, 478 U.S. at 578; *Pope III*, 94 F. Supp. 3d at 335.

20. The third *Gingles* precondition is satisfied when the majority votes as a bloc, and, in the absence of special circumstances, usually defeats the minority preferred candidate. *Pope III*, 94 F. Supp. 3d at 335 (quoting *Gingles*, 478 U.S. at 51). “The key components of the final *Gingles* factor are the presence of racial bloc voting, identifying the minority-preferred candidate, and the extent to which racial bloc voting results in defeat of the minority's preferred candidate.” *Id.*

21. The Second Circuit uses a bright-line rule for determining whether the minority community prefers a certain candidate. A candidate cannot be minority-preferred if they receive “support from fewer than 50% of minority voters.” *Niagara Falls*, 65 F.3d at 1018-19. The Second Circuit also does not require that a minority-preferred candidate be a member of a minority group because “[n]o legal rule should presuppose the inevitability of electoral apartheid . . .” *Id.* at 1016; *see also Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993).

22. To satisfy the third *Gingles* precondition, “[p]laintiffs are not required to show that minority candidates always lose to white candidates, only that they usually do.” *Arbor Hill II*, 281 F. Supp. 2d at 450. Success of minority-preferred candidates “does ‘not necessarily negate’ a finding of bloc voting, particularly if ‘elections are shown usually to be [racially] polarized’ or the success of minority candidates in particular elections can be explained by ‘special circumstances, such as the absence of an opponent [or] incumbency.’” *Pope v. Cty. of Albany*, 687 F.3d 565, 582 (2d Cir. 2012) (*Pope I*). Majority voters rallying around minority-preferred candidates to thwart litigation is another special circumstance. *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557-58 (9th Cir. 1998) (special circumstances where Hispanic candidates were elected amidst “unprecedented” circumstances like endorsement and financial support from white politicians and organizations).

23. “*Gingles* [further] instructs that ‘a pattern of racial bloc voting that extends over a period of time is more probative of a claim . . . than are the results of a single election.’” *Niagara Falls*, 65 F.3d at 1012 (quoting *Gingles*, 478 U.S. at 57).

2. *Dr. Matthew Barreto used accurate, scientifically validated methods to identify racially polarized voting*

24. Plaintiffs’ expert, Dr. Barreto, assisted by his colleague Dr. Loren Collingwood, Tr. 164:12-166:6 (Barreto), used the most accurate, reliable methods available to conclude that blacks and Latinos are politically cohesive, and that their candidates of choice lost every contested election from 2013-2018 to white-preferred candidates. Because voters in New York do not self-report their race or candidate choice, racial voting patterns must be estimated. The standard method for estimating racial voting patterns in a VRA case is ecological inference (“EI”). *Rodriguez*, 308 F. Supp. 2d at 387 (EI is the “standard technique” most commonly used in VRA cases); DX67 at 9.

25. Dr. Barreto used two well-established methods of EI (King’s EI and RxC) to

analyze multiple data sets (BISG, Catalist, CVAP), and additional statistical analyses (BISG analysis of nominating petitions, racial voting analysis of 2012 Presidential election) to form his opinions. The results were remarkably consistent across every single methodology:

Across a variety of analyses that Dr. Collingwood and I performed, we found strong and consistent evidence that blacks and Latinos are politically cohesive and that they consistently vote for the candidates which lose elections. We found strong and consistent evidence that white voters vote cohesively as a block and that they vote for candidates that have won every single election.

Tr. 155:6-12 (Barreto). Dr. Barreto's results are also consistent with substantial anecdotal evidence that black and Latino voters in the District consistently supported losing candidates.

a. BISG generates accurate race estimates and is extensively validated

26. To evaluate racial voting patterns, Dr. Barreto primarily relied on EI analyses of BISG data. BISG, which stands for "Bayesian Improved Surname Geocoding," starts with the voter file, i.e., the list of people who voted in each election, and uses the last name (surname analysis) and address (geocoding) of each voter to estimate the probabilities that each voter is white, black, Latino, or other. Tr. 168:11-70:10 (Barreto); PX305_0008-9. BISG then aggregates those probabilities to the precinct level to understand the racial demographics of each precinct's voters. Tr. 185:23-186:4 (Barreto); PX305_0012. BISG demographic information is then input into EI to estimate voting preference by race. Dr. Barreto used two EI methods—King's EI and RxC—both of which are commonly used in the social sciences and VRA litigation. Tr. 164:1-11 (Barreto). Using two methods allowed Dr. Barreto to compare the results to ensure they were consistent, ultimately supplying greater confidence to his conclusions. *Id.*; Tr. 287:24-288:7 (Barreto).

27. Although the District's expert demographer, Dr. Peter Morrison, claimed that BISG was not intended to be used this way (Tr. 19:24-23:19, 29:4-30:4 (Morrison)), this testimony was not consistent with the article that Dr. Morrison cited on which he was listed as an author. DX101.

To the contrary, experts have used BISG and similar methods to estimate racial populations for over a decade. Dr. Barreto began using surname and geocoded data to analyze voter files in approximately 2003 and authored his first peer-reviewed publication on the subject shortly thereafter. Tr. 170:16-19 (Barreto). Since then, he has used BISG techniques extensively in his published work. Tr. 170:20-23 (Barreto). The present application of BISG, which utilizes the improved surname list from the U.S. census in tandem with geocoding information from the census at the block level, was published in a 2009 peer-reviewed article by RAND scientists led by Marc Elliot. DX101; Tr. 67:15-16 (Morrison). The article found that BISG results in 41% efficiency improvement on surname analysis alone and 108% efficiency improvement on geocoding alone. Tr. 177:8-12 (Barreto). The authors concluded that the concordance (a probability that self-reported race matched with BISG race estimates) was 95% for Hispanics and 93% for blacks and whites. DX101 at 9; Tr. 178:15-19 (Barreto).

28. In 2016, several authors of the 2009 RAND article, including Dr. Elliot, published an update in which they concluded that BISG “can produce accurate estimates of racial/ethnic disparities within populations served when self-reported data are lacking.” PX274_0001 (2016 Fremont Article); Tr. 181:21-24 (Barreto); PX305_0011. They noted that in the seven years since their 2009 article was published, “[n]umerous validation studies have shown that BISG and related methods have an excellent ability to measure race/ethnicity.” PX274_0002; *see also* Tr. 183:13-19 (Barreto); 184:3-6 (Barreto). The article cited 15 validation studies and peer-reviewed articles that had used BISG and its variants to estimate the race of populations across a broad spectrum of disciplines and found that those studies confirmed that “[c]oncordance between self-reported race/ethnicity and BISG estimates is typically 90 to 96 percent for . . . Blacks, Asians/Pacific Islanders, Hispanics, and Whites.” PX274_0002, 05; Tr. 184:3-6, 182:22-183:1 (Barreto).

29. Since the publication of the 2009 RAND article, BISG has been used to estimate race across a variety of disciplines. In 2012-13, multiple peer-reviewed studies validated BISG for estimating the race of populations for use in healthcare. *See* Tr. 188:7-18 (Barreto); PX305_0014 (citing healthcare articles). The Consumer Financial Protection Bureau (“CFPB”) also began using BISG to estimate the race of consumers and borrowers to combat discrimination in consumer credit, determining that BISG’s race estimates “correlate highly with self-reported race and national origin.” DX209 at 3 (2014 CFPB Article); Tr. 188:19-21 (Barreto).

30. Importantly, BISG has been validated for estimating the race of populations across a wide-spectrum of social science and political science applications like the ones employed by Dr. Barreto in this case. Tr. 189:11-15 (Barreto); PX305_0015. In 2016, Dr. Bernard Fraga used a variant of BISG from Catalist to estimate the race of voting populations in nation-wide elections for the purpose of calculating turnout differences amongst racial groups. PX367 (2015 Fraga Article). In 2018, Dr. Fraga published a book, in which he further validated the accuracy of the BISG data from Catalist. PX369 (2018 Fraga Book). Harvard political scientist Ryan Enos used BISG to estimate voting turnout differences between white and black voters in Chicago and used King’s EI (as Dr. Barreto did here) to determine the difference in racial voting preferences. PX368_0013 (2016 Enos Article). Recently, political scientists Jacob Grumbach and Alexander Sahn used BISG race estimates generated by the WRU package created by Kosuke Imai & Kabir Khanna and input them into regression models to analyze racial differences in political campaign contributions. PX370 (2020 Grumbach Article). Each of these articles underwent peer review and was published in the leading journals, including American Journal of Political Science (highest impact and most cited political science journal) and American Political Science Review (oldest and most prestigious political science journal). Tr. 189:23-191:11, 192:2-14 (Barreto). Indeed, the

extensive validation of BISG's accuracy was one of the reasons the Eastern District of Michigan denied defendant's motion to exclude the use of BISG data and methodology in a similar VRA case. *See United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 613 (E.D. Mich. 2019).

31. In 2016, two Princeton political scientists, Kosuke Imai and Kabir Khanna, proposed using BISG to estimate turnout and vote choice for different racial groups. PX269 (2016 Imai & Khanna Article). They published their findings in *Political Analysis*—the leading statistics and methods journal in political science. Tr. 190:3-8 (Barreto). As part of the study, Imai & Khanna created a statistical package called WRU. PX269_0002. Imai & Khanna tested and validated the WRU package at the precinct level against the self-reported race of 10 million voters in Florida. *See* PX269_0002, 5 (“We examine the performance of various methods of estimating individual level race, as well as turnout by race at the precinct and district levels.”). Based on that validation study, they concluded that BISG constitutes a significant improvement in the ability to accurately estimate race and “enables academic researchers and litigators to conduct more reliable inference in states where registered voters are not asked to report their race.” PX269_0006; PX305_0016.

32. In this case, Dr. Barreto used the WRU package to generate the BISG race estimates for all contested elections for seats on the Board from 2013-2018. As Dr. Barreto testified, the Imai & Khanna study validated that package for use “across a variety of geographic locations.” Tr. 201:17-18 (Barreto). He further testified that the findings from Imai & Khanna's validation of Florida voters are particularly apt in the District because of their demographic similarities. Not only does Florida have a large Latino population, but it has “an extremely large Haitian population, as well as an extremely large population of Hasidic Jews.” Tr. 194:4-11 (Barreto).

33. Using the WRU package, Dr. Barreto aggregated the individual BISG race estimates at the group-level to create precinct-level demographic estimates, in the same way that

the RAND scientists recommended that it be used. Tr. 185:13-18, 185:23-186:4 (Barreto); PX305_0012, PX274_0001-3 (“The BISG method is intended to estimate differences at the group or population level; greater caution should be used in classifying specific individuals’ race/ethnicity.”); *compare to* PX242A_0003; *see also* Tr. 179:7-14, 179:21-180:1 (Barreto). Indeed, Dr. Barreto used BISG the same way that the authors in PX269, PX274, PX367, PX368, PX369, PX370, and DX101 used it—“to take the surname and geo-coded information to assign probabilities to people on a list of being different racial or ethnic groups, and then collapsing those down to the group level at the precinct level.” Tr. 2727:23-2728:6 (Barreto). Dr. Barreto testified that BISG, which is “a method to assign probabilities to different racial groups of people in a list,” is just as valid as an input to an EI model to predict vote choice by race as it is as an input to predict health outcomes, turnout, or campaign contributions by race. Tr. 2728:7-23 (Barreto).

34. Although BISG has been validated for use across geographic locations (Tr. 201:17-18 (Barreto)), Dr. Barreto explained why it was particularly reliable for the District. The conditions which enable BISG to work best are “ones where there’s more differentiation between names and more differentiation between racial populations of neighborhoods.” Tr. 201:17-21 (Barreto). First, with respect to surnames, the District has a large population of Latino voters that the Census identifies as having “very commonly occurring Spanish surnames” as well as black voters with commonly occurring black surnames and white voters with very high-occurring white surnames. Tr. 202:2-14 (Barreto). Moreover, the District has many Orthodox neighborhoods with names that are highly likely to be classified as white. *See, e.g.*, Tr. 470:10, 470:16-22, 480:5-12 (Barreto). Second, the District’s neighborhoods are residentially racially segregated “by a very high degree.” Tr. 202:18-20 (Barreto); *see supra* ¶ 6. Dr. Barreto used Census data to review block group maps of the District’s neighborhoods, which show that whites and minorities are highly segregated, with

many neighborhoods that are nearly 100% white and many other neighborhoods that are nearly 100% minority. *See* Tr. 210-17 (Barreto); PX305_0019-29. Although blacks and Latinos live together in some census block-groups, there is greater segregation among blacks and Latinos at the census block level, which is the information that BISG uses to perform geocoding. *See* Tr. 1672:13-1675:19 (Barreto); PX300; PX301. Moreover, even where blacks and Latinos live in the same neighborhoods, BISG is able to differentiate between them because “black and Hispanic surnames are very rarely overlapping.” Tr. 203:23-204:2, 208:5-10 (Barreto). Dr. Barreto concluded that “BISG would be expected to operate extremely well [in the District]” largely because the “pattern of residential segregation, with block groups that are 100 percent white near block groups that are 99 percent minority, is among the most high degree of residential segregation I have seen in my analysis of voting patterns.” Tr. 217:25-218:4 (Barreto).

b. BISG ecological inference analysis shows racially polarized voting in every contested election

35. Dr. Barreto’s EI analysis using BISG data showed high levels of racially polarized voting in every analyzed election. Under both EI methods, white voters showed high levels of cohesion with at least 60-80% of white voters voting in favor of the winning candidate in every election. PX305_0049. Black voters were also highly cohesive and voted for the losing candidate in every election. Dr. Barreto’s RxC showed consistent levels of 70-80% support by black voters for the losing candidates, while King’s EI showed levels of support that often exceeded 90% of black voters. *Id.* Latino voters were also highly cohesive and consistently voted for the losing candidate in every election. *Id.* Dr. Barreto’s RxC showed consistent levels of support by Latino voters for the losing candidate in the 60-70% range, while King’s EI showed levels of support in the 80-90% range. *Id.* Based on these results, Dr. Barreto concluded that black and Latino voters were cohesive as individual groups and cohesive together. In every contested election, “the

candidates who were preferred by a cohesive white voting block beat the candidates preferred by blacks and Latinos.” Tr. 289:14-290:1 (Barreto); PX242A_0004-7; PX243_0017.

c. Dr. Barreto validated his BISG/WRU findings using Catalist data

36. Dr. Barreto also validated his BISG analysis using data from Catalist. Catalist maintains a national database of over 240 million voting-age individuals (the “Catalist Database”) and provides data, analytics, and modeling services to political campaigns, civic organizations, and research institutions. PX258 (Ghitza), 21:13-17; *see also* <https://catalist.us/data>. Catalist uses the Catalist Database to build statistical models, including a race model (the “Catalist Race Model”), which estimates racial probabilities of eligible voters based on their first, middle, and last names, and the racial composition of their neighborhoods.¹ Like the WRU package, the Catalist Race Model uses surname and demographic data from the U.S. decennial Census, and augments that data with 30-40 million voter records containing self-reported race and several hundred thousand records from national surveys in which voters reported their race. PX258 (Ghitza), 75:24-77:23, 77:24-79:7; 86:20-87:3; *see also* Tr. 246:6-9 (Barreto); PX305_0032.

37. Dr. Barreto has extensive experience using Catalist data in his capacity as a professor, researcher, and consultant to many political campaigns. Tr. 242:9-14 (Barreto); PX305_0034. Based on his extensive experience, Dr. Barreto testified that Catalist data is “extremely accurate,” and Catalist is known for “having a very reliable race model.” Tr. 251:9-11, 252:10-21 (Barreto). During the time Dr. Barreto has worked with Catalist, the Catalist Race Model has undergone a number of validation trials and has won awards from political consulting and commercial groups for its accuracy. Tr. 251:24-252:3 (Barreto). Dr. Barreto has performed

¹ Political campaigns use those estimates to target outreach to particular racial groups (PX258 (Ghitza), 23:15-25), analyze turnout differences by race (*id.* at 24:3-7; 24:21-25:6), and design surveys to ensure representative samples by race (*id.* at 25:9-15).

numerous surveys on voters contained in the Catalist data and has confirmed through the self-reported races of those voters that Catalist data is very accurate. Tr. 252:3-21 (Barreto).

38. The Catalist Race Model has also been extensively validated by other political scientists and Catalist itself. *See* PX258 (Ghitza) 92:13-24; PX246_0002-3 (Dr. Ghitza validated the Catalist Race Model in 2018 and found that it predicted voters' race with accuracy varying between 83% to 90%). Dr. Fraga also compared estimates from the Catalist Race Model to the self-reported race of 41,419 survey respondents and concluded that Catalist "accurately coded the race of respondents at a rate of 91.40%." PX367_0006; *see also* PX369_0009 (Dr. Fraga found the Catalist Database were 93% accurate). In 2018, Dr. Yair Ghitza, Catalist's Chief Data Scientist, updated the Catalist Race Model with "minor improvements in statistical methods" and with "more recent Census data." PX258 (Ghitza), 51:13-17; 158:9-23. He then re-validated it. *Id.* at 92:18-24, and Ex. 2 at 2-3; 165:11-15; PX246_0002-3; *see also* Tr. 250:8-15 (Barreto).

39. Moreover, Catalist data has been relied on multiple times in VRA cases. *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 659-61 (S.D. Tex. 2014) ("Catalist data on ethnicity estimates are widely used in academic research and are considered highly reliable."); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 598 (E.D. Va. 2016) (characterizing the Catalist data as "seemingly trustworthy demographic data"); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 918 (W.D. Wis. 2016) (applying analysis derived from Catalist estimates).

40. Dr. Barreto performed his Catalist validation of the WRU/BISG method by using the District's 2017 voter file. He used the 2017 voter file because that was the only voter file Dr. Barreto had at the time. Tr. 254:15-20 (Barreto). Catalist took the District's 2017 voter file and ran the voters' names and addresses through the Catalist Race Model to generate race probability estimates for the voters. PX258 (Ghitza) 109:5-25; Tr. 248:2-4 (Barreto). Catalist then validated

those estimates by comparing them to the existing estimates for the same voters in the Catalist Database. PX258 107:14-17; PX305_0033. Dr. Barreto took the Catalist race estimates for the District's voters and analyzed them using King's EI and RxC. PX305_0051. He then compared the voter preference results that he got from using the Catalist data to the results he got using the WRU/BISG data and found that they produced consistent results. Tr. 254:21-24 (Barreto). Indeed, the Catalist voter preference estimates for white, black, and Latino voters were almost all within a few percentage points of the voter preference estimates generated by WRU/BISG. PX305_0051; PX242A_0007. Results from both methodologies showed that black and Latino voters voted cohesively both as separate groups and together for the losing candidates. Tr. 291:17-24 (Barreto).

d. Dr. Barreto's BISG results are consistent with racial voting patterns under other statistical techniques

41. Dr. Barreto also compared his BISG analysis to other analyses he had performed using CVAP and found that the BISG results were consistent. First, Dr. Barreto compared the results of his EI analyses of Board elections using BISG data to his results using CVAP data—all of which showed racially polarized voting with white-preferred candidates always defeating minority-preferred candidates. Second, Dr. Barreto performed an analysis of the 2012 Presidential election and found racial polarization in that race that was consistent with his BISG findings.

42. At the time Dr. Barreto was required to provide a preliminary report disclosing his methodology, ECF No. 138, the District had not produced all electronic voter files necessary to conduct BISG. So, Dr. Barreto took the CVAP data available at the time to begin analyzing voting patterns and to have another data set as a basis of comparison when he eventually received the voter files. Tr. 283:15-24 (Barreto). Because CVAP is sample data (rather than the complete voter file) and because the CVAP sample presented limitations on the ability to analyze the relatively small groups of black and Latino voters, Dr. Barreto combined those groups into a nonwhite (i.e.,

minority) category to increase the sample size and mitigate those data limitations. Tr. 284:1-14 (Barreto); PX 244B ¶ 30. He then input both white and nonwhite CVAP into King's EI and RxC to estimate voter preferences. Tr. 293:19-22 (Barreto). The results were consistent with the BISG analysis—white voters voted cohesively for the candidate who won and nonwhite voters voted cohesively for the candidate that lost. Tr. 293:25-294:5 (Barreto); PX305_0052; PX242B_0027.

43. Dr. Barreto also separately generated turnout and voter preference estimates for white voters using CVAP and then subtracted the white votes for each candidate from the total votes for each candidate (which came from the official election results) to understand how nonwhite (i.e., minority) voters had voted. Tr. 296:16-25 (Barreto); PX305_0055. This “election algebra” showed that whites provided cohesive support to the winning candidates and nonwhite voters provided cohesive support to the losing candidates. Tr. 300:14-22 (Barreto); PX305_0057; PX242B_0017-26. Further, the results showed both that it would be mathematically impossible for minority voters to have supported the winning candidates and that the white votes for the winning candidate was so large that even if all minorities voted together for the other candidate, they could not overcome the white bloc. Tr. 303:2-7, 304:9-16 (Barreto); PX305_0058-60.

44. Dr. Barreto also used CVAP data to analyze the 2012 Presidential election because there was more data and precincts, and higher turnout. Tr. 306:19-23 (Barreto). That analysis allowed Dr. Barreto to determine if the racial voting patterns he observed in the 2012 Presidential election were consistent with the patterns he observed in Board elections. *Id.* He determined that the 2012 Presidential election was also highly racially polarized, with whites voting cohesively for Romney and blacks and Latinos voting cohesively for Obama. Tr. 307:2-7 (Barreto); PX305_0062; PX242B_0031. The greater amount of data and increased variation among precincts gave Dr. Barreto even more confidence that his BISG results were accurate. Tr. 307:10-17.

45. In total, Dr. Barreto performed five different types of statistical analyses (BISG, Catalist, CVAP, Algebra, Exogenous). PX305_0064-65. Across 14 contested elections in the District, Dr. Barreto generated 202 separate point estimates for white, black, and Latino voter preferences. *Id.* Under every single analysis, across every single election, those point estimates all showed consistent white voting cohesion for the winning candidates and consistent black, Latino, and minority voting cohesion for the losing candidates. Tr. 352:23-353:14 (Barreto).

e. Dr. Barreto's BISG results are consistent with anecdotal evidence

46. Dr. Barreto's statistical analyses are also consistent with the anecdotal evidence. Although statistical evidence is a strong indication of cohesion between and among blacks and Latinos, "statistical evidence is not a sine qua non to establish cohesion," *Brewer v. Ham*, 876 F.2d 448, 454 (5th Cir. 1989), and courts will look to anecdotal evidence to demonstrate cohesion. *See United States v. Vill. of Port Chester*, 2008 WL 190502, at *25-27 (S.D.N.Y. Jan. 17, 2008) (*Port Chester I*); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994) (relying on anecdotal evidence to find political cohesion between blacks and Latinos); *Arbor Hill II*, 281 F. Supp. 2d at 448-49 (finding cohesion based solely on "anecdotal evidence of cooperation between Blacks and Hispanics on political and social issues"); *see also Pope I*, 687 F.3d at 572 n.5. The Court may consider testimony from community leaders that a minority group is cohesive and votes for the same candidates. *See, e.g., Pope II*, 2014 WL 316703, at *7; *Pope III*, 94 F. Supp. 3d at 334-35. Here, the anecdotal evidence is both substantive evidence of minority cohesion under *Gingles 2*, and, because it is consistent with Dr. Barreto's finding of racially polarized voting under *Gingles 3*, it lends greater confidence to those results.

47. In Board elections, consistent with the stark racial divide in public and private schools in the District, *see supra* ¶ 8, a large white voting bloc whose children attend private school

backs one slate, while the black and Latino community whose children attend public schools backs the second slate. PX243 ¶¶ 58-65 & n.71; Trial Tr. 1849:1-4 (Charles) (“when it comes to running for the school board, . . . you’re either working with [the] white community or you’re working with the other community.”); PX286 (Price) ¶ 12. The District’s own witnesses also recognize that black and Latino voters share electoral interests, describing the black and Latino communities jointly as the “public school community.” PX257 (District 30(b)(6) Dep.) 191:18-192:2; Trial Tr. 1238:11-14 (Germain), 2560:11-14 (Charles-Pierre).

48. Moreover, the candidates preferred by the black and Latino voters usually lose elections. PX280 (Clerveaux) ¶¶ 7-9; PX279 (Dos Reis) ¶ 11; PX283 (Fields) ¶¶ 67, 69-70; PX281 (Goodwin) ¶¶ 9, 11, 60-62; PX282 (Miller) ¶¶ 11-15; PX288 (Trotman) ¶ 6; Trial Tr. 1818:5-9 (Charles). Ms. Charles-Pierre testified that, between 2015 and 2018, “in every single contested race for School Board, the preferred candidates of black and Hispanics lost to the other candidates.” Trial Tr. 2572:15-22 (Charles-Pierre).² Other witnesses provided similar testimony. *See* PX80_0427, 774 (Horowitz) (“I hear we had over 9000 and they under 5000.”); PX81_0029, 40, 35 (Grossman) (“If there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3.”); Trial Tr. 1534:13-21, 1536:5-1539:20, 1546:5-19 (Grossman); *see also* Trial Tr. 990:23-991:11 (Horowitz) (the public school community is “getting weaker”), 997:1-6; PX88_0002 (Grossman) (referring to public school advocates: “They feel disempowered because they are.”).

49. The reason that minority-preferred candidates consistently lose is clear: “the majority of the white community does have all of the electoral power.” Tr. 2579:11-14 (Charles-

² Trial Tr. 2562:8-2563:-12, 2565:5-9, 2567:21-2569:7, 2570:13-16, 2684:24-2685:8 (Charles-Pierre).

Pierre), Tr. 2670:12-24 (Charles-Pierre) (the “white majority” “had all the real power”), Tr. 2571:16-22, 2563:17-23; PX80_0279 (Grossman) (writing about the outcome of the 2016 election: “It will be whatever we want it to be”); PX81_0050. Similarly, Mr. Charles testified that the Orthodox and Hasidic community “has the voting power to place anyone they want on the Board,” and “the leaders in the Orthodox and Hasidic community could replace us if they wanted to.” Trial Tr. 1816:22-1817:3 (Charles). Mr. Germain also admitted that in 2013, he “received approximately 90% of [his] votes from the Jewish community,” Trial Tr. 1254:15-21 (Germain).

50. In summary, the anecdotal evidence illustrates that black- and Latino-preferred candidates lose every election, while white-preferred candidates win every election. That evidence is consistent with Dr. Barreto’s statistical analysis, which also shows white-preferred candidates triumphing in every election and black- and Latino-preferred candidates always losing. To reject Dr. Barreto’s results would require a counterfactual scenario in which minority voters voted for candidates who made no effort to campaign for their votes, who promised no support for the schools attended by minority children, and who (with respect to incumbents) had a proven track record of taking steps to defund those schools for the benefit of white-only private schools. Such a scenario would defy both logic and common sense. The anecdotal evidence leaves little doubt that Dr. Barreto’s analyses are credible and reflect the true voting patterns of the District’s voters.

3. *Dr. Alford used less precise data and achieved inconclusive results*

51. Unlike Dr. Barreto, who used the actual voter file to analyze racial voting patterns, the District’s expert, Dr. John Alford, relied on a less precise data set CVAP containing all eligible voters in the District. Dr. Alford admitted that, based on that data, he was “not able to draw a conclusion of whether or not blacks or Hispanics are voting cohesively.” Tr. 2268:13-16 (Alford).

a. BISG is more accurate than CVAP

52. The evidence shows that BISG is more precise and more accurate than CVAP.

Despite Dr. Alford's inability to draw reliable conclusions using CVAP data, both he and Dr. Morrison claimed that CVAP was a better data set than BISG for analyzing voter preference using EI. *See, e.g.*, Tr. 2259:2-5 (Alford); Tr. 26:24-27:3 (Morrison). Dr. Barreto explained, however, that there are several reasons why CVAP data is less precise and produces less credible voter preference estimates than BISG when input into the EI model.

53. First, CVAP uses Census data with less survey coverage than the Census data used by BISG. *See* PX305_0036. CVAP is the Census Bureau's estimate of the voting eligible population and comes from the American Community Survey ("ACS"). Tr. 255:15-18 (Barreto). The ACS is a 10% sample of U.S. households that is taken over five years. Tr. 256:23-257:7 (Barreto). BISG, on the other hand, comes from the decennial census, in which the Census Bureau interviews 100% of U.S. households. *Id.* While BISG estimates racial probabilities for the voters based on information from 100% of the population, CVAP has to infer race estimates based on a 10% sample. Tr. 282:4-12 (Barreto). Moreover, because CVAP is data about eligible voters instead of actual voters, it requires a second level of inference to apply the 10% sample to the estimated voters. Tr. 282:12-17 (Barreto). Doing so introduces nonlinear bias into the estimates generated by using CVAP data because each precinct has different turnout by racial group. Tr. 282:17-18 (Barreto). That problem is particularly limiting when one tries to analyze blacks and Latinos, who typically turnout at lower rates. Tr. 284:7-12 (Barreto).

54. Second, there is a misalignment in the geographic overlay between the Census block groups from which CVAP data is derived and the precincts that contain the voters CVAP data is estimating. *See* PX305_0036. The goal of ecological inference is to determine how the voters in each precinct actually voted. For example, to determine how voters in New York voted, one would not want to use data from voters in Pennsylvania or New Jersey. Tr. 257:11-14

(Barreto). Rather, “[i]f we’re interested in people in a specific precinct, we want data on those specific precincts.” Tr. 257:14-16 (Barreto). “CVAP has what we call ‘geographic misalignment’ between census boundaries and precinct boundaries, whereas BISG has the exact same alignment.” Tr. 257:16-18 (Barreto). BISG uses the actual voter file, so the voters in the BISG data are a comprehensive set of all of the voters in each precinct and no one else. Tr. 258:23-259:7 (Barreto). CVAP, on the other hand, has to try and estimate who the voters in each precinct are. To do that, CVAP uses data about eligible voters that live in block groups (i.e., large neighborhoods) that are defined by the U.S. Census Bureau. Tr. 258:2-22 (Barreto). Voting precincts in the District, however, are defined by the District’s Board. *Id.* The problem is that the block group boundaries drawn by the Census Bureau and the precinct boundaries drawn by the District do not line up and thus there is a misalignment that results in CVAP trying to create estimates about voters in certain precincts by using data from census block groups that are in the vicinity of those precincts but not within the actual precinct boundaries. *Id.*; *see also* PX305_0037.

55. Third, CVAP data does not contain information about the actual voters. *See* PX305_0038. BISG uses the voter file and therefore has data on *actual voters*. *Id.* CVAP, on the other hand, uses data on the larger population of citizen adults who are eligible to vote and tries to estimate the actual voters. *Id.* In the District, for example, there are approximately 60,000 citizen adults who are eligible to vote. Tr. 259:15-260:4 (Barreto). But only about 13,000-14,000 of them actually vote. *Id.*; *see also* PX305_0039. The 47,000 nonvoters in CVAP introduce unwanted “noise” into the estimate and cause the data to be far less precise than BISG. Tr. 259:15-260:4.

56. In a paper he wrote with Professor Bernard Grofman, Dr. Barreto explained how CVAP data could provide turnout estimates for the jurisdiction but was not able to produce reliable precinct-by-precinct estimates necessary for EI analysis. Tr. 264:11-19 (Barreto); PX364. Drs.

Barreto and Grofman identified that relying on census data like CVAP introduced error in the form of inaccurate turnout estimates into the EI models that estimated voter preference. Tr. 2711:8-24 (Barreto); PX364_0003. To mitigate the problem, they proposed a “double equation regression technique” to first estimate voter turnout and then make adjustments to the CVAP data before estimating voter preference. But they ultimately concluded that, even using such an adjustment, the voter preference estimates derived by using voter file data were always going to be more accurate than those derived using census or CVAP data. Tr. 2712:5-16; PX364_0010.

57. The “turnout problem” with CVAP is amplified in VRA cases because CVAP affects different races differently. Tr. 265:24-266:2, 266:7-268:5 (Barreto); PX305_0042. Specifically, CVAP “assumes, without justification, that racial groups vote in proportion to their size.” DX62 (Alford) ¶ 24. But, as Dr. Alford recognized, “studies have disproven that assumption. Typically, Black and Latino populations have significantly lower turnout than White voters.” *Id.*

58. Indeed, analysis performed by Dr. Alford’s assistant in this case, Dr. Randolph Stevenson, proves conclusively that CVAP overestimates black and Latino turnout (and underestimates white turnout) relative to the estimates produced by BISG voter file data. Specifically, Dr. Stevenson used Dr. Barreto’s BISG/WRU script to generate BISG race estimates. *See* Tr. 2348:4-8, 2348:14-21, 2349:6-14 (Alford). The parties stipulated that PX183 contained Dr. Stevenson’s results. Tr. 233:19-234:6. At trial, Dr. Barreto examined the data in PX183 and explained that it contained a comparison, of the difference in turnout rates by race by precinct between CVAP and BISG for the District’s 2015 and 2017 elections. Tr. 269:13-270:20, 271:16-272:9 (Barreto); PX305_0044. Because BISG uses the actual voter file to calculate turnout the BISG numbers in PX183 are more reliable than the CVAP estimates. Tr. 276:19-277:4 (Barreto). Dr. Barreto was able to draw a number of conclusions based on PX183.

59. First, CVAP overestimated black turnout in nine out of ten precincts. Tr. 272:11-19 (Barreto). In some precincts, CVAP dramatically overestimated black turnout. Tr. 272:22-274:10 (Barreto). In total, CVAP overestimated black turnout by 25% or more in eight of the ten precincts, and by more than 57% in four precincts. PX305_0046 (black data; “Abs % diff”). Second, CVAP overestimated Latino turnout in nine out of ten precincts. Tr. 274:14-275:8 (Barreto); PX305_0046. In total, CVAP overestimated Latino turnout by 32% or more in seven of the ten precincts, and by 55% or more in five precincts. *See* PX305_0046 (Latino data; “Abs % diff”). Third, CVAP systematically underestimated white turnout in every precinct. Tr. 275:13-17 (Barreto); PX305_0046. In some precincts, CVAP dramatically underestimated white turnout. Tr. 275:17-276:14 (Barreto). In total, CVAP underestimated white turnout by 20% or more in six precincts (a seventh was underestimated by 19.4%), and by more than 32% in three precincts. *See* PX305_0046 (white data; “Abs % diff”). Fourth, the net effect of CVAP overestimating black and Latino turnout and underestimating white turnout is that EI estimates of voter preference relying on CVAP underestimate the amount of racially polarized voting. Tr. 281:15-20 (Barreto). Several precincts in the Berkowitz-Manigo election in 2017 illustrate that effect. For example:

- Berkowitz received 75% of the vote in precinct 5. CVAP estimated that whites constituted only 55% of the voters in that precinct, meaning that, under a CVAP analysis, it appeared that Berkowitz must have received at least 20% of the votes from minorities. However, corrected turnout using BISG shows that 80% of the voters in precinct 5 were white, meaning that Berkowitz could have received all of his support from white voters without the need for any cross-over minority votes. Tr. 277:5-282:3 (Barreto); PX305_0047.
- Berkowitz received 74% of the vote in precinct 7. CVAP estimated that whites constituted only 61% of the voters in that precinct, meaning that, under a CVAP analysis, it appeared that Berkowitz must have received at least 13% of the votes from minorities. However, corrected turnout using BISG shows that 80% of the voters in precinct 7 were white, meaning that Berkowitz could have received all of his support from white voters without the need for any cross-over minority votes. Tr. 277:5-282:3 (Barreto); PX305_0047.

60. With BISG data, the false “minority crossover” voting implied by CVAP goes away and EI “more naturally converge[s] on the true answer.” Tr. 281:18-282:3 (Barreto). As a result of

CVAP's problems, Dr. Barreto testified that in his experience as political scientist and statistician, "BISG is a better data set to use for ecological inference than CVAP." Tr. 284:17-20.

b. Dr. Alford admits that CVAP is a "bad data set"

61. Consistent with Dr. Barreto's testimony, Dr. Alford admitted that CVAP was not a good data set for EI because it did not use "the number of actual voters from each racial group." Tr. 2335:4-17 (Alford); DX62 (Alford) ¶ 24 ("First, Dr. Cole did not use a good data set, because he did not start with the number of *actual voters* from each racial group when conducting his EI analysis. Instead he started with estimates of the citizen voting age population (CVAP) for each precinct...."). Indeed, Dr. Alford admitted that CVAP is problematic because it assumes without justification that racial groups vote in proportion to their size, when in fact, blacks and Latinos typically have lower turnout rates than whites. DX62 ¶¶ 24, 25. Dr. Alford also cited the article by Drs. Grofman and Barreto for the proposition that using CVAP as a proxy for turnout was "inputting error in the nature of the independent variable." Tr. 2335:25-2336:2 (Alford); DX62 ¶ 25; PX364_0001-2. Dr. Alford also acknowledged that Gary King, the creator of EI, recognized the CVAP turnout problem. Tr. 2336:3-2336:9 (Alford); DX62 ¶ 25 (citing 2017 King Article).

62. In criticizing CVAP, Dr. Alford opined that using a variant of BISG could correct for this flaw in the CVAP data. *See* Tr. 2336:14-19 (Alford) (opining that the flaw could be corrected by estimating "voter turnout by race using surnames and voter sign-in records"); DX62 ¶ 26. Using the voter file and performing surname analysis is, of course, the first part of the process of BISG. And the 2009 RAND article concluded that adding the geocoding step in the BISG process constituted a 41% improvement over surname analysis alone. DX101_0001. Indeed, in support of his opinion that starting with the voter file could account for the flaw in CVAP data, Dr. Alford cited to the same Imai & Khanna WRU/BISG validation study that Dr. Barreto followed to generate his BISG race estimates. Tr. 2336:14-2337:13 (Alford); DX62 ¶ 26 n.17 (citing

PX269).

63. At trial, Dr. Alford claimed that he had used the Grofman & Barreto article to correct for some of the error in CVAP by implementing a double equation regression or double equation EI to estimate turnout by race at the precinct level. Tr. 2208:4-2210:17 (Alford). But there is no evidence in this case to support that. At one point, Dr. Alford claimed to have performed a double regression on the CVAP data before he input it into EI. *See* Tr. 2292:2-9. However, as Dr. Barreto testified on rebuttal, there was no evidence produced in this case that Dr. Alford had applied any such model to the CVAP data prior to inputting it into EI. Tr. 2711:3-7 (Barreto). At another point, Dr. Alford claimed that the double regression was happening simultaneously within RxC to estimate turnout by race at the precinct level. *See* Tr. 2208:4-15, 2210:10-17 (Alford). But Dr. Barreto analyzed Dr. Alford's scripts and testified that there were no commands within those scripts that would have allowed the program to run a double regression or double equation to estimate turnout by race at the precinct level. Tr. 2714:2-2723:11 (Barreto).³ Thus, there is no evidence to support Dr. Alford's assertion that he supposedly had done something that would have corrected the turnout flaw identified in the CVAP data. Tr. 2723:7-11 (Barreto).

c. Dr. Alford's results using more accurate BISG data show racially polarized voting and corrected black and Latino turnout

64. In light of Dr. Alford's admissions that CVAP data is flawed and voter file data is better, it is telling that when Dr. Alford did use voter file data, namely BISG estimates from Catalyst to analyze the 2017 election, his results showed racially polarized voting in the District's elections. Tr. 2197:12-16 (Alford). His results showed a majority of white voters voted for the winning

³ Rather, Dr. Alford's scripts used a "single equation approach" that inappropriately estimated candidate choice and "no votes" at the same time and thus improperly introduced error from the CVAP "input variable." Tr. 2717:2-2723:6 (Barreto). Dr. Barreto testified that the double equation approach was superior to the single equation. Tr. 2708:8-2709:2 (Barreto).

candidate, and a majority of black and Latino voters voted for the losing candidates. DX67_0019.

d. Dr. Alford admits his CVAP analysis of black and Latino voting patterns is not statistically reliable

65. Given Dr. Alford's testimony about the flaws in CVAP data, it is not surprising that he ultimately concluded that his own CVAP EI results were not statistically significant. Dr. Alford admitted that he was unable to conclude whether blacks or Hispanics voted cohesively using CVAP. Tr. 2268:13-16. He explained that there were three data challenges in the District that prevented him from drawing such a conclusion: 1) the number of minority voters in the District; 2) the concentration of minorities across voting precincts; and 3) the number of voting precincts. Tr. 2275:219-2276:6 (Alford); DX67_0009.

66. Dr. Barreto agreed that CVAP exacerbated these "sample size considerations" because CVAP data is based on a 10% sample and provides data about eligible voters instead of actual voters. Tr. 282:13-17, 284:5-12 (Barreto). However, Dr. Barreto used the same CVAP data that Dr. Alford used and addressed the sample size challenges by grouping black and Latino voters into a larger "nonwhite" population to increase the sample size and ran EI using CVAP data for whites and nonwhites. Tr. 284:7-14; 2749:7-11 (Barreto). The results of Dr. Barreto's white/nonwhite CVAP EI analysis showed that white voters voted cohesively for the winning candidates and nonwhite voters voted cohesively for the losing candidates. *See Supra* ¶ 42.

e. Election Algebra uses Dr. Alford's method to prove racially polarized voting

67. Dr. Barreto was able to overcome the sample size considerations identified by Dr. Alford in yet another way by using information about white voters doing basic algebra. Dr. Alford testified that white voters voted cohesively (70 to 80 percent) for winning candidates in every election from 2013 to 2017. Tr. 2267:20-2268:4, 2353:6-10 (Alford) (opining that the confidence intervals gave him confidence in his results for white voters). Dr. Barreto used Dr. Alford's method

and conclusions to demonstrate racially polarized voting. Tr. 295:7-14 (Barreto). Specifically, Dr. Barreto took the total votes for each candidate, subtracted the number of white votes for each candidates (which came from EI estimates of turnout and vote choice using CVAP), and was able to determine how many votes minorities gave to each candidate. Tr. 296:16-25, 297:11-13, 297:23-298:1 (Barreto); PX305_0055; PX242B_0017-26. The “election algebra” showed conclusively that white voters voted cohesively for the winning candidates and nonwhite voters voted cohesively for the losing candidates.⁴ *See supra* ¶ 43. The election algebra also showed that even if every single minority voter voted for the losing candidate, that candidate would still lose by thousands of votes. Tr. 304:9-16 (Barreto). Dr. Barreto tested this conclusion by plugging Dr. Alford’s own CVAP:EI results into the formula, and testing them at the lowest possible confidence bound for white voting preference, and found that even at the lowest theoretical level, the white voting bloc was still too powerful for minority voters to overcome. Tr. 306:2-8 (Barreto).

4. *The District’s criticisms of Dr. Barreto and BISG are unpersuasive*

68. At trial, the District lodged several criticisms against Dr. Barreto’s work, all of which are unpersuasive and contradicted by the weight of the evidence.

a. The 95% confidence interval is not dispositive (or even useful where, as here, there are consistent patterns across many results)

69. The District claims that any of Dr. Barreto’s results that do not show racially polarized voting to a 95% confidence interval should be discarded. *See, e.g.*, Tr. 2155:16-2177:13 (Alford). Dr. Alford claimed that rejecting any result that does not meet a 95% confidence

⁴ Although Dr. Alford criticized election algebra, he had previously used the same methodology to prove a similar point. DX67_0004-5 (Alford Report) (“For example, if we know that a precinct has 100 voters, that 98 of those voters are black, and that 99 people voted for a particular candidate, then we know with complete certainty that at least 97 of the Black voters voted for that candidate, and that at most 98 did.”); Tr. 298:16-299:8 (Barreto); PX305_0056. Moreover, Dr. Alford could not identify any errors in how Dr. Barreto performed his calculations. Tr. 2350:18-20 (Alford).

threshold is an accepted practice in political science. Tr. 2170:13-15 (Alford). However, Dr. Barreto testified that there is no such scientific consensus; instead the use of confidence intervals depends entirely on the type of question being posed and the type of research being performed. Tr. 348:10-16 (Barreto). Some peer-reviewed papers report confidence intervals, while others draw conclusions based on seeing consistent patterns in the results. Tr. 348:20-349:2 (Barreto) (explaining that there is no consensus among the academic journals regarding the use of confidence intervals). Moreover, confidence intervals are more useful when performing hypothesis testing on a *sample* of data. Tr. 348:16-18 (Barreto). They are less useful in cases like this one where the entire universe of voter data for every precinct is available. Tr. 347:19-348:9 (Barreto).

70. But even granting 95% confidence intervals the level of significance to which Dr. Alford ascribed them, Dr. Barreto's results still show a consistent pattern of racially-polarized voting across elections. For example, none of the confidence intervals for estimates of white voters cross below the 50% threshold for the winning candidate in any of the 14 contests Dr. Barreto analyzed using WRU/BISG. Tr. 1683:6-9 (Barreto). Likewise, the confidence intervals for estimates of black voting preferences for losing candidates do not cross below the 50% threshold in 12 of the 14 contests Dr. Barreto analyzed.⁵ Tr. 1677:22-1684:11 (Barreto). For the two elections where the lower tail of the confidence interval for black voters does fall below 50% using RxC, the lower tail is barely below 50%, indicating that the outcome is very unlikely to occur. Tr. 1679:2-21 (Barreto); Tr. 1681:24-1682:10 (Barreto); PX242B_0042; PX242A_0042. Although the confidence intervals for Latino voters are wider, the point estimates are highly consistent in favor of the losing candidate in all 14 contests. Tr. 1684:12-1685:9 (Barreto).

⁵ Moreover, based on the standard errors, it is almost certain that *none* of the confidence intervals for black voters cross below the 50% threshold for the losing candidates in any of the 14 elections Dr. Barreto analyzed using WRU/BISG and King's EI. Tr. 1680:21-23.

71. Dr. Barreto also gave several reasons why his results are reliable notwithstanding the confidence intervals. First, the point estimates are “the most probable outcome statistically and from a probability perspective, in every instance, the point estimates in the ecological inference models point to racially polarized voting.” Tr. 352:13-18 (Barreto); PX305_0064. Indeed, Dr. Alford agreed that the point estimates are the most probable value. Tr. 2351:20-23 (Alford).

72. Second, the data pointed in the same direction across every analysis that Dr. Barreto performed. He ran King’s EI and RxC with BISG, Catalist, and CVAP data, used election algebra to determine nonwhite voting patterns, and analyzed the Presidential election to see how blacks, Latinos, and whites voted. Across all five analyses, he identified consistent racially polarized voting. Tr. 352:23-353:14 (Barreto). In total, Dr. Barreto analyzed 14 separate elections and generated 202 separate point estimates for white, black, and Latino voting preferences. *Id.* Across each analysis, whites voted for the winning candidate, and blacks and Latinos voted for the losing candidate. *Id.*; Tr. 353:22-25 (Barreto); PX305_0064-65. Dr. Barreto explained that those consistent patterns gave him “a lot of security in [his] conclusions.” Tr. 353:12-14 (Barreto).

73. Dr. Alford agreed that if he were to see “similar results from different analyses,” he would “feel more comfortable with those results.” Tr. 2353:23-2354:2 (Alford). He agreed that “similar results repeating year after year” would constitute a “pattern.” Tr. 2354:6-8 (Alford). He also agreed that if he saw the same pattern of racially-polarized voting in eight out of ten elections, that those results were “unlikely to be explained as a random event.” Tr. 2355:20-25 (Alford). And he admitted that in a different case in which he had not supplied confidence intervals with his results he testified under oath that “if you look across the set of eight primaries, and you see exactly the same results in every primary, it really doesn’t matter what the individual confidence values are” and that he could be confident in those results “without knowing the confidence intervals.”

Tr. 2356:11-2358:9 (Alford); PX322_0027-28. If confidence intervals were not necessary when Dr. Alford saw the same results in 8 elections in a row, they are certainly not necessary here, where Dr. Barreto identified the same results in 14 elections. *See, e.g.*, PX305_0065.

74. Third, Dr. Barreto explained that rather than rejecting results out of hand if they fail to meet a 95% confidence interval, it is more appropriate to use probability analysis to determine how likely it is that the results would cross the 50% threshold. Tr. 341:11-20, 343:4-11 (Barreto); PX305_0066. Dr. Barreto performed probability analysis on an election (2015 Rothman-Morales) that Dr. Alford had rejected because it did not meet a 95% confidence interval. *See* PX305_0067. Dr. Barreto used Dr. Alford's CVAP estimates from that election to show that there was only a 3.5% chance that Morales was not the Latino-preferred candidate. Tr. 343:13-347:4; PX305_0068.

75. Fourth, Dr. Barreto used BISG to analyze the nominating petitions from contested elections without an incumbent candidate to determine which racial groups were providing support to which candidates. Tr. 355:24-356:6 (Barreto); PX305_0069. That analysis showed that the winning candidates received an overwhelming majority of signatures from white voters (all over 80%), while the losing candidates received the majority of signatures from black and Latino voters. Tr. 357:22-358:9 (Barreto); PX305_0070; PX242A_0018. Dr. Barreto explained that the racial support for these candidates on their nominating petitions mirrored the racially polarized voting results from his analyses and gave greater confidence in those results. Tr. 358:9-15 (Barreto).

76. In summary, Dr. Barreto credibly explained the basis for his confidence in his racial voting analysis and this Court finds that Dr. Barreto's analyses are reliable, notwithstanding confidence intervals that do not meet 95% for a subset of Latino voters.

b. BISG is not new or experimental and Dr. Barreto used it in the way the academic literature instructs

77. The District challenged Dr. Barreto's use of BISG by offering Dr. Morrison.

However, Dr. Morrison has no political science or statistical expertise in how BISG is calculated; rather, he admitted that his role in the 2009 article about BISG was “to simply go over the description of the demographic work and the Census Bureau’s efforts to construct surname lists and make sure that what they were describing was up-to-date in terms of what the Census Bureau was doing.” Tr. 70:4-14 (Morrison); PX339_0002; *see also* Tr. 55:14-57:3 (Morrison).

78. Perhaps because Dr. Morrison is not an expert statistician or political scientist, he appeared confused regarding how BISG worked. Dr. Morrison described the aggregating process that BISG performed to make precinct level race estimates as “getting pieces of people assembled into populations that can be compared,” and then criticized it because he couldn’t take a particular voter and “tell you what that person would self-identify.” Tr. 21:17-25. Dr. Barreto explained that Dr. Morrison’s explanation was very confusing and completely missed what Dr. Barreto did in this case. Dr. Barreto did not attempt to determine whether an individual person who casts a ballot self-identifies one way or the other; rather, he used the probabilities generated by BISG/WRU, aggregated them to the precinct level and used them to estimate the racial makeup of the people who voted, as the literature instructs. Tr. 187:13-21 (Barreto); DX102_0001-3; PX305_0012.

79. Moreover, Dr. Morrison’s testimony is completely at odds with the statements he had made in his prior published academic work. In a 2017 paper that Dr. Morrison co-authored in *Social Science Quarterly*, he wrote that using BISG, “one could assign a race to registrants in a voter file where this quantity is not present and then aggregate these individuals by a geographic unit such as a voting precinct. Of course, since one must estimate vote choice, an ecological estimation technique must still be used.” DX99 (2017 Hood Article) at 12 n.21. In support of that assertion, Dr. Morrison cited to the Imai & Khanna article that Dr. Barreto relied on in this case. *Id.* (citing PX269). At trial, Dr. Morrison tried to recant this part of his peer-reviewed article by

claiming that he only provided the information in a footnote and did not intend for anyone to rely on it sometime in the future (Tr. 29:3-30:4 (Morrison)), but as Dr. Barreto explained, a footnote would not be included in a peer-reviewed journal unless it was intended for readers to rely on it and had a sound basis in science. Tr. 199:7-201:12 (Barreto). Moreover, Dr. Barreto testified that the way Dr. Morrison and his colleagues recommended using BISG was “exactly the way we did in this case.” Tr. 201:11-12 (Barreto).

80. Dr. Morrison claimed that BISG would not work well in the District because “one’s immediate neighborhood location does little to improve an estimate of one’s race/ethnicity.” DX70 ¶ 35; *see* Tr. 64:7-65:1; PX339_0002. However, Dr. Morrison admitted that he had not actually performed any analysis of the residential racial segregation in the District. Tr. 83:15-17 (Morrison). Moreover, Dr. Barreto had reviewed Census data on racial residential patterns in the District and testified that BISG would be expected to work very well because the District was highly residentially racially segregated, with many neighborhoods close to 100% white or 100% minority and that even in neighborhoods containing blacks and Latinos, the Spanish surname list would allow BISG to clearly differentiate between them. *See supra* ¶ 8; PX305_0019-29.

81. Dr. Alford also claimed that nothing in the existing literature “tests whether [BISG] can be used to accurately predict racial voting.” Tr. 2258:2-7 (Alford). But Dr. Barreto explained that Dr. Alford was confused; Dr. Barreto did not use BISG to predict racial voting, he used it to assign racial probabilities to the District’s voters and to aggregate those probabilities to the precinct level, exactly as the published literature instructs. Tr. 2727:11-2728:6 (Barreto). Dr. Alford also claimed that none of the political science articles listed on PX305_0015 “supports Dr. Barreto’s use of BISG in this case.” Tr. 2217:2-2218:14 (Alford). Dr. Barreto, however, explained that BISG is “a method to assign probabilities to different racial groups of people on a list” and that he had

generated those probabilities in the exact way that the academic literature instructs and was using them to predict outcomes in the exact same way that the authors listed on PX305_0015 did. Tr. 2728:7-23, Tr. 2721:10-2728:6 (Barreto).⁶ In summary, each criticism of BISG lodged by Drs. Morrison and Alford falls flat for the reasons explained by Dr. Barreto and the academic literature.

c. Catalist has been verified extensively

82. As explained above, the Catalist Race Model has been validated extensively. PX305_0034. Unable to refute those validations, the District made two separate criticisms of the race estimates generated by the Catalist Race Model. First, the District claimed that the Catalist Race Model was generating “systematic” errors by misclassifying the race of individual voters. To try to support that claim, the District used a list of what the District claimed were 209 names that the District believed had been coded in error, and confronted Dr. Barreto with names such as Rubin, Cohen, and Braun that it claimed belonged to white voters. Dr. Barreto explained that he was not using Catalist data to predict individual race classifications—both because the academic literature instructed not to use it that way and because the information was much more accurate at the group level—and therefore, the purported errors would not affect his analysis. Tr. 1686:8-22 (Barreto). And in any event, even if all of the 209 names on the District’s list had been coded in error, those 209 entries would constitute 1.4% of the 14,657 voters, falling well within the validation rates for the Catalist Race Model. Tr. 1685:18-1686:4 (Barreto).

83. Dr. Barreto explained that to determine whether Catalist data had a consistent pattern of misclassification, “we would look at every single person named Rubin in the list . . . and my guess is that overwhelmingly they are assigned to a race that you would assume is correct.”

⁶ Dr. Barreto also explained that Dr. Alford’s criticism was based on errors that Imai & Khanna identified regarding individual level race predictions, but that was not how Dr. Barreto was using it in this case. Tr. 2729:11-23, 2731:5-25 (Barreto).

Tr. 481:13-482:4 (Barreto). And indeed, when Dr. Barreto reviewed the names the District had confronted him with, he determined there was no systematic or consistent error at all. Quite the opposite: 37 of the 40 Rubins in the Catalist file were coded as most likely white; 53 of 56 Cohens were coded as most likely white; and 116 of 117 Brauns were coded as most likely white. *See* Tr. 1687:11-1694:15 (Barreto); PX302; PX303; PX304.⁷ The logical conclusion is that the District's attempt to fashion a "systematic error" was little more than cherry-picking.

84. Second, the District claimed that Catalist data was unreliable because it had coded two people with the same last name and address with different race probabilities. Tr. 2255:6-2257:5 (Alford). Dr. Alford could not explain why the probabilities for those two individuals might be different, claiming the "unexplained" differences caused him to have concerns about the entire Catalist methodology. Tr. 2256:5-13 (Alford). However, he later admitted that the two individuals might have been coded differently on the basis of their first names, which are considered by the Catalist Race Model. Tr. 2341:9-2343:15. Dr. Barreto also explained that the Catalist race model took into account self-reported surveys and updated its model accordingly. Tr. 246:6-9 (Barreto).

85. The District also asked the Court to disregard Dr. Barreto's results using Catalist because Dr. Alford achieved different results when he analyzed the Catalist data. Although all point estimates in Dr. Alford's analysis showed racially polarized voting, just like Dr. Barreto's did, the amount of polarization that Dr. Alford identified was somewhat lower. DX70_0019. Dr. Alford admitted that he did not know the reason for that difference. Tr. 2198:18-19 (Alford). What Dr. Alford failed to address was that Dr. Barreto performed ecological analysis using both BISG/WRU data and Catalist data and got consistent results from both data sets (as would be

⁷ The District scrubbed the entire Catalist list again with Dr. Alford in an attempt to identify more purported "errors" of the same type, but only came up with 325 out of 14,657 voters, or approximately 2% of the voters from the Catalist file. Tr. 2347:23-2348:2 (Alford).

expected). Tr. 254:21-24; PX305_0051. Out of the three types of analysis on the same elections, Dr. Alford's results were the only ones that did not match.

d. The District's criticisms of Dr. Barreto's scripts ring hollow

86. The District also attempted to undermine Dr. Barreto's analysis by making several claims about the scripts he produced in this case. The District's primary criticism was that Dr. Alford's assistant, Dr. Stevenson, was unable to get Dr. Barreto's BISG scripts to run. Dr. Barreto testified that his scripts were primarily generated by Dr. Collingwood, a colleague of Dr. Barreto's who has produced similar scripts in peer-reviewed articles, in support of expert testimony, and as part of their political consulting work. Tr. 165:1-166:6 (Barreto). Dr. Collingwood programmed those scripts to generate race estimates and voter preference consistent with the instructions in the Imai & Khanna article and the code from Imai & Khanna's WRU package. Tr. 237:8-19 (Barreto). Moreover, Dr. Barreto testified that he produced all of the scripts he used to calculate his analysis and Dr. Alford and Dr. Stevenson had "everything they needed to run the replication." Tr. 234:15-17 (Barreto). According to Dr. Barreto, any political scientist could have executed the scripts. Tr. 236:8-15 (Barreto). Moreover, Dr. Alford admitted that Dr. Stevenson informed Dr. Alford that he had gotten Dr. Barreto's scripts to run. Tr. 2348:4-2349:14. The District also stipulated that PX183 contained Dr. Stevenson's results. Tr. 233:19-234:6. As such, the District and Dr. Alford's criticism of Dr. Barreto's scripts are entitled to no weight.

87. The District also made several other trivial complaints about Dr. Barreto's scripts, each of which can be disposed of quickly. First, the District claimed that Dr. Barreto's scripts were flawed because they did not calculate error rates for the BISG estimates. Dr. Barreto explained that the scripts calculated racial probabilities rather than race predictions and error rates, and that they did so based on how the academic literature instructed. Tr. 218:14-24 (Barreto).

88. Second, the District claimed that Dr. Barreto must have manipulated the scripts to

selectively produce different measures of uncertainty depending upon the analysis. Dr. Barreto explained that the program running King’s EI had a default setting to report standard errors and Dr. Barreto did not modify the default setting. Tr. 1675:20-1677:9 (Barreto).⁸ In any event, standard errors could easily be converted to confidence intervals and vice versa, so Dr. Alford had all of the information needed to analyze either one had he so chosen. Tr. 1676:18-1677:9 (Barreto).

89. Third, the District claimed that Dr. Barreto’s scripts were defective because they did not generate interim BISG race estimates prior to calculating vote choice. As Dr. Barreto explained, he followed the code published by Imai & Khanna in their WRU package and that the race estimates “are just sort of generated in the background of the program, and as those BISG estimates get generated, they then just get plugged into the precincts and then the precinct analysis is done.” Tr. 237:8-19 (Barreto). As Dr. Barreto further explained, there was no an “interim printout of BISG race estimates” as part of that process. *Id.* Dr. Barreto explained that if someone wanted to generate such interim results, he or she could program the package to stop and “spit out tables of BISG race at the precinct level.” Tr. 237:20-238:7 (Barreto). And Dr. Stevenson did precisely that. As such, the District’s criticisms of Dr. Barreto’s scripts are unpersuasive.

III. THE TOTALITY OF CIRCUMSTANCES

A. Senate Factor 4: There is a Candidate Slating Process for the Winning Slate that is Not Open to Minorities

1. *Legal standard for Senate Factor 4*

90. Under Senate Factor 4, courts consider whether there is a candidate slating process and whether access to the same is denied to minorities. *Gingles*, 478 U.S. at 45.

⁸ The District has also implied that Dr. Barreto inconsistently applied various analyses selectively for different years in order to achieve desired results. *See, e.g.*, Tr. 2177:14-2178:11 (Alford). That criticism is both incorrect and highly misleading. In fact, Dr. Barreto performed his analyses consistently over each election and explained why. Tr. 284:21-286:20; PX305_0048.

91. Slating is “a process in which some influential non-governmental organization selects and endorses a group or ‘slate’ of candidates, rendering the election little more than a stamp of approval for the candidates selected.” *Westwego Citizens for Better Gov’t v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991). The slating organization may be “official or unofficial,” *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1569 (11th Cir. 1984), but its “purpose is to recruit candidates, nominate them, and campaign for their election.” *United States v. City of Euclid*, 580 F. Supp. 2d 584, 608 (N.D. Ohio 2008). Plaintiffs can prove the existence of a slating organization by showing that the endorsement of an influential group guarantees victory. *See Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1122-23 (E.D. La. 1986) (finding a slating organization because it was “extremely difficult to win” without the endorsement of a father-and-son duo), *aff’d*, 834 F.2d 496 (5th Cir. 1987). Community members who endorse candidates may qualify as a slating group when it is “extremely difficult to win . . . without [their] endorsement.” *Gretna*, 636 F. Supp. at 1123.

92. Courts assess whether a slating organization has minority members and whether the slating organization is actually—rather than theoretically—open to minority participation. *See McIntosh Cty. Branch of the NAACP v. City of Darien*, 605 F.2d 753, 757 (5th Cir. 1979) (“lack of minority access to the slating process . . . is broader than minority members’ ability to be placed on the ballot”); *U.S. v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 444-45 (S.D.N.Y. 2010) (*Port Chester II*) (“a system that provides only a theoretical avenue for minority . . . candidates to get their names on the ballot while for all practical purposes making it extremely difficult for such candidates to have a meaningful opportunity to participate does in fact contribute to a violation of Section 2”); *Harper v. City of Chicago Heights*, 1997 WL 102543, at *9 (N.D. Ill. Mar. 5, 1997). A slating process is racially exclusive where minorities do not “have any choice in determining

what issues or candidates should or should not be endorsed.” *Gretna*, 636 F. Supp. at 1123.

93. A slating process is not racially inclusive merely because it recruits, endorses, and secures the election of a few “safe minority candidates.” In *Goosby v. Town Bd. of Hempstead (Goosby III)*, the Second Circuit held that minorities lacked meaningful access to the majority’s slating procedures where the only black candidate selected to run on the majority slate was “a black crony” of the local Republican Party. 180 F.3d 476, 496-97 (2d Cir. 1999). In *McNeil v. Springfield*, the court looked at the donations of a black candidate to determine that the “full machinery of the party organization [was] behind her” in holding that the white community in power sought to evade Section 2 by “by manipulating the election of a ‘safe’ minority candidate.” 658 F. Supp. 1015, 1031 (C.D. Ill. 1987). And in *Harper v. City of Chicago Heights*, the court evaluated whether the local slating organization, Concerned Citizens Party, intentionally selected minority candidates for their platform in order to split the minority vote and elect a “‘safe’ minority candidate.” See 824 F. Supp. 786, 805-806 (N.D. Ill. 1993); *Velasquez v. Abilene*, 725 F.2d 1017, 1022-23 (5th Cir. 1984) (reversing lower court’s decision where the court “failed to mention any of the evidence presented by the plaintiffs that the minority candidates slated by the [majority organization] were not true representatives of the minority population in the city of Abilene.”).

2. *Factual analysis for Senate Factor 4*

94. The outcome of Board elections is determined by whether a candidate is endorsed by the white, dominant, private school slating organization that ensures the election of white-preferred candidates, including “safe” minority candidates. Candidates running with the support of this slating organization are vetted and/or selected by influential people in the white private school community. PX242A ¶ 37; Tr. 372:19-374:5 (Barreto).

95. Evidence of this slating organization is abundant. First, Dr. Barreto, testified that the repeated occurrence of two-candidate elections over the past decade indicates “organizational

control over ballot access.” PX242A ¶ 43; Tr. 377:4-378:13 (Barreto). Second, winning and losing candidates separately received nearly identical vote totals in every contest, which indicates the presence of an operative slating organization. PX242A ¶¶ 44-53; Tr. 379:20-383:25 (Barreto).

96. Third, the dominant slating organization shares many characteristics with exclusive slating processes described in the literature. PX242A ¶¶ 36-55; Tr. 372:19-388:24, 389:19-395:6, 390:15-397:12 (Barreto). Dr. Barreto, relying on a seminal study on informal slating, opined that powerful and exclusive slating organizations typically refuse minority participants access to the nominating process by “vesting authority in a handful of community leaders who were largely unaccountable to others in the organization” and not “maintaining consistent procedures from year to year.” PX242A ¶ 38; PX271; Tr. 374:6-375:12 (Barreto). Dr. Barreto also explained why the selection of *some* minority candidates by the slating mechanism is of no consequence—“all slating groups [in the seminal study] included some minority group members, but they were often described by minority leaders not involved in the slating process as tokens, and in some cases the minority nominees were not the choice of minority voters.” PX242A ¶ 38; PX271.

97. Fourth, trial testimony from several witnesses shows that an informal slating organization has operated behind the scenes since at least 2007 to select and elect white-preferred candidates. Tr. 1155:6-9 (Wieder) (testifying that “there is a group of people in the Orthodox and Hasidic community who select people to run” for the Board); Tr. 706:23-708:8 (Freilich); Tr. 1035:4-25, 1067:12-1068:18, 1072:9-1076:19 (Weissmandl); Tr. 1241:5-1243:11 (Germain); Tr. 1381:12-1382:19, 1383:10-1388:4 (Rothman); Tr. 1420:8-1424:4 (Grossman); Tr. 1787:2-1789:16, 1790:7-18, 1813:24-1814:12, 1816:22-1817:3, 1818:20-1820:16 (Charles); PX80_1532; PX88_0004, 10, 12; PX81_0016-20. That slating organization’s endorsement *guarantees* the election of white-preferred candidates. PX242A ¶¶ 36-55; Tr. 2564:17-25, 2566:11-23; 2577:19-

2578:2 (Charles-Pierre). The slating organization's support also enables private school candidates to overcome superior fundraising and campaigning efforts from minority-preferred candidates. PX242A ¶¶ 54-55; *see, e.g.*, Tr. 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich).

98. There are several key players in the slating organization described above, including former and current Board Members, Aron Wieder, Harry Grossman and Yehuda Weissmandl, community activists, Shaya Glick and Kalman Weber, and influential Rabbis in the community, such as Yehuda Oshry, Hersh Horowitz, Goldman, and Rosenfeld, amongst others.

99. Rabbi Oshry plays a lead role in selecting candidates for the Board. Tr. 2503:15-2506:18; 2470:4-17, 2474:3-2375:7, 2475:16-19, 2475:25-2476:12, 2476:19-2477:13, 2487:14-2488:16, 2493:11-2494:6, 2495:12-2497:16 (Oshry testifying that he, Mr. Glick, Rabbi Rosenfeld, Mr. Weber, and/or Rabbi Horowitz decided the candidates and that he met with and endorsed several white-preferred candidates); PX88_0004 (Rabbi Horowitz writes regarding the 2017 candidates: "Oshry has been busy with it, and he has 4 people for the 2 other seats. Last I spoke he hasn't decided yet."); Tr. 982:22-984:7, 991:16-19 (Horowitz); Tr. 1444:1-1445:13, 1449:23-1450:7 (Grossman). Candidates need approval from Rabbi Oshry to run. Tr. 2468:23-2469:16, 2479:10-24, 2483:15-21 (Oshry) (explaining he "okayed" people to run); PX88_0004 (Mr. Grossman: "I know somebody who would like to run for one of the seats. Who should I connect him to?" Mr. Horowitz: "Give me his number and Rabbi Oshry will call him."). Rabbi Oshry also controls ballot access for the private school slate. To get on the ballot, candidates must submit nominating petitions with signatures of 2 percent of the actual voters from the previous election. JPTO VII.B.4.⁹ Rabbi Oshry testified that he submitted the nominating petitions on behalf of the

⁹ Gathering those signatures can be a time consuming process for public school candidates. Tr. 785:17-786:2 (Goodwin); PX283 (Fields) ¶ 56. By contrast, Rabbi Oshry testified that all the signatures could be collected "in one morning in the synagogue." Tr. 2505:15-17 (Oshry).

white-preferred/winning slate for many years. Tr. 2500:18-2501:24, 2502:9-2506:18 (Oshry).¹⁰

100. Rabbi Horowitz is another “influential” leader in the white community and in the dominant slating organization. Tr. 1424:23-25, 1432:14-1434:2, 1434:8-15, 1436:1-19, 1437:16-1438:4, 1444:1-1447:21, 1477:8-1479:24 (Grossman); PX80_1532. Rabbi Horowitz connects candidates to Rabbi Oshry and tells people to vote for them. Tr. 971:14-22, 977:8-13, 1009:9-1010:24 (Horowitz); *see also* PX75_0035 (Mr. Grossman: “I know somebody who would like to run for one of the seats. Who should I connect him to? Joel Freilich.” Mr. Weissmandl: “Horowitz.”); Tr. 1434:8-15 (Grossman); PX77_0001; Tr. 1078:2-11 (Weissmandl); Tr. 1432:14-1434:2, 1436:1-19, 1437:16-1438:4, 1444:1-1445:13 (Grossman); PX80_1532 (Mr. Weissmandl writes, “I personally got the blessing for our slate every year last 3 years through the son new rebbe along with rabbi Horowitz [sic]); Tr. 1072:9-1076:19 (Weissmandl). In fact, Mr. Grossman told Ms. Charles-Pierre that Rabbi Horowitz was “key” to her running unopposed in 2016. Tr. 2575:11-14 (Charles-Pierre); *see also id.* at 2579:5-14, 2648:14-21, 2663:21-25 (Charles-Pierre); PX81_0016-19. And when the District’s counsel asked Mr. Grossman to convey a message that “it would be good for the case to have a minority to run against Sabrina that [the] community could support,” Mr. Grossman conveyed that message to Rabbi Horowitz. PX88_0010; Tr. 972:24-975:2 (Horowitz); Tr. 1477:8-1479:24, 1484:6-14, 1509:16-1513:6 (Grossman).¹¹

101. Mr. Glick also helps decide which candidates will run, Tr. 2503:15-2506:18 (Oshry), manages the campaigns of those candidates, and mobilizes the white community to vote

¹⁰ Other witnesses confirmed that Rabbi Oshry submitted petitions for the winning candidates. Tr. 1444:23-1445:13, 1446:18-1447:7 (Grossman); Tr. 1792:2-10, 1837:13-1838:6, 1844:8-13 (Charles); Tr. 709:3-713:17 (Freilich); PX88_0004 (discussing Rabbi Oshry’s collection of signatures in 2016 and 2017); Tr. 985:14-988:15 (Horowitz); Tr. 1733:21-1734:13 (Russell).

¹¹ Counsel for the District suggested that the text of the exchange did not fully convey the context of his conversation with Mr. Grossman, but counsel never asked Mr. Grossman for a fuller explanation on redirect, and so none was ever given. Tr. 1480:15-22.

for them. Since 2012, Mr. Glick worked on campaigns, made signs, organized get-out-the-vote efforts, and provided poll watchers for the dominant slate. Tr. 1381:12-1382:19, 1383:10-1388:4 (Rothman); Tr. 1410:6-1413:15, 1427:24-1428:6, 1430:10-1431:1, 1438:13-22, 1441:3-13, 1451:12-1454:13, 1455:6-1458:12, 1458:24-1461:4, 1464:13-21, 1466:1-1467:23, 1468:15-1470:15 (Grossman); Tr. 1736:2-10 (Russell); Tr. 1792:2-10, 1836:13-24 (Charles); Tr. 993:9-24, 996:17-999:2 (Horowitz); PX80_759-61, 773-75. For example, in 2017, Mr. Grossman congratulated Mr. Glick on running a great campaign. PX80_759-61, 773-75; Tr. 1410:6-1413:15, 1420:8-1421:22, 1427:24-1428:6, 1430:10-1431:1 (Grossman); Tr. 996:17-999:2 (Horowitz).

102. Similarly, South East Ramapo Taxpayers Association (SERTA), an organization led by Mr. Weber, campaigns on behalf of the dominant slate by placing ads, including in the local magazine for the Jewish community, *Community Connections*, making calls, and undertaking other efforts to increase voter turnout. PX218; Tr. 991:16-992:10 (Horowitz).

103. The private school slating organization in the District excludes minorities except for those that the organization chooses as its “token” candidates. *See* Tr. 1849:1-4 (Charles) (admitting that he stated that “when it comes to running for the school board . . . you’re either working with [the] white community or you’re working with the other community”); Tr. 1893:13-1895:25 (Young-Mercer). That is because it does not publish open calls for candidates and does not invite participation from the public, instead selecting candidates based only on recommendations from a small group of white people. Tr. 1025:23-1026:7 (Horowitz); Tr. 1155:21-23 (Wieder); Tr. 1242:3-1243:15 (Germain); Tr. 2573:18-2575:10, 2575:15-25 (Charles-Pierre). The private school slating organization solicits recommendations for candidates from and provides services to the white community, but does not do the same for the black and Latino communities. Tr. 1785:7-10 (Charles); Tr. 1873:3-5 (Young-Mercer); PX279 (Dos Reis) ¶ 60;

PX281 (Goodwin) ¶ 55 (describing that they were never approached by the private school slate).

104. The following evidence demonstrates how the slating organization operated in each of the election years for 2008, 2011-2013, 2015-2019.

- In 2008, the winning candidates Messrs. Rothschild, Hopstein, and Wieder, were selected by the dominant, white slating organization. PX187; PX188_0002; Tr. 1162:23-1165:17, 1168:6-1171:12, 1171:16-1172:15, 1173:3-12, 1173:17-19 (Wieder); Tr. 2467:21-2468:10 (Oshry). Members of the dominant slating organization drafted a phone script to encourage voters to vote “for our Heimishe candidates.” PX188, Tr. 1168:6-1171:12 (Wieder).
- In 2011, the winning candidates Messrs. Daniel Schwartz, Weissmandl, and Hopstein, ran on the dominant, white slate. PX218. Rabbi Rosenfeld provided the nominating petitions for at least one candidate, Mr. Weissmandl. Tr. 1035:4-25, 1037:7-23, 1052:2-9, 1053:7-11, 1059:18-21 (Weissmandl).
- In 2012, the winning candidates Messrs. Lefkowitz, Solomon, and Rothman ran on the private school slate. Tr. 1388:11-1390:25 (Rothman). Mr. Rothman was approached by Mr. Walfish, who “handled everything” for his election and gathered the signatures for his nominating petition. Tr. 1381:12-1382:19, 1383:10-1388:4 (Rothman); PX128. He was also introduced to Mr. Glick, who worked on his campaign. Tr. 1383:10-1388:4 (Rothman). Mr. Rothman himself did not do “anything” to get elected and did not meet the other candidates on his slate until after the election. Tr. 1381:12-1382:19 (Rothman).
- In 2013, the winning candidates, Mr. Charles, Mr. Germain, and Ms. Corado, ran on the dominant slate. They also received campaign donations from SERTA. PX218_0017; Tr. 1247:1-1249:23 (Germaine); Tr. 1791:3-15, 1834:10-19, 1835:6-16 (Charles); PX8; PX58; PX30. They were all vetted and approved by Rabbi Rosenfeld. Tr. 1787:2-1789:19, 1790:7-18, 1813:24-1814:12, 1818:20-1820:16 (Charles) (Rabbi Rosenfeld told him “like I did you, I’d like to interview [Germain and Corado] and see if I will accept them”); Tr. 1241:5-1243:11 (Germain). Rabbi Horowitz ensured the candidates won by telling people in the white community to vote for them. Tr. 1010:19-24 (Horowitz). The slating organization also helped gather signatures and create campaign signs, and Mr. Glick worked on the campaign. Tr. 1243:21-1245:6 (Germain); Tr. 1792:2-10, 1791:3-15, 1836:13-24, 1837:13-1838:6, 1844:14-1846:3 (Charles); PX9; PX59.
- In 2015, the dominant slate, Messrs. Lefkowitz, Rothman, and Juan Pablo Ramirez, won again. Mr. Ramirez was vetted by Rabbi Rosenfeld before being added to the slate. Tr. 1820:22-1821:17 (Charles). Mr. Weissmandl assisted with the vetting process in 2015 along with Rabbi Horowitz. PX80_1532 (stating that he “personally got the blessing for our slate every year [for the] last 3 years through the son[’s] new rebbe along with [R]abbi Horowitz”); Tr. 1024:20-1025:11 (Horowitz). Similar to his prior election, Mr. Rothman did not actively campaign or gather signatures for his nominating petition or meet his running mates until election day. Tr. 1391:9-1393:5 (Rothman); PX129.
- In 2016, the winning candidates, Messrs. Charles, Germain, and Weissmandl, ran on the

dominant slate, and were again approved and endorsed the slating organization, including SERTA, Rabbis Oshry and Horowitz, and Mr. Glick. PX80_1532; Tr. 1242:9-1243:11, 1250:2-1251:2 (Germain); Tr. 1010:19-24 (Horowitz); Tr. 1846:4-1847:8 (Charles); Tr. 1513:14-1513:21 (Grossman). Rabbi Oshry submitted the signed nominating petitions for the candidates. Tr. 1837:13-1838:6 (Charles); Tr. 1246:11-1251:2 (Germain); PX10, PX174. Mr. Glick supported the campaign with signs, ads, and get-out-the-vote efforts. Tr. 1836:13-24, 1846:4-1847:8 (Charles). Ms. Charles-Pierre, a black woman who was appointed to the Board under pressure from State monitors, was successfully elected because the private school slate permitted her to run unopposed. Tr. 1395:17-1396:6 (Rothman). Ms. Charles-Pierre won in 2016 whereas the minority-preferred candidates she ran alongside lost, because without “the support of the majority of the white community, you have basically no chance to win.” Tr. 2566:11-15, 2564:17-25 (Charles-Pierre).

- In 2017, the winning candidates, Messrs. Grossman, Berkowitz, and Freilich, ran on the dominant slate. Mr. Grossman referred Mr. Freilich to Rabbis Horowitz and Oshry for their endorsement. PX88_0004; PX77_0001; Tr. 706:23-709:7 (Freilich); Tr. 1432:14-1434:2, 1434:8-15, 1436:1-19 (Grossman). As usual, Mr. Oshry submitted the candidates’ nominating petitions, Mr. Glick provided support for the candidates, including campaign materials, get-out-the-vote efforts, and poll watchers, and SERTA placed ads supporting the slate. Tr. 1410:6-1413:15, 1420:8-1421:22, 1427:24-1428:6, 1430:10-1431:1 (Grossman); Tr. 994:18-995:5, 996:17-999:2 (Horowitz); Tr. 706:23-709:7, 709:12-713:17, 720:13-724:7 (Freilich); PX50; PX51; PX79. Mr. Freilich did virtually no campaigning. Tr. 714:22-716:7, 718:9-719:19, 720:13-724:7 (Freilich).
- In 2018, the winning candidates, Messrs. Ephraim Weissmandl and Yoel Trieger, ran on the dominant slate. Again, Mr. Glick and Mr. Grossman assisted those candidates. PX74_0005. Rabbi Oshry met with both candidates, and Mr. E. Weissmandl asked Rabbi Oshry for his support. Tr. 2487:14-2488:16. Ms. Charles-Pierre also won in 2018 because the slating mechanism did not oppose her. *See* Tr. 2569:10-2570:2 (Charles-Pierre).
- In 2019, the losing candidate, Pastor Joselito Cintron, ran with the superficial support of the dominant slating organization. *See* Tr. 2489:1-2490:4 (Oshry); Tr. 1517:6-12 (Grossman). Pastor Cintron initially ran for Mr. Weissmandl’s seat, but then, at the behest of the white community, switched to running for an open seat. Tr. 1515:21-1516:16 (Grossman); Tr. 1774:14-1776:18, 1778:25-1779:4 (Leveille); Tr. 2593:20-23 (Charles-Pierre); Tr. 2101:14-2102:5 (White). It is clear from the addresses and dates of signatures (all of which were signed the day the petitions were submitted) that the slating mechanism assisted Pastor Cintron in completing his nominating petition. *See* PX330; PX341 (Felder Decl.) (showing all signatories from the white towns of New Square and Monsey). However, the slating organization then engineered his loss—turnout at all of the primarily white polling locations plummeted as compared to 2018. Tr. 1740:11-1744:4 (Russell).

105. Against the weight of the above evidence, the District argues that there is no formal slating organization in the white, private school community, and that the community leaders described above are merely individual activists. But a slating organization may be unofficial and

operate informally. *See Euclid*, 580 F. Supp. 2d at 608. On the facts, it is clear that there is an influential group of white community leaders whose endorsement and support *guarantees* a candidate's successful campaign and election. *Gretna*, 636 F. Supp. at 1123.

106. The District also argues that even if there is a slating organization, minorities have access to it. But, the inquiry under Senate Factor 4 asks whether minorities may actually participate in the slating organization, including by “determining what issues or candidates should or should not be endorsed.” *Gretna*, 636 F. Supp. at 1123; *see Harper*, 1997 WL 102543, at *9. Outside of the token minority candidates selected and elected by the white slating mechanism, the District is unable to offer any evidence that the slating mechanism is open to participation from other minorities or the general public. Rather, it is clear that the dominant slating organization (i) is controlled by a select group of white individuals who are generally unknown to the minority community, (ii) does not offer open forums or calls for candidates from the community at large, and (iii) has vetted and supported only a select few, handpicked minority candidates as tokens.

107. Finally, the District argues that an alleged slating process in the public school community, purportedly run by a man named Steve White, negates any Factor 4 impact of the white, dominant slating organization. That argument is unavailing for three reasons.

108. First, whether or not there is a slating organization in the public school community is irrelevant because public school candidates consistently lose every contested election. PX242A ¶ 39; Tr. 379:15-19 (Barreto); Tr. 2084:3-9 (White). Public school candidates testified that they raised thousands of dollars, knocked on doors, distributed campaign flyers, posted signs, created campaign websites, and attended public events to publicize their candidacy and gain voter support. Tr. 2133:21-2134:6 (White); PX279 (Dos Reis) ¶¶34-57; PX281 (Goodwin) ¶¶30-50; PX283 (Fields) ¶¶53-58. Yet, despite their rigorous efforts, they lost to the powerful white slate.

109. Dr. Barreto testified that often, “after frustration, the people who are locked out of the [winning] slate do eventually form their own slate and try to get organized to win.” Tr. 379:8-14 (Barreto). However, as long as those reactionary slating organizations represent “a numeric minority,” as it does here, they are “never able to overcome the more powerful slate.” *Id.*

110. Second, Mr. White does not lead any slating organization. Mr. White is one of many a community organizers and civil rights activists in the public school community. Tr. 2083:7-21 (White); Tr. 1203:8-17 (Price); PX279 (Dos Reis) ¶ 33; Tr. 606:2-11 (Castor). He runs his own publicly-accessible website and newsletter, both named Power of Ten. Tr. 2093:18-2094:25 (White). Although he endorses candidates for the Board, he does not personally select candidates. Tr. 2095:3-5 (White). Rather, Mr. White decides which candidates to endorse based on “[w]hatever the group decides”—referring to the public school community. Tr. 2095:9-12 (White).

111. Third, various groups and grassroots organizations, such as the East Ramapo Stakeholders, Concerned Citizens, and Strong East Ramapo, have attempted to organize in order to overcome the dominant slating organization. Tr. 2095:11-2098:21 (White). Although Mr. White has participated in some of these groups, he did not create any of them, and he did not, and does not, control their activities. *Id.* During some years, community organizations have hosted an open process whereby potential candidates fill out a publicly accessible and widely distributed questionnaire and there is a public forum where members of the community discuss, rank, and choose their candidates. Tr. 2088:7-11; 2088:16-2089:11 (White). Mr. White does not control this candidate selection process. In fact, in 2010, he attended the candidate forum as a potential candidate but was not selected. *Id.* at 2092:1-17. Once the public school slate is formed, Mr. White’s support is limited to volunteering with their campaigns, publishing their candidacy in his Power of Ten newsletter, and encouraging people to go out and vote. Tr. 2133:3-7 (White).

B. Senate Factor 7: Minorities and minority-preferred candidates have only been elected to public office in the jurisdiction as safe minority candidates or under special circumstances

1. Legal standard for Senate Factor 7

112. Senate Factor 7 requires courts to consider “the extent to which members of the minority group have been elected to public office in the jurisdiction.” *Goosby III*, 180 F.3d at 491.

113. The Supreme Court made clear that the election “of a few minority candidates does not ‘necessarily foreclose the possibility of dilution of the [minority] vote’” and expressed concern regarding “the possibility” that “majority citizens might evade” Section 2 “by manipulating the election of a ‘safe’ minority candidate.” *Gingles*, 478 U.S. at 75 (quoting S. REP. NO. 97-417 (1982)); *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (finding that “safe minority candidates” were elected due to “the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign[ed] to insure his election”). For example, in *Goosby v. Town Bd. of Hempstead (Goosby I)*, the court held that a black Republican who was appointed and subsequently elected in a town controlled by Republicans and that had never previously elected a black candidate was a “safe” minority candidate. 956 F. Supp. 326, 339-44 (E.D.N.Y. 1997). The court discounted the candidate’s election, holding that Senate Factor 7 weighed in favor of the plaintiff. *Id.* In *U.S. v. Charleston Cty.*, the court found that a successful minority candidate who received only 30.7% of minority support in an election was a “safe” candidate and discounted his election in weighing the evidence in plaintiffs’ favor. *See* 316 F. Supp. 2d 268, 278-79 & n.14 (D.S.C. 2003), *aff’d*, 365 F.3d 341 (4th Cir. 2004).

114. Courts will also discount elections of minorities where special circumstances are present. In *Williams v. City of Dallas*, the court found relevant that a Hispanic candidate’s financial support came from white voters in determining that he was a “safe” minority candidate who was elected in order to “avoid a Hispanic lawsuit.” 734 F. Supp. 1317, 1399 (N.D. Tex. 1990).

Similarly, in *Pope III*, the court found this factor weighed in favor of plaintiffs after finding special circumstances where two minority candidates first ran unopposed and one was appointed prior to his first election. 94 F. Supp. 3d at 345-46.

2. Factual analysis for Senate Factor 7

115. In its defense, the District points to the election of minorities to the Board. However, Plaintiffs have produced ample statistical evidence that no minority-preferred candidate has been elected to the Board in a contested election between 2008 and 2018, and every minority candidate elected since 2007 has been either a safe minority candidate or elected under special circumstances. According to Dr. Barreto, minorities have won only seven out of 32 contested races between 2005 and 2018. In three of those seven races, the minority was an incumbent, and in six of the seven races, the minority was the preferred candidate of the white voting bloc and opposed by a large majority of minority voters. *See* PX242A ¶¶ 39, 60-64, Appendix A.

116. Anecdotal evidence also shows that the minority candidates who won contested elections between 2008 and 2018 were ‘safe minority candidates’ whose candidacies were engineered by the white slating mechanism, who did not campaign for minority votes, and who were elected with overwhelming support from white voters and little support from minority voters. Mr. Charles and Mr. Germain, who together won four of the six contested elections won by minority candidates between 2008 and 2018, testified that they were elected almost exclusively by the white community after meeting with and receiving the endorsement from the white slating mechanism. *See supra* Section III.A.2.¹²

117. Given the substantial support from the white community during his campaign, Mr.

¹² Mr. Charles also testified that during Mr. Ramirez’s successful 2015 campaign, Rabbi Rosenfeld had to approve Mr. Ramirez before he would agree to support his candidacy. *See* Tr. 1820:22-1821:17 (Charles). Rabbi Rosenfeld ultimately vetted Mr. Ramirez and agreed to support him. *Id.*

Charles declined to participate in candidate forums held by the NAACP in 2013, 2016, and 2019, which provided an opportunity to address the needs and concerns of the District's black and Latino voters, because he felt that there was no reason to attend. *See* Tr. 1847:9-1848:15 (Charles). In 2013 in particular, Mr. Charles chose to attend an all-white event at a stadium instead of attending the NAACP's candidate forum. *See* Tr. 1847:18-1848:6 (Charles). Mr. Germain similarly declined to attend the 2013 NAACP candidate forum. *See* PX288 (Trotman) ¶ 37. In fact, the only instance where a Board candidate backed by the white, private school community conducted any campaign activities within the minority, public school community was during the 2016 election when Mr. Germain briefly attended a NAACP candidate forum before leaving early. *Id.* ¶ 37.

118. Ultimately, Messrs. Charles and Germain were elected to the Board with substantial support from the white community. *See* PX242B_0015, 18, 24, 26, 28, 35, 38. In the words of Mr. Charles, the leaders in the Orthodox and Hasidic community “got [his slate] elected two to one.” Tr. 1814:10-1815:10, 1811:11-25 (Charles); PX339_0010. Mr. Germain similarly testified that he believed that he received approximately 90 percent of his votes from the Jewish community. *See* Tr. 1254:15-21, 1257:2-25, 1258:23-1259:6 (Germain). Mr. Grossman even referred to them as private school members. PX80_0279; Trial Tr. 1487:20-1488:6 (Grossman).

119. Once elected, Messrs. Charles and Germain consistently acted in the white community's interests in their activities on the Board, neglecting the needs, concerns, and preferences of the District's minority voters. *See* PX279 (Dos Reis) ¶¶ 21-24; PX281 (Goodwin) ¶¶ 18-22; PX278 (Castor) ¶¶ 21-34; PX264; PX172; Tr. 1110:1-1113:4 (Weissmandl). For instance, Messrs. Charles and Germain were unresponsive to calls from the minority community to remove Superintendent Klein after he made certain racially insensitive remarks. *See* Tr. 1337:11-1338:4 (Trotman); PX288 (Trotman) ¶ 13; PX108. Messrs. Charles and Germain also

failed to respond to concerns from the NAACP and the Latino community regarding the provision of translation services at Board meetings following Mr. Klein's comments. *See* PX288, (Trotman) ¶ 14; PX222; PX104. Mr. Charles prevented Messrs. Cohen and Trotman from attending an event organized by the Latino community. Tr. 1928:11-1929:23 (Cohen).

120. Further, when the Board had the opportunity to appoint Ms. Charles-Pierre, a public school parent who had previously run for the Board, to fill a Board vacancy, neither Mr. Charles nor Mr. Germain outright supported her appointment. Mr. Charles did not support her because he believed that she was aligned with public school activists and the NAACP President Trotman. *See* Tr. 1849:5-25. As Mr. Charles put it, he thought Ms. Charles-Pierre would be the "lamb who will certainly lead to a slaughter of this board" because she was a representative of the minority, public school community. *See* Tr. 1850:1-1851:19; PX13. While Mr. Germain ultimately supported Ms. Charles-Pierre's appointment, his support was conditioned on the belief that the Board could "have better control of Sabrina than the Spanish girl." *See* Tr. 1264:18-1266:1; PX161.

121. In 2016, Mr. Charles similarly ignored the concerns of the minority community by choosing to vote for the appointment of Joe Chajmovicz, a white man with no background in education, to fill a Board vacancy over the appointment of Ms. Fields, a retired principal with over 20 years of experience in the District's public schools. *See* Tr. 1853:16-1855:21 (Charles); PX283, (Fields) ¶¶ 6, 65-66; PX342, (Cohen) ¶ 22; PX167. Although Mr. Charles was not present when the Board interviewed Mr. Chajmovicz, Mr. Charles still voted for Mr. Chajmovicz because he had been vetted by other, white members of the Board. *See* Tr. 1855:22-1856:6 (Charles).

122. While the District has argued that Messrs. Charles and Germain are not safe minority candidates because some witnesses could not identify specific instances where they disagreed with any of those Board members votes, that argument is far too narrow to be of any use

in assessing whether a candidate is truly minority-preferred. Every black and Latino plaintiff in this case testified that they do not see Messrs. Charles or Germain as their candidates of choice or someone who represents their interests on the Board, especially when those candidates failed to campaign for their votes or in their communities.¹³ *See* PX280 (Clerveaux) ¶ 9; PX342 (Cohen) ¶ 23; PX279 (Dos Reis) ¶ 12-15; PX283 (Fields) ¶ 43, 62; PX281 (Goodwin) ¶ 9-10, 12-13; PX282 (Miller) ¶ 17, 20; PX288 (Trotman) ¶ 37; Tr. 841:10-25, 842:8-19 (Miller); Tr. 1927:24-1928:10 (Cohen). Even Ms. Charles-Pierre, who has served on the Board with both, did not support Messrs. Charles and Germain in their 2016 races. Tr. 2565:14-23, 2567:21-24, 2598:4-7 (Charles-Pierre). In fact, far from seeing Messrs. Charles and Germain as representatives of their interests, members of the minority community protested against them and demanded their resignation. *See* Tr. 1858:12-14 (Charles); Tr. 1260:25-1261:14 (Germain).

123. Other than Messrs. Charles and Germain, the remaining minority candidates who were elected to the Board since 2008 all won under special circumstances.¹⁴ Ms. Young-Mercer in 2010, Ms. Thompson in 2011, and Ms. Charles-Pierre in 2016 and 2018 were only elected to the Board when they ran as unopposed incumbents. *See* Tr. 1893:13-1895:25 (Young-Mercer testifying that even 2007 had special circumstances); PX343 (Young-Mercer) ¶ 15; PX242A ¶¶ 60-64. Ms. Thompson, after her uncontested win in 2011, lost her seat to Mr. Rothman, a white man, the following year in a contested election. *See* PX234; PX242A at 34-35; Tr. 1876:2-1877:7

¹³ Although Mr. Charles claims that he reached out to Mr. Trotman and Wilbur Aldridge based on their status as leaders in the black community, *see* DX251 (Charles) ¶ 16, at trial, Mr. Charles testified that he could not actually recall reaching out to Mr. Trotman and that he did not reach out to Mr. Aldridge but instead ran into him at a restaurant. *See* Tr. 1856:10-1858:14 (Charles).

¹⁴ While Ms. Corado and Mr. Ramirez each won contested elections, they did so with the support of the white community, and quickly resigned thereafter. *See* Tr. 1252:5-7, 1260:25-1261:8 (Germain); 1113:17-1115:1 (Weissmandl); PX165; PX242A at 4, 18, 35-36; PX242B at 18, 25, 28, 37. Harry Grossman was later chosen to replace Ms. Corado to the dismay of the minority community. *See* Tr. 1110:11-1111:1 (Weissmandl); PX172.

(Young-Mercer). In protest of Board decisions that harmed black and Latino children in the District's public schools, and cognizant that the white community would replace her in the next election given her criticisms of Board policies, Ms. Young-Mercer resigned from the Board in 2013. *See* PX343 (Young-Mercer) ¶ 38; Tr. 1880:14-1881:15 (Young-Mercer); PX142.

124. With respect to Ms. Charles-Pierre, she was first appointed to the Board due to pressure from the state-appointed monitors, and only after she was personally vetted by Mr. Wesismandl. *See* Tr. 2576:1-2577:2 (Charles-Pierre); Tr. 1116:24-1117:7 (Weissmandl); Tr. 1395:17-1396:6 (Rothman); Tr. 1540:7-25 (Grossman); PX81 at 47. Further, when Ms. Charles-Pierre ran for re-election in 2016, Mr. Grossman told Ms. Charles-Pierre to reach out to Rabbi Horowitz to ensure that the private school slating organization did not run a candidate against her. PX81 at 16-18 (“My fear is that private community runs a candidate against you. I want to prevent that but need to promote trust . . . Without it though they will run a candidate and they have the votes.”); *see also* Tr. 1009:9-1010:15, 1024:23-1025:11 (Horowitz) (stating that he supported Ms. Charles-Pierre in 2016 “[i]f it’s the year she won”); Tr. 2566:11-2567:24, 2582:22-2583:16 (Charles Pierre).

125. Throughout Ms. Charles Pierre’s tenure, Board members repeatedly indicated that they felt they could control Ms. Charles-Pierre, and that she had “zero control or influence on direction.” *See* Tr. 2595:17-23, 2638:16-2640:9 (Charles-Pierre); PX80_1260-61. In fact, the day after the 2016 election, Mr. Grossman texted Ms. Charles-Pierre: “When you look at the vote totals from last night, you know you are on the board because the Jewish community trusted me and Yehuda not to run another candidate.” PX81_0029; Tr. 1536:11-23 (Grossman); Tr. 1882:10-1884:8 (Young-Mercer testifying that Ms. Charles-Pierre “didn’t want to make waves.”); Tr. 2670:12-24 (Charles-Pierre). Mr. Grossman continued to threaten Ms. Charles-Pierre throughout

the summer of 2016, stating that the white community could vote her out if they wished to do so. Tr. 1546:5-9 (Grossman). On July 28, 2016, Mr. Grossman wrote to Ms. Charles-Pierre, “[i]f there really was any desire by anybody to remove you from the board, all that would need to be done was to run a candidate against you in May. That candidate would have garnered 8,000 votes and you would have lost by 4,000 votes just like the other 3 Orthodox community could just have voted you out in May. WE told them that you were good and not to run a candidate.” PX81 at 35, 40; Tr. 1405:3-16, 1537:12-1538:16, 1538:23-1539:4, Tr. 1539:5-1540:4 (Grossman).

126. During her tenure on the Board, Ms. Charles-Pierre believed that the white Board members were making her look “stupid” and were “keeping [her] in the dark.” *See* Tr. 2626:25-2527:7 (Charles-Pierre); PX361 - PX363. Ms. Charles-Pierre’s fears were later justified by the lack of appropriate consideration the majority-preferred Board Members showed her during settlement discussions between the District and Plaintiffs in this litigation. Ms. Charles-Pierre testified that she had not seen numerous documents evidencing settlement discussions between Plaintiffs and the District. *See* Tr. 2673:5-18 (Charles-Pierre). Based on the privilege log produced by counsel for the District showing its correspondence with Board members regarding settlement discussions, Ms. Charles Pierre was only included on communications sent on February 9, 2020, the day before the first day of trial. *See* Dkt. No. 545-2 (District’s Letter, Ex. B). Notably, the Court specifically requested that all Board members be in attendance for the first day of trial to discuss settlement. *See* Dkt. No. 507 (Feb. 7, 2020 Order). In private communications inviting Ms. Charles-Pierre to the February 10, 2020 settlement discussions, Board President Harry Grossman represented that the purpose of the meeting was for the “Judge wants to talk/yell at [the Board] [f]or not doing what N.A.A.C.P. [sic] wants.” *See* Tr. 2675:23-2677:1; DX233 at 1079-80. Despite Mr. Grossman’s inaccurate description of the purpose of the February 10, 2020 settlement

conference, Ms. Charles-Pierre nevertheless attended. *See* Tr. 2673:22-2674:1 (Charles-Pierre).

127. Following the February 10, 2020 settlement conference, counsel for the District sent two additional settlement updates to the Board on February 15 and February 20, 2020, respectively. Dkt. No. 545-2 (District's Letter, Ex. B). However, unlike the Board correspondence leading up to the February 10 settlement conference, Ms. Charles-Pierre was not included on these communications. *Id.* Disturbingly, Ashley Leveille, a black woman elected to the Board in May 2019, does not appear on *any* of the communications on counsel's privilege log, and did not receive any of Plaintiffs' settlement proposals following the February 10, 2020 settlement conference. *See* District's Letter dated March 4, 2020, Ex. B (Dkt. No. 545-2); Decl. of A. Leveille dated March 12, 2020 (Dkt. No. 553-1). In fact, based on its own privilege log, after the February 10, 2020 settlement conference, the District's counsel only shared Plaintiffs' settlement proposals with white, male members of the Board. *See* District's Letter dated March 4, 2020, Ex. B (Dkt. No. 545-2). The exclusion of the District's only minority and female Board members from any serious discussions concerning settlement further evidences that while minorities have been able to win elections under special circumstances, the white community refuses to treat them as equal partners in the administration of the District because it knows it can remove them whenever it sees fit.

128. Indeed, the election of Ms. Leveille itself evidences of the gamesmanship the white community is willing to orchestrate in order to maintain its power. As the evidence uncovered at trial demonstrated, Ms. Leveille's surprise win in 2019 was manufactured by the white community in order to help aid their defense to this lawsuit by demonstrating that a minority-preferred candidate could win a contested election in the District. The plan for this strategy began in 2018, when David Butler, the District's lead attorney, asked current Board President Harry Grossman "to convey message [sic] that it would be good for the case to have a minority to run against

Sabrina that the community could support.” *See* Tr. 2648:22-2649:6 (Charles-Pierre); PX88 at 10. While Mr. Butler’s suggestion was not implemented in 2018, it was successfully executed in 2019.

129. At a meeting in March 2019, Ms. Leveille, Mr. Cintron, and Mr. Goodwin decided to run together as part of the public school slate. *See* Tr. 1772:7-1773:20 (Leveille); Tr. 783:18-23 (Goodwin). During this meeting, each agreed to run for separate seats: Ms. Leveille for Mr. Germain’s seat, Mr. Cintron for Mr. Weissmandl’s seat, and Mr. Goodwin for Mr. Charles’s seat. *See* Tr. 1773:9-1774:13 (Leveille); Tr. 783:24-784:4 (Goodwin). At that time, it was believed that neither Mr. Germain nor Mr. Weissmandl would seek re-election. *See* Tr. 1773:21-23 (Leveille); 2590:8-12 (Charles-Pierre). Ms. Leveille, among others, later signed Mr. Cintron’s nominating petition to support his campaign for Mr. Weissmandl’s seat. *See* Tr. 1774:14-16 (Leveille); 2591:4-2592:3 (Charles-Pierre); Tr. 784:14-20 (Goodwin); Tr. 2101:1-6 (White).

130. During this same time period, Mr. Grossman and Ms. Rivkie Feiner discussed that it would be “good for the case to have a minority to run against Ashley Leveille.” Tr. 1520:18-21 (Grossman). This plan sprang into action when the white community decided Mr. Weissmandl should run for re-election, meaning that Mr. Cintron’s candidacy would no longer be unopposed if he continued to run for Mr. Weissmandl’s seat. *See* 2592:9-12 (Charles-Pierre). After Mr. Weissmandl decided to seek re-election, Mr. Cintron informed Ms. Leveille that he had decided to run for Mr. Germain’s seat instead of Mr. Weissmandl’s seat, which meant that he would have to run against her. *See* Tr. 1774:20-1776:4 (Leveille), Tr. 2593:5-8 (Charles-Pierre); Tr. 785:3-14, 797:16-798:8 (Goodwin); Tr. 2101:14-2102:5 (White). When Ms. Leveille questioned the reason for his last minute switch, Mr. Cintron explained that rabbis from the white community had agreed to support his candidacy if he ran for Mr. Germain’s seat instead of Mr. Weissmandl’s seat. *See*

Tr. 1775:23-1776:18 (Leveille); Tr. 2593:20-23 (Charles-Pierre); Tr. 2101:14-2102:5 (White).¹⁵

131. The white community, including Rabbis Oshry and Horowitz, did in fact help Mr. Cintron by securing the necessary signatures for the him to appear on the ballot for Mr. Germain's seat. *See* Tr. 2489:1-2490:4 (Oshry); Tr. 1515:21-1516:16, 1517:6-12 (Grossman). Almost all of Mr. Cintron's signatures were collected on the same day and in the predominantly white areas of Monsey and New Square. *See* PX314; PX330; PX341; Tr. 1748:10-1755:11 (Russell).

132. Notwithstanding Mr. Cintron's switch, Ms. Leveille continued to campaign, and ultimately defeated Mr. Cintron by fewer than 500 votes. *See* Tr. 1777:6-1780:5 (Leveille). Despite Mr. Cintron's representations that he had the support of the white community, he in fact received fewer votes than any Board candidate since 2008. *See* Tr. 1742:19-1743:1 (Russell); DX252 (Russell) ¶ 62; DX12. The vote totals for the race between Mr. Cintron and Ms. Leveille was nearly 2000 less than the vote totals for the 2019 election overall. Tr. 1743:18-1744:4 (Russell). The 2014 election was the only election with comparably low turnout, when four candidates from the white community ran unopposed. Tr. 1743:2-13 (Russell); DX252 (Russell) ¶ 62(g).

133. Based on the 2019 results, it is clear that Mr. Cintron lost because the white community did not truly want him to win and declined to turn out to vote for him. *See* Tr. 2594:12-18, 2684:24-2685:8 (Charles-Pierre). If the white community had wanted him to win, they easily could have turned out and elected him, but they declined to do so. *See* Tr. 2594:12-18 (Charles-Pierre). While this calculated decision allowed Ms. Leveille to be elected, it has no probative value in assessing Senate Factor 7 because its purpose was frustrating Plaintiffs' claims in this litigation.

134. In sum, although minorities have been elected to the Board, those elections must be

¹⁵ Members of the minority community also suspected that Mr. Cintron's switch was engineered by the white community. *See* Tr. 2593:20-23 (Charles-Pierre).

discounted because the candidates were either safe minority candidates or otherwise elected under special circumstances. The evidence weighs in Plaintiffs' favor for Senate Factor 7.

C. Additional Factor 8: The District and its Board are Not Responsive to Minorities' Needs

1. Legal standard for Senate Factor 8

135. Under the totality of circumstances analysis, courts consider "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group" *Goosby III*, 180 F.3d at 491-92. Once plaintiffs have established that the minority community has a particularized need, plaintiffs must produce evidence showing that elected officials have not responded to that need. *Id.* Examples of unresponsiveness in other Section 2 cases include: (1) failure to provide an explanation for terminating the school district's first black superintendent, *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1074 (E.D. Mo. 2016); (2) failure to respond to complaints of racial discrimination, *Goosby I*, 956 F. Supp. at 346; (3) failure to identify concerns of the black community, *McDaniels v. Mehfoud*, 702 F. Supp. 588, 595-96 (E.D. Va. 1988); (4) scarcity of outreach sessions in the minority community, *Conn. Citizen Action Grp. v. Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *11-13 (D. Conn. Sept. 27, 1984); (5) failure to respond to discipline and achievement gaps in the minority community, *Ferguson-Florissant*, 201 F. Supp. 3d at 1073; (6) lack of an affirmative action policy and denial of funding requests for community centers in black communities, *Goosby I*, 956 F. Supp. at 346; and (7) failure to provide bilingual translations of official forms. *Pugliese*, 1984 U.S. Dist. LEXIS 24869, at *11-13.

136. A defendant in a Section 2 case may introduce evidence of responsiveness, but where a plaintiff demonstrates "by other, more objective [Senate] factors . . . that minority voters nevertheless were shut out of equal access to the political process," then a defendant's proof of

some responsiveness will not negate a finding in plaintiff's favor under the totality of circumstances analysis. *Port Chester II*, 704 F. Supp. 2d at 446. Moreover, while "a showing of unresponsiveness [has] probative value, a showing of responsiveness [has] very little." *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1047 (D.S.D. 2004).

2. Factual analysis for Senate Factor 8

137. As an initial matter, the provision of public school services in the District constitutes a particularized need of the black and Latino communities because black and Latino children constitute over 90 percent of the public school population. *Supra* ¶ 40. During the past decade, the Board has exhibited a significant lack of responsiveness to the needs of the minority community despite repeated efforts from the community to bring their concerns to the Board's attention. Since 2008, the Board has ignored the public school community and refused to engage in genuine efforts to represent their interests by, among other acts, closing and selling public schools attended predominantly by minority children; appointing unqualified white men over qualified people of color to vacant Board seats; rejecting state funding to restore public school programs; retaining high-priced counsel who berated community members; retaining a superintendent in spite his racially insensitive remarks; and cutting public school programming and staffing with "no meaningful effort made to distribute [the] pain of deep budget cuts fairly among private and public schools." PX152_0029-0033; PX279 (Dos Reis) ¶¶ 18-19, 22-24; PX282, (Miller) ¶¶ 7-9, 21-28; PX342 (Cohen Aff) ¶¶ 8-22; PX343 (Young-Mercer) ¶¶ 20-38; PX213. Although continuous state oversight and an influx of state funding have led to a fraction of services being restored since 2014, the minority community is fearful that without continued state oversight, the Board will once again drastically slash public school services. PX279 (Dos Reis) ¶ 20; PX282 (Miller) ¶ 27; PX283 (Fields) ¶ 26; PX288 (Trotman) ¶ 25.

a. The District and Board have ignored and been hostile to the minority community

138. The District and the Board have refused to engage with the minority community and have treated the minority community with indifference and, in many instances, hostility. The Board lacks the transparency required of a publicly-elected organization. Over many years, the Board largely ignored the NAACP's numerous requests for information. PX342, (Cohen) ¶¶ 18-19; PX288 (Trotman) ¶¶ 12, 16, 25, 36; PX223; PX92; PX228 (April 25, 2017 Letter listing numerous requests for information from the NAACP to the Board); Tr. 2666:2-7 (Charles-Pierre) (testifying to Board's lack of transparency regarding special education settlements). Similarly, the Board did not respond to an outpouring of concern from the public school community regarding lead in the drinking water at public schools. PX288 (Trotman) ¶ 17; Tr. 1305:1-1306:7 (Trotman). The Board also did not respond to complaints and requests for information regarding the poor condition of public schools, PX279 (Dos Reis) ¶¶ 21-24; PX40 ("This [dangerous condition of the roof in a public school] had been reported numerous times over the past several years without appropriate action taken."), even when those complaints were raised by public school students themselves. PX278 (Castor) ¶¶ 22-28, 30-32. As Ms. Castor testified, the Board would typically ignore her, or even accuse her of falsifying information, when she spoke to the Board as public school student. PX278 (Castor) ¶¶ 22-28; Tr. 590:11-24 (Castor); *see also* Tr. 669:20-670:5 (Dos Reis) ("[O]ne of the most frustrating and disheartening [] facts about going up and approaching the Board is that while you're speaking to them, and you're looking right at them, they won't even look at you. The school board members will not look at you.").

139. The Board's non-responsiveness is no accident; in fact, the Board has instituted policies to avoid listening and responding to public school parents and students. At trial, Board Members raised as a defense that "Board rules"—which they admitted are set by the Board itself—

prohibited Board Members from responding when community members voiced concerns during Board meetings. Tr. 734:25-735:9 (Freilich). In 2010, the Board moved the public comment portion of Board meetings to the end of the meetings with the intent of discouraging the public school community from raising concerns. PX152_0035; PX257 at 176:14-177:3, 178:13-179:4; PX39; PX48; PX342 (Cohen) ¶ 13; PX283 (Fields) ¶ 44; PX286, (Price) ¶¶ 30-31; PX288 (Trotman) ¶¶ 11-12; PX343 (Young-Mercer) ¶¶ 32-34. Compounding this decision, the Board also began engaging in prolonged and improper executive sessions, meaning that the public comment period often occurred late in the night, which also discouraged attendance by the public school community. PX283 (Fields) ¶¶ 44-45; PX342 (Cohen) ¶ 13; PX286 (Price) ¶ 30; PX288 (Trotman) ¶¶ 10-11; PX343 (Young-Mercer) ¶ 34; PX152_0035. During Board meetings, Board members also walked out of the room to deprive the meeting of a quorum to force its adjournment and prevent public comment. PX286 (Price) ¶ 31.

140. In addition to ignoring the minority community's concerns, the Board and its representatives have treated the minority community with condescension and hostility. For example, Dr. Joel Klein, former Superintendent of the District, made numerous racially insensitive remarks about the District's Latino population, including stating that immigrant students attending the District's public schools "want a free lunch, breakfast, and whatever else they can get" and "we know every one of these kids are dropping out." DX171 at 3; Tr. 1337:22-1338:3 (Trotman). A NYSED Report noted that several racist statements by Dr. Klein indicated a "failure to understand the background and needs of ERCSD's ELL community." PX217_0009-10. The Board nonetheless continued to retain Dr. Klein in spite of significant protests from people of color until pressure from NYSED forced the appointment of a new superintendent. PX156_0010. Similarly, Mr. Freilich seemingly has such little interaction with people of color that he seemed surprised

that a woman of color could competently chair a committee. Tr. 730:4-5 (Freilich) (“Q. Is Carol Anderson a woman of color? A. Yes. But she did an excellent job chairing the committee.”).

141. Board Members elected by the white community are also openly hostile to their fellow Board Members who support the public schools. PX343 (Young-Mercer) ¶¶ 35-38; PX286 (Price) ¶¶ 26-27, 33. In 2013, Mr. Price resigned from the Board due to a “continuing pattern of harassment and intimidation.” PX141; Tr. 1184:8-1186:22 (Price). In 2013, Ms. Young-Mercer, the only person of color on the Board at the time, resigned due to lack of access to information and “[t]he hostility of...the other Board members [backed by the white, private school community] to the concerns of the public school community and their lack of civility toward me, Mr. Price, and the students, parents, and advocates for the public school community.” PX343 (Young-Mercer) ¶ 38; PX142. Ms. Young-Mercer explained that there were “important decisions that are being made without [her] knowledge or input” and she experienced a “persistent level of intimidation...about speaking out against the activities...that [she had] concerns about.” PX142; *see also* Tr. 2664:5-20 (Ms. Charles-Pierre testifying that she felt she was in an “eight-to-one minority” and was left “in the dark” on key decisions that negatively impacted the public school community).

142. Separately, the Board’s former counsel were openly hostile and aggressive to the public school community. PX152_0020, 28, 36; PX282 (Miller) ¶ 24; PX283 (Fields) ¶¶ 46-48; PX286 (Price) ¶¶ 22-25; PX257 at 164:14-165:3, 175:10-19. On November 18, 2009, the white-preferred Board Members voted to retain the law firm of Minerva & D’Agostino at double the price of its former counsel because the firm was known for having represented a school district on Long Island that closed and sold a public school to a private school.¹⁶ PX286 (Price) ¶ 23; PX343

¹⁶ It would later be revealed that the reason for this change was that the Board was intending to sell two public schools. PX343 (Young-Mercer) ¶¶ 26-27; PX286 (Price) ¶¶ 23-27.

(Young-Mercer) ¶¶ 24-25. In 2013, Albert D’Agostino interrupted and publicly berated a student of color who had graduated from the District. PX286 (Price) ¶ 24; PX343 (Young-Mercer) ¶ 27. Mr. D’Agostino also directed profanities towards a black honor roll student—calling him a “piece of shit”—and threatened to physically fight him. PX278 (Castor) ¶ 29; PX140; PX257 174:7-175:16. Another attorney at the same law firm, Christopher Kirby, insulted a public school parent during a Board meeting and verbally attacked her after the meeting with profanities. PX283 (Fields) ¶ 47 (describing the incident); PX36. In November 2014, the NYSED monitor reported to the New York Board of Regents: “The board...have allowed [Minerva & D’Agostino] to berate students, to berate parents in unthinkable ways. The controversy reached a fever pitch over a year ago when one of the members of that firm spoke things I would never even think to utter in this chamber, all captured on video.” PX213 at 23:2-9. Despite the concerns raised by the public school community and the NYSED monitor, the Board refused to replace Minerva & D’Agostino for a prolonged period of time and even rehired the firm after announcing that it would replace them in the aftermath of the incident involving Mr. Kirby. PX152_0028; PX264; *see also* Tr. 632:19-24; 641:14-642:14 (Castor); PX278 (Castor) ¶ 31.

143. The Board rebuffed numerous attempts by leaders in the public school community to engage in a reconciliation process with the Board. In declining to meet with the NAACP, the then-Board President explained that the Board had all of the power and that the Board was the only party with “something to lose.” PX48; PX342 (Cohen) ¶ 16; PX288 (Trotman) ¶ 9. In 2011, the Board rejected the NAACP’s recommendation of “a process whereby school board Members, representatives of the Spring Valley NAACP, key religious and other community groups, including East Ramapo Stakeholders, come together in a thoughtful way to address the tensions, conflicts and misunderstandings that have arisen and divided [the community].” PX225.

144. The Board's non-responsiveness and outright hostility have discouraged minorities from attending meetings or contacting the Board to voice their concerns. PX283 (Fields) ¶ 42; PX288 (Trotman) ¶ 11; PX282 (Miller) ¶¶ 21-22, 25; PX152_0037.

b. The Board has made policy decisions that negatively affect the minority community

145. Beginning in 2009, the Board started making deep cuts to programming, staff, and services in public school budgets estimated at \$30 to \$40 million. PX342 (Cohen) ¶¶ 13-15; PX283 (Fields) ¶¶ 10-14, 16-25; PX288 (Trotman) ¶¶ 8, 19-25; PX152_0012, 15-18, 24-33, 37; PX80_0278. Between 2009 and 2012, the Board eliminated 400 public school positions, including almost 170 teachers, 49 teaching assistants, all social workers, all deans, all department chairpersons, and 88 civil service positions. PX152_0030; PX283 (Fields) ¶ 15; PX185_0001; PX184. From 2012 to 2014, the Board eliminated 45 additional positions. PX152_0031-32. The Board also reduced full-day kindergarten to half-day and reduced high school electives, and made cuts to art, music, professional development, supplies, materials, and extra-curricular activities. PX152_0030-32; PX283 (Fields) ¶¶ 20-26; PX288 (Trotman) ¶¶ 19-20.

146. These budget cuts led to a severe decline in the quality of public schools. PX278 (Castor) ¶¶ 11-20 (describing the cuts to classes and programming); PX283 (Fields) ¶¶ 27-35 (explaining that some students were ineligible for an Advanced Regents Diploma or did not have enough classes to graduate on time); PX288 (Trotman) ¶¶ 19-24. Due to the firing of full time or substitute teachers and guidance counselors, class sizes increased and many elective, AP, and honors classes were eliminated, and students' schedules were frequently filled with extended lunch breaks or free periods as opposed to substantive classes. PX278 (Castor) ¶¶ 11-20; Tr. 582:12-584:25; 638:9-24 (Castor); PX3B_0002, 4; PX279 (Dos Reis) ¶ 18; PX283 (Fields) ¶¶ 27-35; PX288 (Trotman) ¶ 20. Public school students did not have instruments for music programs and

had to rely on outdated textbooks. (PX281) ¶¶ 16-17; PX288 (Trotman) ¶ 20; PX3C_0003. Public school students experienced a “disenchantment” towards education due to the programmatic cuts and lack of resources. PX3B_0002, 4. The infrastructure in public schools also deteriorated—including wires hanging in hallways, lack of heat or air conditioning, water leakage, mold, and broken bathroom stalls—threatening student safety. PX279 (Dos Reis) ¶ 19; PX278 (Castor) ¶¶ 18-20; PX288 (Trotman) ¶ 18; PX40; Tr. 1306:16-25 (Trotman).

147. The Board also closed two public schools—Hillcrest Elementary School and Colton Elementary School—and sold them to private schools, despite opposition from the minority community. PX198_0006-7; PX199_0006; PX286 (Price) ¶¶ 26-27; PX343 (Young-Mercer) ¶¶ 28-30; PX257 at 232:5-25, 237:7-23, 253:14-254:15. Before closing, both public schools predominantly served minority students. PX257 at 237:24-238:3. Board Members Ms. Young-Mercer and Mr. Price, supported by the minority community, voted against the sales. PX198_0007-8 (approving the sale of Hillcrest with 1 nay vote by Ms. Young-Mercer at a Board meeting where Mr. Price was absent); PX199_0006. The NYSED Commissioner annulled the sale of Hillcrest because the Board sold the school at below market value. PX212.

148. Due to the Board’s mismanagement, the District’s public schools—once having amongst the highest graduation rates in New York State—had the lowest graduation rate in Rockland County and among the lowest in NY State as of 2013, and continue to fall well behind state-wide graduation rates as of 2019. PX204 (72% graduation rate in 2007-08 compared to 74% state-wide in 2008, 60% graduation rate in 2013-14 compared to 76% state-wide in 2014, 58% graduation rate in 2018 compared to 80% state-wide in 2018; 62% graduation rate in 2019 compared to 81% state-wide in 2019); PX37B_0005; PX208_0007 (“Graduation rates, with the exception of Black students, have steadily declined since 2015. The Hispanic and Latino

graduation rate is unacceptably low....”); PX283, Fields Aff. ¶¶27-35.

c. While The District and Board ignored the public school community, it increased services to the private school community

149. As the Board cut spending on public schools year after year, spending on private schools *increased*: transportation costs increased by 48.1% from 2006 to 2013, more than double the statewide average increase of 21.9% in the same time. PX152_0033. State-appointed monitor Mr. Greenberg reported that “in times of fiscal crisis, [the Board] play[ed] favorites; that the private school community’s interests are placed ahead of the public school community’s interests.” PX213 24:9-18. Mr. Greenberg also noted that the Board made “[n]o meaningful effort to distribute [the] pain of deep budget cuts fairly among private and public schools.” PX152_0033. For instance, during the 2017-18 school year, the NYSED Commissioner rescinded her initial approval of the budget after discovering that the Board had included five non-mandated days of busing for private school students. PX170. In the 2019-2020 school year, the Board implemented cuts to public school transportation that resulted in condensing bus routes, placing three children in seats previously for two, and pickup of children starting at 6:15 a.m. No similar audit and cuts were performed on private school transportation. Shortly after instituting these changes, the Board and the District approved six days of non-mandated busing for private school students. PX262.

150. In addition to discriminatory budget cuts, on multiple occasions, the District ignored highly-qualified minority candidates in favor of appointing less qualified white candidates to vacant seats on the Board without any formal interview process:

- In 2014, Mr. Grossman, a white man with no experience in education, was appointed to fill a vacancy—created by the resignation of Ms. Corado—without any information regarding his qualifications being provided to the public. PX172; Tr. 1110:24-1111:1 (Weissmandl). Mr. Calherbe Monel, a black man who applied for the same vacant seat, was not even offered an interview. PX172.
- In 2015, following Mr. Juan Pablo Ramirez’s resignation, members of the public suggested that the Board reach out to the unsuccessful, minority-supported candidates from the last

election to fill the vacancy, but the Board refused to do so because appointing those candidates would be a “tough sell.” PX165; *see also* Tr. 1114:2-1115:1 (Weissmandl).

- In 2016, the Board appointed Mr. Chajmovicz, a white man with no experience in education and an application riddled with spelling and grammatical errors, over Ms. Fields, a retired principal with over 20 years of experience working in the District’s public schools. PX283 (Fields) ¶¶ 65-66; PX342 (Cohen) ¶ 22; PX168 (Ms. Fields’ letter); PX167 (Mr. Chajmovicz’s letter). Ms. Charles-Pierre strongly disagreed with the decision to appoint Mr. Chajmovicz because he did not have the background to be an appropriate candidate for the Board. Tr. 2666:21-2667:17; 2668:20-2669:3 (Charles-Pierre). When it came time to vote on the appointment, Mr. Weissmandl emailed only the white Board Members and confirmed their decision to appoint Mr. Chajmovicz. PX73. *See supra* ¶ 121.

d. The District has ignored the needs of its Latino constituents

151. The District has ignored the needs of its Spanish-speaking Latino constituents by failing to address their individualized needs. For example, despite initially committing to provide translators at Board meetings, the Board did not do so for months, and when it did, the translation services were severely inadequate. PX222; PX104; *see also* Tr. 1302:8-1303:18 (Trotman) (testifying that Spanish-speaking students and other attendees at Board meetings translated for Latino parents in the absence of Board-provided translators). The District has also failed to provide adequate Spanish bilingual education services. PX217; Tr. 2421:12-15 (Wortham) (noting that the District was under a “corrective action plan” as directed by NYSED’s Office of Bilingual Education and World Languages until March 2019); Tr. 1875:18-1876:23 (Young-Mercer) (testifying that former Board Member JoAnn Thompson criticized the Board for spending more time on personnel and real estate issues than programming issues like bilingual education).

152. In 2015, the U.S. Department of Education Office of Civil Rights (OCR) found that Spanish-speaking students and families received disparate, negative treatment compared to Yiddish-speaking students and families. For instance, in August 2013, the District invited parents of Yiddish-speaking students to an open house for bilingual special education programs, but did not conduct a similar open house for parents of Spanish-speaking students. PX157_0008. At trial,

Mr. Trotman testified that he visited a public school where white private school students attended an English-Yiddish bilingual program in a separate classroom, after the school's principal complained to the NAACP about the disparate treatment provided to those white students. Tr. 1307:16-1309:20 (Trotman). Among other things, the white students' classroom had air conditioning whereas the public school students' classrooms in the building did not. Tr. 1355:14-1363:15 (Trotman). OCR found that while Spanish bilingual students in public elementary schools were integrated with other students, the Yiddish bilingual students in the same public elementary school were not integrated with other students in any classes or activities and actually arrived and left school at different hours than other students. PX157_0008-9. OCR reported that the separation of the Yiddish speaking students from the rest of the students "[was] not specified or otherwise required" in the Individual Education Plans of the Yiddish speaking students. PX157_0009.

- e. Any improvements to public schools in recent years are due to state oversight, and the District continues to require such oversight.

153. Although the weight of evidence shows that the District's public schools continue to suffer, the District argues that the schools have actually improved in recent years. First, the alleged improvements represent a fraction of the services that were cut from public schools beginning in 2009 and have not kept pace with the rising enrollment in public schools. As of December 2018, the Board had restored only 185.5 of the 506.5 positions it cut since 2009, while public school enrollment during the same period increased by approximately 2,100 students. PX208_0008-9. As Board Member Charles-Pierre admitted at trial, the number of positions that have been restored are not sufficient to return the District's public schools to their former quality. Tr. 2678:14-2679:1 (Charles-Pierre). Moreover, as recently as 2018, the failure to pass a budget led the Board to eliminate almost \$4.5 million in funding. PX208_0024-25.

154. Second, all the improvements cited by the District have occurred under the

continued supervision of state monitors over the past five years. On June 10, 2014, the NYSED Commissioner appointed a fiscal monitor to oversee the District due to “the District’s history of and continued signs of fiscal distress, particularly in light of the lottery advance and the fact that the District currently receives approximately \$20 million in federal funding.” PX210. The Commissioner has since continued to appoint monitors to oversee the District and Board’s activities. PX169 (“Mr. Greenberg’s presentation to the Regents made clear that a fiscal, social and human crisis exists in the District, requiring a strong and immediate response.”); PX152; PX156 ; PX206; PX207; PX208. Likewise, the District’s budgets now have to be approved by the Commissioner before being submitted to a vote in the District. Tr. 2404:22-2405:1 (Wortham); PX170 (rescinding approval of the 2017 budget). Guided by the monitors’ recommendations, the state has also provided yearly \$3 million grants to the District to be spent *solely* on public schools. PX206_0007-8; PX203; Tr. 2431:23-2432:13 (Wortham); PX207_0009-10; PX208_0010-11.

155. As a result of the continued supervision and grants from the State, the Board has restored some programs and services to public schools. Tr. 2680:15-22 (Charles-Pierre); Tr. 950:3-8 (Fields); Tr. 2433:11-15 (Wortham); PX206_0019 (“Without continuation of the \$3 million grant, the district does not have the fiscal capacity to maintain both full-day kindergarten for all students and the recent partial restoration of elementary arts programs.”); PX207_0010 (“The enacted 2017-18 State Budget continues the \$3 million in State funding...”); PX208_0022 (“For fiscal year 2018-19, the entire \$3 million fund will support the same services as in the previous two years serving 707 students.”). Indeed, Board Member Weissmandl admitted that things improved in the public schools “[a]s a result of the close involvement of state monitors and an infusion of resources made possible by our state lawmakers.” PX18.

156. However, responsiveness to NYSED monitors is not responsiveness to minorities’

needs, and numerous witnesses testified that they are concerned that once state oversight ends, the Board will resume cutting public school services in favor of private school expenses. Tr. 846:6-20 (Miller) (expressing concern over whether public schools will see any improvement without monitors); PX283, PX283 (Fields) ¶ 26; PX288 (Trotman) ¶ 25. *See also* Tr. 2665:12-18 (Charles-Pierre) (testifying to her view that the Board cannot be trusted without monitor oversight).

f. State law and lack of funding do not prevent the Board from being responsive to minority needs.

157. The District also argues that the Board had to cut services to public schools due to a lack of funding and that it had to increase services to private schools due to state law mandating the provision of those services. Neither of those arguments is borne out by the evidence.

158. First, to the extent the District has shown that there was a financial crisis in the District that led the Board to cut services, state-appointed monitor Mr. Greenberg found that the Board made “no meaningful effort to distribute [the] pain of deep budget cuts fairly among private and public schools.” PX152_0033. For instance, Board Member Grossman expressed his view that the Board could cut teachers from public schools because there was no express mandate from the state prohibiting such cuts. DX232_CHARLES-PIERRE0496; Tr. 2679:12-2680:14 (Charles-Pierre). The Office of the State Comptroller also found that the Board mismanaged the District’s finances. *See* PX229_0011-12; PX230_0002; PX231_0004-05, -16-17. Further, the Board rejected millions of dollars in state lottery funding that would have expressly helped public schools, belying the Board’s alleged helplessness to do anything in the face of a financial crisis. PX152_0022, -45.

159. Second, the District elicited no testimony that any of the Board’s decisions were actually motivated by state law mandates. In fact, Board Members claimed privilege and refused to provide any testimony or discovery on the reasons for their decisions until trial. The District’s citations to state law should be seen as mere pretext. To the extent state law mandates providing

services such as transportation and special education, the state has already determined that the District provides more than just the mandated services to private schools and that the District mismanages expenses on those services. PX170; PX152_0022-27, -33; PX156_0019-26; PX213 at 19:18-22:13; PX214_0003, -06-07; PX216 at 22:36-26:12. For example, the Board has performed audits to reduce spending on public school transportation while not performing the same analysis and cuts on private school transportation. PX288 (Trotman) ¶ 23; PX262. Similarly, NYSED withheld reimbursements for private special education placements by the Board because of a finding that the Board made those placements without first verifying whether those placements were required under federal law. PX286 (Price) ¶ 18. A NYSED report shows that those improper placements were disproportionately given to white children. PX289 (reimbursements withheld for placement in Yiddish bilingual programs).

160. For the above reasons, the Court holds that the evidence weighs in favor of Plaintiffs on this factor, *i.e.*, that the District and its Board are not responsive to minorities' needs.

D. Senate Factor 5: Minorities in the District face disparate socioeconomic impacts and voter futility

1. Legal standard for Senate Factor 5

161. In analyzing Senate Factor 5, courts consider “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.” *Goosby III*, 180 F.3d at 491. In the Second Circuit, where (1) disparate socioeconomic conditions and (2) lower political participation are shown, “plaintiffs need not prove any further causal nexus between their disparate economic status and the depressed level of political participation.” *Port Chester II*, 704 F. Supp. 2d at 445 (“the burden falls to Defendant to show that the cause is something else”). Inferior education, employment, income levels, and living conditions tend to operate to deny

access to political life. *See Gingles*, 478 U.S. at 69. In *Ferguson-Florissant*, for example, the court found that disparities in student achievement, home ownership, and racial and educational segregation contributed to lower political participation for minorities. 201 F. Supp. 3d at 1069-71. In *Charleston*, the court held that the “on-going racial separation that exists in Charleston County—socially, economically, religiously, in housing and business patterns—makes it especially difficult for African–American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win an at-large elections.” 316 F. Supp. 2d at 291. In *Luna v. Cty. of Kern*, the court found that Latinos bore effects of discrimination where Latinos had “been unable to influence elections commensurate with their population size because they form a much smaller percentage of the electorate and are socioeconomically disadvantaged compared to non-Hispanic whites.” 291 F. Supp. 3d 1088, 1137 (E.D. Cal. 2018).

162. Inequalities in public education are particularly harmful to minority political participation because of the critical link between public education and voting. *See Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 905 (2003) (holding that the New York Constitution guarantees an education that prepares students to “eventually function productively as civic participants capable of voting”); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (“[T]he public schools [are] a most vital civic institution for the preservation of a democratic system of government.”).

2. *Factual analysis for Senate Factor 5*

163. In the District, black and Latino residents lag behind white residents by most socioeconomic measures. Blacks and Latinos suffer from higher unemployment rates than whites, notwithstanding the white community’s much lower workforce participation rates. PX244H_0051-54; Tr. 749:3-11 (Cooper). In the labor market, white residents occupy a significantly larger

percentage of professional and managerial jobs. PX244H_0055-56.

164. Although the black community appears to enjoy a higher median income and per capita income, along with lower poverty rates, compared to the white community, these statistics must be viewed in light of the white community's low workforce participation rates and the white community's relatively large household sizes. PX244A ¶¶ 43-44; PX244H_0051-54; Tr. 745:23-747:12 (Cooper) (explaining the distinction between income and wealth and the fact that the Census Bureau calculates poverty rates based on income rather than wealth); Tr. 748:21-749:1 (Cooper) (stating that the income of the white population in the District does not reflect that population's wealth). The overwhelming majority of white families are also able to send their children to private schools. Similarly, home values reveal the true picture of wealth in the District, as "median home values in predominantly minority neighborhoods in the District are significantly lower than in the remainder of the District." PX244A ¶ 47; Tr. 748:3-8 (Cooper) (stating that it is "quite clear" that the white areas of the District have significantly higher home values than minority neighborhoods).

165. As discussed earlier, the District is highly segregated by race, the result of which is that blacks and Latinos are concentrated in areas with relatively low housing values, while whites tend to live in higher value areas. *Compare* PX244A ¶ 33 & figs. 8-9, *with id.* ¶¶ 47-48, & figs. 13-14; Tr. 511:15-513:15 (Cooper) (describing the high levels of residential segregation in the District, as indicated in figures 8 and 9 of his expert report). In addition, Latinos trail whites "across most of these same key socioeconomic measures." PX244A ¶ 44. *See also* Tr. 532:4-6 (Cooper) ("[I]n almost all socioeconomic measures Latinos are behind African-Americans and non-Hispanic Whites in terms of income as well as other measures.").

166. Compared to whites, higher percentages of blacks and Latinos in the District lack

a high school diploma and lower percentages of blacks and Latinos have a bachelor's degree. PX244H_0021-22; Tr. 745:15-21 (Cooper) (stating that the white population in the District outperforms both African Americans and Latinos in educational attainment, and the white population does so "to the extreme" when compared to Latinos alone). As funding for the public schools has decreased, so has the quality of education for the District's public schools, to the point where minority public schools dramatically lag behind their statewide counterparts in student achievement. *See* PX152_0029-33; PX208_0007 ("Graduation rates, with the exception of [b]lack students, have steadily declined since 2015. The Hispanic and Latino graduation rate is unacceptably low [at 37%], especially compared to the Statewide graduation rate of 68% for Hispanic and Latino students in 2017."); PX204A-R.

167. In 2007-08, the year right before the Board's dramatic cuts to public schools, the graduation rate was 72%; in 2014, the graduation rate fell to 60%; in 2019, despite state-mandated improvements, it was only 62%. PX204B_0014; PX204C_0001; PX204I_0002. The District's graduation rate is also starkly lower than the graduation rates of other districts in Rockland County. In 2019, the next-lowest graduation rate in Rockland County, for the Haverstraw-Stony Point Central School District, was 82%. PX204J-204R.¹⁷ Although the 39% graduation rate for white public school students in the District is less than half the graduation rates for white students in most other Rockland County districts, the population of white students in the District's public schools is very low. PX204I. Further, because the District does not track the graduation rates for nonpublic schools, the low graduation rates for white students in the District's public schools cannot be compared against the graduation rates for white students in nonpublic schools, although

¹⁷ The Court may take judicial notice of the statistics in PX204J-204R, which come from a public NYSED data website that is similar to the website that the Court took judicial notice of with regard to Mr. Cooper's testimony. Tr. 680:9-15.

white students make up 98% of the nonpublic school population. Tr. 2440:16-18 (Wortham); PX372, ¶ 24.

168. The District argues that the overall socioeconomic factors in the District show that the white community is performing worse than blacks. But notwithstanding certain socioeconomic measures under which blacks in the District may appear to perform better than whites, the white community is able to overcome any relative socioeconomic disadvantage and participate in the political process through its well-organized slating mechanism and get-out-the-vote efforts.

169. In contrast, the relative disadvantage of minorities in education, employment, and housing, combined with the persistence of racial tension, is correlated with “an overall trend of decreasing” minority voter turnout. PX305_0095; PX242A ¶¶ 56-59; PX242B_0022 ¶ 28 (Table 7). Dr. Barreto analyzed this trend and testified that blacks and Latinos in East Ramapo also have lower voter turnout rates due to electoral futility. Tr. 160:25-161:6 (Barreto). *See also* Tr. 398:10-19 (Barreto) (identifying electoral futility as one of the strongest factors correlated with low minority voter turnout rates under Senate Factor 5), Tr. 1631:2-12 (Barreto) (“[T]here’s ample evidence of election hindrance in the [m]inority community; that they don’t have equal access to slating organizations and mobilizing groups which turn out the vote for candidates that win. When you find yourself on the other side of that, you are, by definition, hindered. And that limits their ability to participate in the political process”); Tr. 1818:13-16 (Charles) (stating that minorities do not come out to vote in Board elections); Tr. 1282:14-1283:6 (Trotman testifying regarding minority futility). Board President Grossman recognized as much, writing to members of the private school slating mechanism that minorities “feel disempowered because they are....” PX88_0002; PX80_0774-75; Tr. 1468:15-1471:24 (Grossman).

170. Plaintiffs have shown that blacks and Latinos in the District lag behind whites in

key socioeconomic metrics and these disparate socioeconomic conditions have hindered the minority community's ability to participate effectively in the political process and contributed to electoral futility and low minority voter turnout. Thus, Senate Factor 5 weighs in Plaintiffs' favor.

E. Senate Factor 3: The District's election systems operate to enhance vote dilution

1. Legal standard for Senate Factor 3

171. In analyzing Senate Factor 3, courts look to “the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.” *Gingles*, 478 U.S. at 37, 45.

172. Regarding this factor, the Supreme Court “has long recognized that . . . at-large voting schemes may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’” *Id.* at 47 (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). The Supreme Court's skepticism of at-large election districts predates the 1982 amendment to the VRA. In 1969, the Supreme Court found that at-large elections had the effect of “nullify[ing] [black voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-69 (1969). And in 1977, the Supreme Court held that, because multimember districts tend “to submerge electoral minorities and overrepresent electoral majorities, . . . single-member districts are to be preferred in court-ordered legislative reapportionment.” *Connor v. Finch*, 431 U.S. 407, 415 (1977). The Supreme Court instructed that courts were only to maintain at-large districting in cases of “a singular combination of unique factors,” none of which are present here. *Id.*; see, e.g., *Mahan v. Howell*, 410 U.S. 315, 333 (1973). And as recently as 1993, the Supreme Court held that where “members of a racial minority group vote as a cohesive unit, practices such as . . . at-large electoral systems

can reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (quoting *Allen*, 393 U.S. at 569).¹⁸

173. Courts' scrutiny of election mechanisms is not limited to at-large systems. For example, the dilutive effects of at-large districts on minority voters are magnified in election districts that elect candidates to specific seats, because the practice "prevents a cohesive political group from concentrating [all of their votes] on a single candidate" through the use of single-shot voting. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1411 (E.D. Wash. 2014); *see, e.g., Charleston*, 316 F. Supp. 2d at 281 n.18 (explaining that "[s]ingle-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates"). Similarly, courts have found a greater likelihood of dilutive effects where there is only a small number of polling places, available only for short hours, and located in inconvenient locations that are not staffed with minority election officials. *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1222-23 (S.D. Tex. 1997); *see also Rodriguez*, 964 F. Supp. 2d at 782, 785. Likewise, staggered elections and off-cycle voting tend to dilute minority voting power. *See Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 475 (8th Cir. 1986); *Port Chester I*, 2008 WL 190502, at *28. Other dilutive practices include not making efforts to address the needs of those minority communities who do not speak English as a first language. *See Port Chester II*, 704 F. Supp. 2d at 431-33, 443 (finding

¹⁸ The Supreme Court's concerns about at-large voting districts are well-founded given their origins. At-large voting districts began being adopted in the early-1900s "to eliminate[e] the local bases of voting power of, respectively, urban working class ethnics and freed slaves, [by] turn-of-the-century reformers [who] hoped to centralize political power through the use of at-large and multimember election devices." S. Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. R. 1833, 1839-40 (1992). Their numbers increased following the adoption of the Voting Rights Act in 1965. *See C. Davidson, The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 24 (Grofman and Davidson eds., 1992).

that the village’s failure to address the needs of the Hispanic community, including by providing adequate language assistance at polling sites, amounted to discrimination in elections.) Where, as here, numbered posts and other discrimination-enhancing practices are combined with a dominant slating mechanism that regularly ensures that contests for each seat are almost always two-candidate races, the result is a “de facto majority vote requirement” that further diminishes the electoral opportunities of minority voters. *Charleston*, 316 F. Supp. 2d at 294.

2. *Factual analysis for Senate Factor 3*

174. The District utilizes many of the same election practices identified by courts as dilutive of minority votes—at-large elections using numbered posts in staggered, off-cycle elections. PX242A ¶¶ 20-35; Tr. 364:12-20 (Barreto); Tr. 366:6-367:19 (Barreto); Tr. 369:25-371:14 (Barreto). Plaintiffs’ expert, Dr. Barreto, explained that at-large elections in racially-polarized districts dilute minority voting strength because they prevent even politically cohesive minority voters from ever electing their candidate of choice given that they will always be out-voted by a cohesive majority voting bloc. PX242A ¶¶ 22-24; Tr. 364:12-366:4 (Barreto). This is particularly true here, where numbered posts and a requirement that voters only cast one vote for each seat prevent minorities from casting all of their votes for one candidate or engaging in any kind of effective single-shot voting. PX242A ¶¶ 32-33; Tr. 369:25-371:1 (Barreto). The off-cycle nature of the elections also negatively impacts minority political participation. PX242A ¶¶ 25-28; Tr. 366:6-368:19 (Barreto). Dr. Barreto explained that off-cycle elections increase the burden on voter participation, and when burdens increase, voters who feel powerless to elect their representatives tend to opt-out. *Id.* In the District, minority voters fit that description. *Id.*

175. The District’s polling locations, which are few and cater to white voters, and the District’s failure to use non-English election materials, further depress minority engagement and minority voter turnout. PX242A ¶¶ 29-31, 34-35; Tr. 368:20-369:24, 371:2-372:18 (Barreto). Dr.

Barreto found that there are substantially fewer polling places in use for District elections in East Ramapo than for other elections in the same geographic area. PX242A ¶ 29. Until 2017, voters were assigned to only 10 polling places for District elections. *Id.*; PX257 at 43:7-9. This number was increased to 13 polling places in the 2018 District elections. PX242A ¶ 29; PX257 at 43:4-6. For state and federal elections run by the Rockland County Board of Elections, voters in the *same geographic area* were assigned to more than 20 polling places. PX242A ¶ 29. The result is not only an effective reduction in polling places for Board elections, but added confusion for voters who may be assigned to vote in different locations depending on the election. *Id.* This confusion tends to prejudice minority voters more than white voters, who are able to overcome the confusion through the use of a highly organized and effective slating organization. PX242A ¶¶ 29, 37; Tr. 366:22-368:15 (Barreto).

176. For the 2018 election, the District adopted three new polling places, which had a net effect of advantaging the District's white voters. PX243 ¶ 53; Tr. 1367:21-1369:15, 1370:22-1371:9 (Trotman). The new polling locations were intentionally adopted in order to help the white bloc vote. Shaya Glick, a get-out the-vote activist for the white, private school community, reached out to Board President Grossman in May 2017, telling him that the white community needed to add Elmwood Elementary and 229 West Maple (the location of the private Viznitz Girls School) as polling locations. PX80_0801; Tr. 1472:8-1473:15 (Grossman). Six months later, Mr. Grossman reached out to Mr. Glick to let him know that "[t]he school district is soliciting input on changing poll sites. [...] Shaya – this is your opportunity." PX 080_1306; Tr. 1475:8-1475:22 (Grossman). To which Mr. Glick responded, "Great opportunity to help ourselves," and Mr. Grossman replied, "Bingo." PX80_1306; Tr. 1475:24-1476:8 (Grossman). Drs. Barreto and Collingwood analyzed the new polling locations and found the new locations had Mr. Grossman's

desired effect – they benefitted white voters, including the addition of Elmwood Elementary and Viznitz Girls School (229 Maple Ave) as polling locations. PX243 ¶ 53. Moreover, virtually all of the votes at Viznitz and Elmwood in the 2018 elections were in favor of the white-preferred candidates, Yoel Trieiger and Ephraim Weissmandl. *See* PX235; Tr. 1473:12-1474:7 (Grossman).

177. The District has also failed to produce critical voting and election materials in a language other than English, although 37% of the District’s public school students are English Language Learners and 53.6% of Latinos and 21.9% of blacks in the District speak English “less than very well.” JPTO IV.A.3; PX244A ¶ 51. The District admitted that it has failed to make virtually any of its election materials, including ballots, ballot applications, absentee ballots, information on voter registration, nominating petitions, and information on polling locations, available in the primary languages of many of the District’s black and Latino voters, such as Creole or Spanish. PX257 at 22:2-24, 41:6-41:20; 42:20-43:3, 105:16-25, 106:11-22, 148:17-149:4, 150:12-151:10, 152:14-153:4; PX243 ¶¶ 49-51; PX288 (Trotman) ¶ 34; Tr. 1266:7-19 (Germain).

178. Thus, the evidence showing that the District’s election practices enhance vote dilution weighs in favor of Plaintiffs on Senate Factor 3.

F. Additional Factor 9: The actions of the District’s Board and its counsel show that its stated reason for maintaining its at-large election system is tenuous

1. *Legal standard for Senate Factor 9*

179. Under Senate Factor 9, courts consider whether the policy underlying the contested practice or structure is tenuous. *Gingles*, 478 U.S. at 37. A “tenuous state policy supportive of a particular districting scheme is probative of the question of the fairness or the unfairness of that scheme’s impact on minority voters.” *Major v. Treen*, 574 F. Supp. 325, 352 (E.D. La. 1983).

2. *Factual analysis for Senate Factor 9*

180. Prior to trial, and in an effort to encourage resolution, the Court explained that the

District could settle the case by entering into a consent decree to implement a ward system. Tr. of Jan. 30, 2020 Hr'g at 42:5-11; 44:3-3-16. Such a settlement could have saved millions in legal fees that come directly from the District's budget. However, evidence adduced at trial shows that the Board Members controlling the settlement negotiations are the ones most involved in the dominant slating mechanism, and who therefore had the most to lose from such a settlement. Those Board Members excluded the minority-preferred Board Members from settlement conversations and misinformed them regarding settlement.¹⁹ This conduct indicates a tenuous motive for maintaining the at-large system: preserving the dominance of the white voting bloc.

181. As trial approached, the Parties engaged in settlement negotiations, including an in-person settlement conference before this Court on February 10, 2020. To encourage fruitful conversations, the Court asked that all Board Members attend. Mr. Grossman, rather than counsel, was tasked with contacting the two minority-preferred Board Members, Ms. Charles-Pierre and Ms. Leveille. On February 6, 2020, Mr. Grossman asked Ms. Charles-Pierre about attending the conference. DX233_Charles-Pierre1079. When Ms. Charles-Pierre asked what for, Mr. Grossman stated, in a clear mischaracterization of the Court's intent: "Judge wants to talk/yell at us[.] . . . The board. For not doing what NAACP wants." DX233_Charles-Pierre1080; Tr. 2675:21-2676:23 (Charles-Pierre). Ms. Charles-Pierre testified that prior to that conference (and even as of her deposition on February 26, 2020) she had not seen any of the Parties' settlement communications. Tr. 2673:5-2674:1; 2676:24-2677:1 (Charles-Pierre).

¹⁹ For example, Yoel Trieger, a Board Member elected by the white slating mechanism, conveyed misinformation about the legality of implementing a ward system. In a November 18, 2019, text to the other Board Members, Mr. Trieger wrote: "I think we should use every opportunity to remind people that we CANNOT legally setup a ward system for voting and thus have no choice but to defend this frivolous lawsuit which is costing our students so much." DX233_Charles-Pierre1044; Tr. 2672:10-2673:4 (Charles-Pierre).

182. On the same day, Mr. Grossman texted Ms. Leveille about the conference, telling Ms. Leveille: “[the Judge] wants to force us to do what the NAACP wants.” Dkt. No. 553-1, Leveille Decl. ¶ 9. Mr. Grossman did not tell Ms. Leveille that the conference was for the purpose of negotiating a settlement and Ms. Leveille ultimately could not attend the conference. *Id.* Ms. Leveille was not informed of any of the Parties’ settlement communications between a February 4, 2020, Board meeting and a March 3, 2020 Board meeting.²⁰ *Id.* at ¶ 4.

183. The District’s privilege log detailing settlement communications confirms that Ms. Charles-Pierre did not receive any settlement communications after February 9, 2020, and Ms. Leveille never received any via email at all. *See* Dkt. No. 545-2. According to the privilege log, after February 9, 2020, the District’s counsel narrowed the recipient list for his communications regarding settlement, sending emails only to Messrs. Grossman, Weissmandl, and Gerhardt, the District’s general counsel, *id.*, in other words, only to those Board Members who have an interest in maintaining the at-large system they use to control the elections.

184. By declining to share these settlement communications with the minority-preferred Board Members, and taken with the fact that the Parties’ settlement communications broke down, it is evident that the Board has an ulterior and improper motive to preserve the at-large system. Such a motive “indicate[s] that the policy is unfair.” *Marengo Cty. Comm’n*, 731 F.2d at 1571. This factor thus weighs in Plaintiffs’ favor.

G. Senate Factor 6: Racial appeals have formed part of campaigns

1. Legal standard for Senate Factor 6

185. Senate Factor 6 asks courts to examine “the use of overt or subtle racial appeals in

²⁰ Earlier in the day on March 3, 2020, this Court remonstrated counsel for the District for failing to ensure its Board Members were aware of settlement conversations. Tr. 2689:14-2696:22.

political campaigns.” *Goosby III*, 180 F.3d at 491 (quoting *Gingles*, 478 U.S. at 44-45). Examples of subtle racial appeals include when a candidate’s campaign materials suggest an opponent’s victory would mean an increase in the minority population, including in schools. *See Goosby III*, 180 F.3d at 488; *Ferguson-Florissant*, 201 F. Supp. 3d at 1078. A racial appeal likewise exists when a candidate sends campaign materials to only white communities and includes a picture or indicator that an opponent is a person of color. *See Charleston*, 316 F. Supp. 2d at 295; *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1318 (11th Cir. 1995) (Hatchett, J., dissenting); *cf. Flores v. Town of Islip*, 382 F. Supp. 3d 197, 241 (E.D.N.Y. 2019) (mailing flyer to white only neighborhoods could constitute racial appeal).

186. Plaintiffs are not required to “prove that racial appeals are a permanent or exceedingly pervasive feature of a jurisdiction’s elections” *Euclid*, 580 F. Supp. 2d at 610. Plaintiffs are also not required to show that the racial appeals were successful, simply that they were made. *Sessions*, 56 F.3d at 1318.

2. *Factual analysis for Senate Factor 6*

187. Plaintiffs have shown that in the District, racial appeals form a part of Board campaigns, particularly in the way that the successful, white Board candidates run their campaigns. For example, Board Member Freilich could not recall speaking to a single minority voter about his campaign, and Board Member Weissmandl could only recall speaking to a single minority voter. Tr. 719:6-17 (Freilich); Tr. 1061:1-9 (Weissmandl). That correlated with the experiences of Plaintiffs who testified that private school candidates did not make any effort to reach out to minority voters. Tr. 841:10-25, 842:8-19 (Miller); Tr. 816:19-23 (Goodwin); PX283 (Fields) ¶ 67. Plaintiffs also presented evidence demonstrating that the white slating mechanism does all of the campaigning on behalf of the private school slate of candidates, and that the slating mechanism’s campaign activities occur in white neighborhoods targeting white voters. *See infra* Section III.H.2.

This includes campaign advertisements with pictures of white candidates in newspapers targeting white subscribers. PX218A_0008; PX218A_0013 (advertisements in Community Connections, a publication circulated in the Orthodox and Hasidic communities). Similarly, volunteers supporting white candidates were told to use Yiddish in a get out the vote script that contained different text from the English version. The Yiddish script told voters “the fate of Jewish money and Jewish children is in your vote.” Tr. 1169:15-1170:8; PX188; *see* Trial Tr. 970:1-19 (Horowitz testifying that his get out the vote efforts did not include blacks or Latinos except Dr. Wortham once) .

188. This evidence demonstrates a pattern of racial appeals in District elections, and satisfy a finding in favor of Plaintiffs on Senate Factor 6.

H. Senate Factor 2: Racially polarized voting exists in District elections, and the District’s alternative explanation for divergent voting patterns do not refute Plaintiffs’ claim

1. Legal standard for Senate Factor 2

189. Senate Factor 2 “requires the Court to consider ‘the extent to which voting in the elections of the State or political subdivision is racially polarized.’” *Pope III*, 94 F. Supp. 3d at 342 (quoting *Goosby III*, 180 F.3d at 491). Courts weigh Senate Factor 2 “heavily in favor of Plaintiffs” where, as here, ecological inference analyses show that “Board elections suffer from stark racial polarization.” *Ferguson-Florissant*, 201 F. Supp. 3d at 1063-64.

190. Once racially polarized voting patterns are shown, courts may consider the defendant’s alternative explanations for such voting patterns. As the Second Circuit has held, courts are to “consider the political partisanship argument under the ‘totality of circumstances’ analysis rather than as part of the third *Gingles* precondition.” *Goosby III*, 180 F.3d at 493 (adopting the standard from the First, Fourth, and Ninth Circuits). Thus “the fact that divergent voting patterns may logically be explained by a factor other than race does not end the [Section 2] inquiry....” *Pope III*, 94 F. Supp. 3d at 342 (quoting *Goosby I*, 956 F. Supp. at 355). And “even

if [proof of a race-neutral cause of divergent voting patterns] is forthcoming, the defendant does not automatically triumph.” *Goosby I*, 956 F. Supp. at 355 (quoting *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995)). Rather, the Court still ““must determine whether, based on the totality of the circumstances ..., the plaintiffs have proven that the minority group was denied meaningful access to the political system on account of race.”” *Id.* Importantly, where “the influence of race and [race-neutral factors] on voting patterns . . . are too closely related to isolate and measure for effect . . . the evidence fails to demonstrate that race-neutral factors explain the voting polarization” *Charleston*, 316 F. Supp. 2d at 304. Additionally, once a race neutral explanation for voting patterns has been introduced, it does not then “require plaintiffs to prove racial bias in the community or that political parties in the [community] serve as ‘proxies’ for racism.” *Pope III*, 94 F. Supp. 3d at 342.

191. The case that established the standard for evaluating alternative explanations in the Second Circuit is *Goosby*. In *Goosby I*, the defendant argued both that a correlation between race and partisanship created a presumption that partisanship was the controlling factor and that plaintiffs must establish racial bias in the voting community to rebut this presumption. The district court rejected this argument, concluding “that neither the existence (or non-existence) of racial bias in the community nor the strength of the correlation between partisan politics and divergent voting patterns can be dispositive in a Section 2 case.” *Goosby I*, 956 F. Supp. at 353. Although the district court found in favor of the defendant under Senate Factor 2 because of a “strong correlation between political partisanship and the voting behavior of blacks and whites,” it ruled for plaintiffs on their Section 2 claim based on its analysis of the totality of circumstances because “black citizens’ failure to elect representatives of their choice to the Town Board is not *best* explained by partisan politics,” and other factors in the analysis showed that the black community

did not have access to the political process. *Id.* (emphasis added). The Second Circuit ratified this approach and affirmed the district court's decision. *Goosby III*, 180 F.3d at 493.

192. The District has repeatedly implored the Court to treat race-neutral explanations for divergent voting patterns as dispositive against Plaintiffs' claim, only to be rebutted if Plaintiffs are able to prove racial bias. The District's approach is one that has been deployed by the Fifth and Eleventh Circuits, but not by the Second Circuit in *Goosby*. The Second Circuit instead chose to follow the approach used in the First, Fourth, and Ninth Circuits, which analyze race-neutral explanations as part of the totality of circumstances analysis, *Goosby III*, 180 F.3d at 493; *see also Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Lewis v. Alamance Cty.*, 99 F.3d 600, 616 n. 12 (4th Cir. 1996). The Ninth Circuit has also held that "proof of groupwide or individual discriminatory motives has no part in a vote dilution claim." *United States v. Blaine Cty.*, 363 F.3d 897, 912 (9th Cir. 2004) (internal citations omitted). Indeed, requiring proof of racial bias would "would place an impossible burden on the plaintiffs" and be contrary to the 1982 amendment to Section 2, which omitted the requirement that plaintiffs must prove intent and substituted it with a results-based test. *Id.*; *see also* Tr. of Nov. 19, 2019 Hr'g at 32 ("No specific showing of discriminatory intent is required to prove a Section 2 violation.").

2. *Factual analysis for Senate Factor 2*

193. As discussed, Plaintiffs have shown that the very high levels of racially polarized voting in the District operates to consistently defeat minority-preferred candidates. *See supra* II.B.

194. In response, the District argues that policy preferences provide a better explanation than race for racially polarized voting, and that District elections are not driven by racial concerns, racial animus, or racial bias. The District relies on the public school versus private school divide

in the District,²¹ asserting that the Orthodox and Hasidic community in the District votes in favor of Board candidates who support lower taxes and maintaining mandated services for private schools, and against Board candidates that advocate for increasing taxes and cutting mandated services for private schools. There are numerous problems with this argument, including that it simply ignores the reality on the ground—i.e., race and policy cannot be isolated in a community where only 4% of white children attend public schools and the rest attend virtually all-white private schools, while 92% of the public school children are black and Latino.

195. The District’s only expert testimony on the topic was an unsupported line from Dr. Alford who opined that “anyone with a passing knowledge of the political divide in East Ramapo would recognize that there are so-called public school activists and voters and so-called private school activists and voters.” Tr. 2295:15-22 (Alford). Yet in offering his opinion, Dr. Alford admitted that he did not perform an analysis of either group, *id.* 2296:17-18 (Alford), nor did he perform an independent analysis of the Senate Factors, *id.* 2266:2-4 (Alford). Rather, he relied solely on a review of the Plaintiffs’ complaint and the report of Plaintiffs’ preliminary expert, Dr. Cole, in reaching his opinion. *Id.* 2296:5-10 (Alford).

196. Next, although each Board Member generally asserted that Board elections are

²¹ Although the District argues that it was Plaintiffs who originated the terms “public school” and “private school” community, it is clear from all the witnesses’ testimony that these are terms used throughout the District to describe the minority and white community, respectively. *See supra* Section II.B.2.e; *See also* PX257 at 191:18-192:2, 201:23-202:11; Tr. 730:14-17, 731:22-732:3 (Freilich); Tr. 1082:15-18 (Weissmandl); DX176 (Weissmandl) ¶ 36; Tr. 1150:10-15, 1152:21-1154:1 (Wieder); Tr. 1238:4-10 (Germain), 2560:15-17 (Charles-Pierre); DX177 (Rothman) ¶ 9; *see also* PX152_0015, 42, 59, 61; PX156_0008, 10, 14, 15 (NYSE reports). Plaintiffs’ witnesses testified that when they used the term private school community, they usually mean the Orthodox and Hasidic/white community. Tr. 656:11-16 (Dos Reis); Tr. 920:18-23 (Fields); Tr. 1201:21-25 (Price); Tr. 1373:15-22 (Trotman). Plaintiffs also testified that black and Latino parents who send their children to private schools vote for the same candidates that public school parents do, and are thus part of the public school community. Tr. 657:2-20 (Dos Reis), 838:14-25, 839:21-25 (Miller).

driven by policy, not race, none provided any foundation for their opinions. DX174 (Grossman) ¶ 70; DX176 (Weissmandl) ¶ 68; DX172 (Wieder) ¶ 41; DX177 (Rothman) ¶ 68; DX251 (Charles) ¶ 56; DX175 (Germain) ¶ 31. None testified specifically about their campaign platforms or policy positions, and certainly none testified that they ran on a platform of lower taxes or supporting mandated services for private schools. When asked whether he could name a candidate he “voted for who said they were going to raise taxes,” Mr. Weissmandl answered “I don’t recall *ever* hearing a candidate say that, period.” Tr. 1054:23-1055:4; *see also* Tr. 1199:9-18 (Price testifying that “I’d say certainly everybody favored lower taxes.”). Additionally, none testified that they were asked about their policy positions when they met with Rabbis Horowitz, Rosenfeld, and Oshry. In fact, Mr. Charles, Mr. Germain, and Ms. Charles-Pierre testified to the opposite, that they were *not asked* for their policy positions when they met with the rabbis. Tr. 2578:3-23; 2587:20-2588:12 (Charles-Pierre); Tr. 1787:20-1788:10 (Charles); DX175 (Germain) ¶ 16; DX251 (Charles) ¶ 21.

197. Instead, the Board Members claim without evidence that they and other successful candidates ran on vague platforms of bridge-building between the public and private school communities and working with all stakeholders. DX174 (Grossman) ¶ 13; DX176 (Weissmandl) ¶¶ 67, 69; DX172 (Wieder) ¶ 40; DX177 (Rothman) ¶ 69; (DX251) Charles ¶¶ 31, 38;²² Tr. 734:10-20 (Freilich). But this seems illogical when nearly all of the Board Members admitted that they carried out little to no campaigning, *see supra* Section III.A.2, and none of the black or Latino voters said they had seen these Board Members campaign in their neighborhoods.²³ PX342

²² Messrs Charles and Germain went so far as to claim that in 2013 they “ran on a platform focused on the needs of public school students.” *See* DX251 (Charles) ¶ 20; DX175 (Germain) ¶ 13. But this runs counter to the District’s arguments that the elections in which Charles and Germain ran, and won, were somehow determined by the white voters’ policy interests in lower taxes or services to private schools.

²³ If anyone campaigned on a platform of supporting all students, it was the minority-preferred candidates who lost. *See, e.g.*, PX279 (Dos Reis) ¶¶ 32, 37, 39, 40-41; PX283 (Fields) ¶ 52; PX281

(Cohen) ¶ 23; PX279 (Dos Reis) ¶¶ 12, 61, 63; PX283 (Fields) ¶¶ 43, 62; PX281 (Goodwin) ¶¶ 10, 12, 56, 58; PX282 (Miller) ¶¶ 12-15, 17, 20, 27; PX286 (Price) ¶ 14; PX288 (Trotman) ¶ 37; PX343 (Young-Mercer) ¶¶ 18, 40, 43. The few Board Members who did campaign testified that their campaign efforts were targeted at the white community. For example, Mr. Wieder used a get out the vote script that told voters “The fate of Jewish money and Jewish children is in your vote.” Tr. 1169:14-19 (Wieder); *see also* Tr. 1174:19-1175:5 (Wieder). Mr. Wieder also testified that white voters would not vote for him if they knew he had solicited votes from the public school community. Tr. 1175:8-1177:4 (Wieder); *see also* PX186. Similarly, Mr. Charles testified that he did not campaign for minority votes at the annual NAACP candidate forum because “there was no reason to.” Tr. 1847:9-1848:15. Mr. Freilich could not remember interacting with a single minority voter in his campaign, and instead stated his only campaign announcement was to an all-white audience. Tr. 714:2-13, 719:6-17.²⁴

198. To the extent the District argues that the white community was voting *against* the candidates that took positions opposite their policy interests, such evidence was similarly not adduced at trial. Although Mr. Charles and Mr. Germain stated that their opponents ran on platforms opposing the Orthodox and Hasidic community, their testimony is not credible. All of the minority-preferred candidates testified that they did not take particular positions on taxes or threatened to take away mandated private school services. PX343 (Young-Mercer) ¶ 12; Tr. 1889:12-1890:14, 1891:22-1892:6 (Young-Mercer); PX279 (Dos Reis) ¶¶ 32, 37, 39, 40-41; Tr. 661:2-662:8 (Dos Reis); PX283 (Fields) ¶ 52; Tr. 861:19-862:3, 944:20-946:1 (Fields); PX281

(Goodwin) ¶¶ 32-36.

²⁴ Although Mr. Grossman and Mr. Weissmandl stated in their direct testimony that they did not campaign, they separately testified that could not recall making any meaningful effort to reach out to minority voters. Tr. 1034:15-1035:3, 1059:22-1063:9 (Weissmandl); 1420:5-1421:9 (Grossman).

(Goodwin) ¶¶ 32-36 (PX281); PX286 (Price) ¶ 9; Tr. 1208:3-11, 1211:15-22 (Price); DX253 (Charles-Pierre) ¶¶ 3-4, 7.

199. The District attempted to elicit testimony that the minority-preferred candidates did not campaign to white voters, but the testimony only showed the extent of the racial divide in the electorate. Although many of the minority-preferred candidates did not campaign in the white community, it was not without reason. Ms. Fields testified that she was scared to campaign in white neighborhoods after being forced out of one white neighborhood by a group of all-white men. PX283 (Fields) ¶ 60; Tr. 950:12-951:8 (Fields). Mr. Goodwin testified that he was told by Mr. Wieder that he should not waste his time campaigning in the white neighborhoods because the white voters would not vote for him. PX281 (Goodwin) ¶ 54; Tr. 801:3-14; 812:5-11 (Goodwin); Tr. 1174:6-8 (Wieder testifying that he told Mr. Goodwin, a black man, “that the best use of his time was to campaign in his own community”). Ms. Leveille testified that she knocked on the homes of white voters, but that she did not speak with any occupants. Tr. 1778:13-24 (Leveille).

200. The District also tried to elicit testimony that candidate forums were not welcoming to Orthodox and Hasidic candidates or voters because they were held in churches, held on Saturdays (which is the Jewish Sabbath), or hosted by well-known anti-Semites in the community. This testimony similarly failed. The only testimony elicited was that one year the NAACP’s candidate forum was held on a Saturday in an auditorium attached to a church. Tr. 1317:22-1318:13, 1374:1-11 (Trotman). Other years, the NAACP’s forums were held on weeknights at community centers. Tr. 1317:19-21 (Trotman). The forums that Steve White and public school activists held were on weeknights every year from 2015 to 2019. The one exception was 2020, when the forum was scheduled for a Saturday and Sunday, but the Sunday event was canceled. Tr.

2125:21-2128:12 (White).²⁵

201. There is also no evidence that the people who hosted these forums are known as anti-Semites. In support of its position, the District pointed to a draft letter from the NAACP that was never sent and a few emails that Mr. White sent to personal correspondents. But none of the documents appeared to have been shared outside a handful of recipients, and the documents certainly do not show that their content was known outside those recipients, let alone to the entire Jewish community. Tr. 1926:16-1927:5 (Cohen); Tr. 2073:7-2075:25 (White). Although Mr. Grossman testified that the NAACP is known in the Jewish community as “racist,” “anti-Orthodox” and “anti the Yeshivas,” he was the only person out of the nearly thirty witnesses who held this view, and as explained *infra*, was not credible. Grossman Tr. 1406:2-19 (Grossman).

202. The District’s arguments also entirely ignore that the District’s public and private schools are racially segregated, leading to a scenario where the policy preferences identified by the District have a disparate racial impact.²⁶ In other words, when the white community votes down a budget because the budget increases taxes, minority children lose access to full-day kindergarten or exposure to arts, sports, and music. *See, e.g.*, PX76_0024-26, 1548:22-1554:2 (Grossman advocating in favor of voting down a budget that would result in “massive cuts to the public schools.”); *see also* PX218 (ads in Jewish magazine telling readers to “vote no” on the budget). And if a candidate runs on a platform of both lower taxes and increased services to private

²⁵ Indeed, Orthodox and Hasidic members have attended these forums. Tr. 2091:9-11 (White).

²⁶ The District claims that Board Members ran on platforms of maintaining private school services while at the same time arguing that state law mandates such services. This leads to an interesting dichotomy where Board Members are allegedly campaigning (and winning) on maintaining services that the Board cannot eliminate. *See, e.g.*, Tr. 1211:16-22 (Price testifying “it seems like redundant” to campaign on a platform that he was “interested in making sure that Orthodox and Hasidic students in the district received the services that they are entitled to under New York law” because that was “just implicit in my duties” as a Board member.)

schools, then voting for that candidate diverts money from minority children to fund services for white children. *See, e.g.*, PX80_1451-53; Tr. 1527:2-1529:9 (Grossman encouraging the organization of a petition threatening to vote down the budget: “I am a resident of East Ramapo and am fed up with seeing the public schools get so much restored and improved, even nonmandated items, and private schools have had nothing restored.”); *see also* PX74_0005 (Grossman to Glick: “Put up a few large signs that say, ‘No busing, No budget.’”).²⁷

203. Although the District argues that Plaintiffs and their witnesses testified that race does not play a role in elections and that as minorities, they were not prevented from voting or running for office, those same witnesses testified that there is a “racial element” to the elections. *See, e.g.*, Tr. 612:19-614:6 619:9-21 (Castor); Tr. 947:11-14 (Fields); PX283 (Fields) ¶¶ 42, 60; Tr. 801:20-802:2 (Goodwin); PX281 (Goodwin) ¶¶ 52-53 (PX281).

204. Ms. Castor, a former student at Spring Valley High School explained it best:

[P]olicy and race kind of make it seem as if they’re distinctive buckets, when they’re not. They’re much more intersectional issues. So for example, when you are someone who attends the public schools, it’s not just about the fact that the board is like or the private school community is proposing all these cuts or like defunding the budget. It’s also about the fact that most of those people are white and most of the people that you know who attend the public school, and you[,] are black and Latino. . . . This is the matter of the way I look and the way that they look and how that racial literacy is informing the way in which people are voting and the way people are supporting or not supporting our public school policies . . . So it’s the policy part, but it’s also the racial element. . . .at the end of the day it’s more than just education, it’s also about racial equality in the district.

Tr. 644:13-645:18 (Castor).

205. Other witnesses expressed similar views. Ms. Dos Reis testified that “when you are supporting the public school community, you’re supporting students who are students of color.”

²⁷ The 2018 budget did not pass and the Board “adopted a contingency budget which represented the elimination of \$4,375,787 from the Board-approved 2018-2019 budget.” PX208_0024.

Tr. 668:4-17 (Dos Reis). Ms. Miller testified that the Board's decisions impacted the minority community "because the public schools now are made up mostly of minority, Black and Latino students." Tr. 855:13-17 (Miller). And Dr. Cohen testified that this "lawsuit is about impact, racial impact on the children attending public schools It's about trying to level the playing field so that people in the minority community feel as though they're represented in matters dealing with their children's education." Tr. 1983:3-13 (Cohen); *see also* 1930:1-17 (Cohen).

206. The District's own witnesses undermined its arguments. Mr. Wieder testified that he understood when he was making decisions that impacted the public schools, he was making decisions that impacted minority students. Tr. 1177:23-25 (Wieder); *see also* Tr. 1184:12-1185:3 (Price testifying regarding "an avalanche of bad decisions that really affected the educational programs of the Minority students."). And although all the 2013 candidates were minorities, Charles described the 2013 campaign as a "very racially divided" campaign. Tr. 1845:23-25 (Charles). Mr. Charles issued a "press release" in which he discussed significant racial divisions in the District. PX273; Tr. 1813:1-3 (Charles). In the release, Mr. Charles stated that Mona Montal, a white woman involved in local politics and her cohorts "serv[ed] themselves and their community on the backs of the communities of color" without impunity. PX273; Tr. 1802:1-8, 1803:18-21, 1805:5-13 (Charles). Mr. Charles acknowledged that by "cohorts" he meant the Ramapo Town Board, which includes Mr. Weissmandl and another former school Board member. Tr. 1803:1-3, 1807:4-8 (Charles). And Mr. Charles admitted that the Board "also made cuts to the District's public schools music programs" and "the Board's cuts ... predominantly affected the black and Latino community." Tr. 1811:19-25 (Charles).

207. Thus, it is clear to the Court that the impact of the elections falls squarely into racial categories, with white-supported Board Members supporting policies that favor white students in

private schools over minority students in public schools. In circumstances such as these, where race and policy are so closely related, the Court will not accept the District's race-neutral explanation for divergent voting patterns. *Charleston*, 316 F. Supp. 2d at 304.

IV. ADDITIONAL PROPOSED FINDINGS REGARDING THE CREDIBILITY OF DISTRICT'S WITNESSES

208. In a bench trial, credibility determinations are the province of the presiding judge. *Chill ex rel. Calamos Growth Fund v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 229 (S.D.N.Y. 2019). “[T]he judge is entitled, just as a jury would be, to believe some parts and disbelieve other parts of the testimony of any given witness.” *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012); *accord Hyman v. Brown*, 927 F.3d 639, 661-62 (2d Cir. 2019). Moreover, if the Court finds that any portion of a witness's testimony was intentionally untruthful or misleading, the Court can elect to reject the entirety of the witness's testimony. *Hernandez v. NJK Contractors, Inc.*, 2015 WL 1966355, at *31 (E.D.N.Y. May 1, 2015). Grounds for finding a witness incredible include evasive, inconsistent, contradictory, or implausible testimony. *See, e.g., Latin Am. Music Co. v. Spanish Broad. Sys.*, 254 F. Supp. 3d 584, 589-90 (S.D.N.Y. 2017).

209. Several witnesses that Plaintiffs called adversely suffered from serious credibility issues because their testimony was evasive, contradicted by their past written statements or testimony, or implausible.²⁸ Moreover, many of the District's current and former Board Members submitted self-serving affidavits only to have that testimony undermined and contradicted by their previous private communications. Therefore, the Court makes the following credibility findings:

210. Multiple witnesses testified that they are not aware of any slating organization in the District that is run by members of the Orthodox and Hasidic communities, DX174 (Grossman)

²⁸ Plaintiffs impeached nearly all of these witnesses at least once, and some multiple times. *See* PX339.

¶ 34, DX172 (Wieder) ¶ 25, DX177 (Rothman) ¶ 22, DX251 (Charles) ¶ 22, DX176 (Weissmandl) ¶ 16, DX175 (Germain) ¶ 18, or that they are not aware whether Rabbis Horowitz and Oshry, Mr. Glick, or Mr. Weber (SERTA) assisted with Board campaigns, DX174 (Grossman) ¶¶ 35-37, DX175 (Germain) ¶ 21, DX251 (Charles) ¶ 26, *see* Tr. 712:2-713:17 (Freilich), PX339_0003 (impeaching Freilich's testimony that he does not know who assisted with his nominating petition). But documentary evidence shown to the witnesses at trial and their testimony directly contradicted these claims. For example:

- Mr. Grossman was well aware of Hersh Horowitz, Rabbi Oshry, and Shaya Glick's participation in Board campaign activities, often communicating with them directly on these topics. *See* Tr. 1411:8-1412:6, 1412:11-18, 1413:6-12, 1427:22-1428:6, 1436:13-19, 1437:12-1438:4, 1438:13-22, 1444:15-1446:16, 1446:23-1447:7, 1447:12-21, 1451:5-1452:19, 1453:14-1454:13, 1458:24-1459:17, 1465:24-1466:7, 1468:15-1469:2, 1477:17-25, 1485:1-5, 1485:15-1486:8, 1515:16-20, 1516:5-16, 1517:6-10 (Grossman); PX080_0774-75, -0759; PX074_0001-03; PX088_0004, -0010, -0012.
- Mr. Charles and Mr. Germain testified at length to the campaign activities SERTA handled for them. *See* Tr. 1248:2-1249:23, 1250:5-15, 1250:20-1251:2, 1252:12-21 (Germain); PX058_0002; Tr. 1822:19-1830:11, 1832:17-1833:9; 1835:6-9; 1837:3-10 (Charles).
- Mr. Wieder testified that there is a group of people in the Orthodox and Hasidic community that select people to run for the Board and that he was endorsed by these influential leaders in both 2007 and 2008. *See* Tr. 1155:6-9, Tr. 1161:4-12, 1165:13-17, 1166:2-9, 1167:6-7, 1167:15-20, 1173:6-12 (Wieder); PX187.
- Mr. Rothman testified about the slating activities that helped him win in 2012 and 2015, all without spending any meaningful time campaigning or raising campaign funds. *See* Tr. 1381:21-1383:12, 1383:19-1384:8, 1384:12-1385:10, 1386:6-11, 1388:1-4, 1391:9-1392:8, 1392:9-20, 1393:3-5 (Rothman).
- Other witnesses gave evasive and implausible answers when asked about the activities and individuals involved in the same slating mechanism. *See* Tr. 979:25-982:2, 993:25-995:3 (Horowitz); Tr. 1056:10-1057:19, 1073:1-1074:25 (Weissmandl); PX80_1532.

211. The Court therefore does not credit testimony regarding the non-existence of an operative slating mechanism in the white community in the District from any of these witnesses.

212. Mr. Weissmandl and Rabbi Horowitz gave testimony that minority-preferred candidates have equal access to that same slating mechanism. Mr. Weissmandl testified that black

and Latino candidates can equally access the support of the Orthodox and Hasidic community, yet he could not name a single black or Latino candidate who had signatures gathered for them by those communities. *See* Tr. 1036:19-24, 1053:7-11 (Weissmandl). Rabbi Oshry could remember all of the white-preferred candidates for the Board he met with and supported, but he refused to confirm whether he met with any of their opponents, claiming it was because he is bad at remembering names. *See* Tr. 2465:19-25, 2475:3-15; 2474:25-2475:7, 2475:25-2478:11, 2480:10-22, 2487:14-2488:25, 2490:5-16 (Oshry). Rabbi Oshry then claimed that he met with Sabrina Charles-Pierre in 2016, but Ms. Charles-Pierre later testified that this meeting never happened. *See* Tr. 2497:19-2498:4 (Oshry); Tr. 2588:20-22 (Charles-Pierre) (“Q. If Rabbi Oshry claimed that he had met you and talked to you, that would be incorrect, right? A. Correct.”). The Court therefore does not credit the testimony of these witnesses that minority-preferred candidates had equal access to the white slating mechanism in the District.

213. Many current or former Board Members testified that they campaigned for minority votes or represented minority interests during their tenure on the Board. *See* DX174 (Grossman) ¶ 19, Tr. 1471:19-20 (Grossman); Tr. 718:9-11 (Freilich); DX176 (Weissmandl) ¶¶ 15, 68, 69. But Mr. Freilich testified that he did not attend the NAACP candidate forum during his run for the Board nor could he recall a single conversation he had with a minority voter in the District. *See* Tr. 719:1-11 (Freilich). Mr. Weissmandl could only provide evasive answers regarding whether he campaigned in any minority neighborhoods, including asking for clarification on what a minority neighborhood is. *See* Tr. 1034:15-1035:3 (Weissmandl). And while Mr. Grossman was a Board Member, he actively advocated for the private school community to sue the District if private school programs are cut, to vote down the school budget and make cuts to the public school budget, and to vote out all “non-frum” (non-Orthodox) members of the Board, including Ms.

Charles-Pierre. *See* Tr. 1550:7-1554:8 (Grossman), PX076_0024-25; Tr. 1525:23-1529:9 (Grossman), PX080_1451-53. The Court thus does not credit testimony that these Board Members campaigned for minority votes or were responsive to the minority community.

214. Mr. Germain and Mr. Charles both testified they have no basis to believe that they needed to be vetted by or obtain the approval of leaders in the dominant slating mechanism to be part of the private school slate. *See* DX175 (Germain) ¶¶ 18-19; DX251 (Charles) ¶ 22. However, they both described meeting with rabbis for the approval of adding Mr. Germain to the slate. *See* Tr. 1819:9-11, 1819:16-18; Tr. 1242:3-4, 1243:1-11 (Germain). They also testified that they have no reason to believe they were not the candidates of choice of minority voters. DX175 (Germain) ¶ 49; DX251 (Charles) ¶ 51. But Mr. Charles acknowledged that members of the public school community have protested against him and called for his resignation, *see* Tr. 1858:12-14 (Charles), and Mr. Germain testified that he believes that the majority of his votes came from the white, Jewish community, Tr. 1254:15-21, 1259:3-6 (Germain). Ample testimony supports the contention that neither Mr. Germain nor Mr. Charles were the preferred candidates of minority voters. *See supra* Section III.B.2. The Court therefore does not credit testimony that Mr. Germain and Mr. Charles did not need the approval of leaders of the slating mechanism to run on the private school slate or testimony that Mr. Germain and Mr. Charles were minority-preferred.

215. Mr. Charles also testified that the issues that divide the District have nothing to do with race. DX251 (Charles) ¶ 56. But Mr. Charles admitted that he believes the Town of Ramapo Board, whose membership contains two current and former Board Members, have served “themselves... on the backs of the communities of color” and “want retail business and [*sic*] and a yeshiva or synagogue from their community to replace my communities [*sic*] programs like music instruction, NAACP SV headquarters.” *See* Tr. 1813:1-3 (Charles); PX273. Mr. Charles

further testified that when it comes to running for the Board, you are either working with the white community or you're working with the "other" community, Tr. 1849:1-4 (Charles), and he admitted that the 2013 Board election, in which all candidates running were minorities, was "a black-and-white campaign," clearly referring to the race of the voters who supported each slate, *see* Tr. 1846:1-3, 1863:14-22 (Charles). The Court does not credit his testimony that the issues that divide the public and private school communities in the District have nothing to do with race.

216. Finally, Mr. Grossman was not an honest broker to other Board Members during the Parties' settlement negotiations. Although the Court asked the District to bring all of its Board members to those negotiations, Mr. Grossman sent private messages to Ms. Charles-Pierre and Ms. Leveille that were untrue and appeared intended to discourage their attendance, telling them that the purpose of the settlement conference was because the "Judge wants to talk/yell at us ... for not doing what the NAACP wants." *See* Tr. 2675:23-2676:23 (Charles-Pierre); Leveille Decl. ¶ 9. Such facts suggest Mr. Grossman was personally trying to thwart any settlement, which the Court can infer was because of his vested interest in maintaining the at-large system, and, as such, the white community's power. Thus, the Court will also infer from his intentional misleading of other Board Members that the District's reason for maintaining its at-large election system is tenuous, and in favor of Plaintiffs on Senate Factor 9.

V. FINAL CONCLUSIONS & REMEDY

217. Having proven that the current at-large method of electing Board Members in the District violates Section 2 of the VRA as to the minority community living in the District, Plaintiffs are entitled to a full and complete remedy.

218. As an immediate remedy, this Court enjoins the District from holding any further elections under its at-large system, including the May 2020 elections. *See Pope III*, 94 F. Supp. 3d at 351-52; *Goosby v. Town Bd. of Hempstead*, 981 F. Supp. 751, 763 (E.D.N.Y. 1997), *aff'd*, 180

F.3d 476 (2d Cir. 1999) (*Goosby II*); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964). To expeditiously restore the rights of the District's minority community, this Court orders the District to propose a remedial plan that fully complies with the VRA within three weeks. *See Pope III*, 94 F. Supp. 3d at 351. Such a remedial plan shall (1) divide the District into nine voting wards—one for each Board seat; (2) require that only those residents living in a voting ward may vote for their Board seat; and (3) include at least three wards whose population is majority-minority. If the District fails to comply with the Court's directive, this Court shall draw its own remedial plan. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see also Pope III*, 94 F. Supp. 3d at 351; *Molina v. Cty. of Orange*, 2013 WL 3009716, at *8 (S.D.N.Y. June 14, 2013); *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2003).

219. Once a remedial plan is adopted and so-ordered, the District shall within two months of such adoption, hold a special election for the election of *all nine* Board Members. *See, e.g., Arbor Hill Concerned Citizens v. Cty. of Albany*, 357 F.3d 260, 262 (2d Cir. 2004).

220. This Court shall retain jurisdiction to ensure that the District complies fully with the VRA and implements all steps to cure its violation. *See New Rochelle*, 308 F. Supp. 2d at 163.

221. Finally, Plaintiffs are entitled to attorney's fees and costs, including expert fees, pursuant to 52 U.S.C. § 10310. *See Pope III*, 94 F. Supp. 3d at 351-52. Within 30 days of the entry of this order, Plaintiffs shall file a motion for the award of such fees and costs.

Dated: March 13, 2020

New York, New York

Respectfully submitted,

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Appendix A

