IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

MATHIS KEARSE WRIGHT, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: 1:14-cv-42 (WLS)
	)	
	)	
SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,	)	
	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. Introduction

The Defendant's motion for summary judgment should be denied because the evidence shows, despite Defendant's assertion to the contrary, that Plaintiff has established the second and third factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as probative of a violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *Gingles* factor 2 requires that "the minority group must be able to show that it is politically cohesive," 478 U.S. at 51, and "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim," *id.* at 56. *Gingles* factor 3 requires a showing that the white majority votes "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." *Id.* at 51 (citation omitted).

Plaintiff's challenge is to the method of electing two members of the Board of Education at-large and the unnecessary packing of blacks in Districts 1 (65.9% black) and 5 (72.8% black) as diluting black voting strength. Report of Frederick G. McBride, Doc. 40-3 ("McBride Report"), p. 12. The remedy Plaintiff seeks is a plan using seven single-member districts which provide blacks an equal opportunity to elect candidates of their choice.

II. Defendant Does Not Dispute the Reliability of Plaintiff's Statistical Data

Defendant's expert, Dr. Karen L. Owen, did not conduct *any* election analysis of her own. Thus, she did not present any evidence that contradicted in any way the data and estimates presented by Plaintiff's expert, Dr. Frederick G. McBride. More importantly, Owen assumed "*arguendo*, that McBride's data and estimations are reliable and valid." Expert Report of Karen L. Owen, Doc. 40-4 ("Owen Report"), p. 5. McBride used three statistical methods to determine racially polarized voting: (1) Goodman Single-Equation Ecological Regression, (2) double-

equation regression analysis (BERA), and (3) EI (Ecological Inference, referred to as King's Method). McBride Report, pp. 19-20; Deposition of Frederick Glenn McBride, Doc. 38 ("McBride Dep."), at 94:13-18. King's Method generally provides the best estimates of minority cohesion and racial bloc voting, and this is the methodology principally relied upon by Plaintiff in this brief. McBride Dep. at 83:11-13, 175:16-22. Owen, in her report, Doc. 40-4, pp. 6-7, and Defendant in its brief in support of summary judgment, Doc. 40-1, pp. 4-8, also relied on King's Method. Courts have acknowledged that King's Method is an improvement over BERA and is "a reliable method of analysis." *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004); *see Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 387 (S.D.N.Y. 2004) (referring to King's Method as "the standard technique most commonly used in voting cases" (internal quotation marks omitted)).

McBride also relied upon "endogenous elections," which are those for the governing body at issue, *i.e.*, the Sumter County Board of Education. Courts have acknowledged that endogenous elections, rather than "exogenous elections," which are those for other offices, provide "the most probative evidence." *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 773 (N.D. Ga. 1997). *Accord, Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999); *Askew v. City of Rome*, 127 F.3d 1355, 1381 n.13 (11th Cir. 1997). McBride also relied upon elections which included minority candidates. Courts have concluded that "a court may assign more probative value to elections that include minority candidates, than elections with only white candidates." *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000) (citing *Johnson*, 196 F.3d at 1221-22). *Accord, Cofield*, 969 F. Supp. at 772. McBride also analyzed the more recent elections for the Board of Education, *i.e.*, those from 2002 to 2014. Courts have concluded "that recent elections are more probative than those which occurred long before the

litigation began." *Solomon*, 196 F.3d at 1227 (citing *Meek v. Metro. Dade Cnty., Fla.*, 985 F.2d 1471, 1483 (11th Cir. 1993)). McBride's analysis was thus conducted in a reliable manner and using the most probative evidence.

III. Plaintiff Established the Second *Gingles* Factor

Owen says in her report: "There are inconclusive results from the plaintiff's report for support of *Gingles* prong 2 in four of the twelve elections (33% of the elections)." Owen Report, p. 5. The four elections she cites are: District 3 in May 2014; District 2 in May 2014; District 3 in 2006; and District 3 in 2002. *Id.* First, even assuming Owen's statement is correct—which, as demonstrated below, it is not—she does not dispute that blacks were politically cohesive in eight (66.6%) of the twelve elections. Thus, as Owen concedes, McBride's report shows that in a majority of the elections, a "significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56. *Gingles* does not require that minority group members "always" vote for the same candidates, but only that a significant number "usually" vote for the same candidates. Even crediting Owen's inaccurate characterization of the record, the evidence in this case establishes the minority political cohesiveness necessary to a Section 2 vote dilution claim.

Second, and equally or more important, in three of the four elections Owen cited, black voters were in fact politically cohesive, in that a majority of blacks voted for the black candidates. In the District 3 election in 2014, while some blacks voted for the white candidate (Reid), the majority (56%) of blacks voted for Fitzpatrick, the black candidate. McBride Report, p. 44. Black voters were politically cohesive in that election.

In the District 2 election in 2014, while a minority of blacks voted for two white candidates (Byrd, 25.1%, and Krenson, 8%), the majority (50.5%) of blacks voted for Pride, the

black candidate. McBride Report, p. 43. Black voters were again politically cohesive in that election.

In the District 3 election in 2006, while a few blacks voted for the white candidate (Minich), and some blacks voted for Seay, a black candidate, the majority (93.4%) of blacks voted for Harris, a black candidate. McBride Report, p. 51. Black voters were politically cohesive in that election.

In the District 3 general election in 2002, blacks were not politically cohesive in that neither of the two black candidates (Harris and Seay) received a majority of the black votes. McBride Report, p. 52. Nevertheless, in eleven (91.7%) of the twelve contests blacks were politically cohesive satisfying the second *Gingles* factor, *i.e.*, a "significant number of minority group members usually vote for the same candidates." 478 U.S. at 56.

IV. Plaintiff Established the Third *Gingles* Factor

Owen further claims there is "no support for *Gingles* prong 3" in Plaintiff's expert report. Owen Report, p. 7. She cites the results of seven elections to support her claim. But an examination of those elections demonstrates the opposite, that the evidence in the record supports a finding of the third *Gingles* prong.

First, of the seven elections cited by Owen, the black candidate actually *lost* in two elections. For example, Owen cites District 3 in 2002 to support her claim, but in that election the black preferred candidate (Seay) was defeated and a white candidate (Minich) was elected. McBride Report, p. 52.[1] Owen also cites the at-large election in May 2014 to support her claim.

[1] There is a disparity in the data in this election. Under King's Method, Seay got 24.3% of the black vote but under BERA she got 46.5% of the black vote and was the candidate of choice of black voters. McBride Report, p. 52. Under King's Method, Harris and Minich each got more black votes than under BERA. The exception was Seay, and for this reason McBride elected to rely upon BERA in estimating Seay's level of black support. In addition, in his

Owen Report, p. 7. Although a black candidate (Coley) received a majority (68.2%) of the black vote,[2] McBride Report, p. 46, there was a runoff election, because no candidate received a majority of the total votes. In the runoff election held in July 2014, Coley received 65.6% of the black vote, but was defeated by his white opponent (Roland), who received 76.2% of the white vote. McBride Report, p. 48. Thus, nothing in the 2014 at-large election, which was racially polarized and which resulted in the defeat of the black preferred candidate, undercuts in any way Plaintiff's claim that whites vote as a bloc usually to defeat the minority's preferred candidates.[3] The election strongly supports Plaintiff's vote dilution claim.

Second, in four of the elections cited by Owen, the black-preferred candidate was elected to office, but from a district in which blacks were either a majority or a plurality of the electorate. If anything, this proves that black-preferred candidates generally can succeed in Sumter County only in districts where black voters outnumber white voters. For example, Owen cites the District 1 election in May 2014, in which a black candidate (Green) was elected, in support of her claim. Owen Report, p. 7. But in that election, blacks were 62.7% of the voting-age population (VAP) of the district and there was no white majority. McBride Report, p. 42. In addition, the candidate of choice of white voters (Smith) was white and got 60.6% of the white vote, while Green got 87.9% of the black vote. *Id.* Not only was voting racially polarized, but

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response to Owen's expert report, McBride relies upon both King's Method and BERA. Resp. to Def.'s Expert Report of Karen L. Owen, Doc. 38-5, p. 2 (the propriety of relying upon "ecological regression (BERA) and ecological inference (EI) is not refuted by Dr. Owen").

[2] Coley did receive more votes in the first round of voting in that election than any other candidate, but, notably, blacks were a majority (51.3%) of the total population (TPO) and 48.1% of the voting-age population (VAP) of the district. McBride Report, pp. 46, 58.

[3] Defendant claims McBride said he "did not know" if the May 2014 election should be counted as a win for the minority preferred candidate. Br. in Supp. of Def.'s Mot. for Summ. J., Doc. 40-1 ("Def.'s SJ Br."), p. 6. To the contrary, McBride actually said: "But if he really won the election, why do we have a runoff? I can't say he won." McBride Dep. at 122:1-3.

nothing in the election undercuts in any way Plaintiff's claim that where whites are a majority they vote as a bloc usually to defeat the minority's preferred candidates.

Similarly, Owen also cites the District 5 election in May 2014, in which a black candidate (Green) was elected, to support her claim. Owen Report, p. 7. But in that election blacks were 70.6% of the VAP of the district and there was no white majority. McBride Report, p. 45. In addition, the candidate of choice of white voters (Griggs) was white and got 81.1% of the white vote, while Green got 66.4% of the black vote. Once again, not only was voting racially polarized, but nothing in the election undercuts in any way Plaintiff's claim that where whites are a majority they vote as a bloc usually to defeat the minority's preferred candidates.

Owen also cites the District 1 election in 2008, in which a black candidate (Whitehead) was elected, to support her claim. Owen report, p. 7. But in that election blacks were a majority of the total population (TPO) and a plurality (49.5%) of the VAP of the district. McBride Report, pp. 50, 58. Whites were a minority (46.2%) of the VAP. Sumter County District Demographics Chart, prepared by McBride using Maptitude for Redistricting 6.0, Caliper Corporation, attached hereto as Exhibit 1. In addition, the candidate of choice of white voters (McCook) was white and got 50.7% of the white vote, while Whitehead got 96.9% of the black vote. McBride Report, p. 50. Not only was voting racially polarized, but there was no white majority, and thus nothing in the election undercuts in any way Plaintiff's claim that where whites are a majority they vote as a bloc usually to defeat the minority's preferred candidates.

Owen also cites the District 3 election in 2010, in which a black candidate (Pless) was elected, to support her claim. Owen Report, p. 7. But in that election blacks were a majority (52.4%) of the TPO and a plurality (48.4%) of the VAP of the district. Exhibit 1; *see also* McBride Report, p. 49. Whites were a minority (42.5%) of the VAP. Exhibit 1. There was no

white majority, and thus nothing in that election undercuts in any way Plaintiff's claim that where whites are a majority they vote as a bloc usually to defeat the minority's preferred candidates. That voting in the election was polarized is evident from the fact that the black candidate got 99.5% of the black vote and the white candidate (Minich) got 60.8% of the white vote. McBride Report, p. 49.

Last, Owen cites the District 6 election in March 2014[4] to support her claim. Owen Report, p. 7. Although blacks were 28% of the VAP, a white candidate (Mock) received a majority (58%) of the black vote and was elected. McBride Report, p. 41. Thus, in only one of the elections where whites were a majority were blacks able to elect a candidate of their choice: the District 6 election in 2014. But the winning white candidate (Mock) also had overwhelming (95.4%) white support. McBride Report, p. 41. In the remaining elections where whites were a majority, the black preferred candidates lost. With the exception of the 2014 election in District 6, it was only in districts where blacks were a majority of the total or voting age population, *i.e.*, Districts 1, 5, and 3, or in which there were no white majorities, that blacks were able to elect candidates of their choice.

It is clear from the statistics submitted by Plaintiff, and from the fact that no black candidate has ever been elected to an at-large position on the Board of Education, that the election of two members of the Board at-large and the packing blacks in Districts 1 and 5 dilutes black voting strength. Both the second and third *Gingles* factors are met in this case, and Defendant's motion for summary judgment should be denied. Indeed, a motion for summary judgment as to the *Gingles* factors should be granted to Plaintiff.

[4] Owen lists this election as having taken place in May 2014, but the corresponding page of McBride's report lists it as having taken place in March 2014.

V. Non-Statistical Evidence Further Supports Plaintiff's Claim

Gingles makes clear that "[a] showing that a significant number of minority group members usually vote for the same candidates is *one way* of proving the political cohesiveness necessary to a vote dilution claim." 478 U.S. at 56 (emphasis added). The dilution of black voting strength in Sumter County is shown by other factors including: the long history of discrimination in Georgia;[5] the exclusion of blacks from elected office; court decisions invalidating at-large elections; objections by the Department of Justice under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, to discriminatory voting changes; the civil rights movement in Sumter County and concerted efforts by whites to suppress it; racially segregated elections; and racially segregated schools. These factors confirm that blacks in Sumter County are politically cohesive and that whites vote as a bloc usually to defeat the candidates of choice of minority voters, providing further proof of the second and third *Gingles* factors.

A. Elections for Members of the Board of Education

There is a long history of efforts to dilute the voting strength of the politically cohesive black community in Sumter County, which stretches from the 1960s through the 2010s. In 1964, Georgia law provided that the Sumter County grand jury appoint school board members. *Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985) ("*Edge II*"). In *Allen v. State*, 137 S.E.2d 711, 712 (Ga. Ct. App. 1964), the court found that the jury commissioners of Sumter County "have for over 40 years failed to select any Negroes from the tax digest for the grand jury list or for the traverse jury list, and no member of the Negro race has been called for either grand jury duty or traverse jury service in the county." And in *Edge II*, 775 F.2d at 1510, the court

[5] The extensive history of racial discrimination in Georgia in all areas of life is set out in Plaintiff's First Request for Judicial Notice, Doc. 32, which is incorporated herein by reference thereto.

found that although blacks were 44% of the population of Sumter County, "[n]o black person ha[d] ever served on the county school board."

In 1968, the legislature made a decision that school board members be elected. The legislature enacted Georgia Laws 1968, p. 2065, providing that the Sumter County Board of Education consist of seven members elected from four single-member districts, one two-member district, and one member elected at-large. *See Edge v. Sumter Cnty. Sch. Dist*., 541 F. Supp. 55, 56 (M.D. Ga. 1981) (three-judge court) ("*Edge I*"), *aff'd*, *Sumter Cnty. Sch. Dist. v. Edge*, 456 U.S. 1002 (1982). On July 12, 1972, the election districts were declared unconstitutionally apportioned in *Carter v. Crenshaw*, C.A. No. 768 (M.D. Ga., Americus Division). *See Edge I*, 541 F. Supp. at 56. The legislature enacted a new plan, Ga. Laws 1973, p. 2127, which provided for at-large elections for the entire Board. *See Edge I*, 541 F. Supp. at 56. The plan was submitted to DOJ for preclearance under Section 5 but was objected to because it would "have a racially discriminatory effect." Letter from J. Stanley Pottinger, Assistant Attorney General, to Henry L. Crisp, July 13, 1973, p. 1, attached hereto as Exhibit 2. According to the objection letter, "the requirement that all candidates must be voted on county-wide would result in the dilution and minimization of the voting strength of black citizens." *Id*.

The Board of Education, however, ignored the objection and continued to hold at-large elections until they were enjoined by a three-judge court as violating Section 5. *Edge I*, 541 F. Supp. at 57. A new plan was enacted in 1982 consisting of six single-member districts and one at-large seat, but it was objected to by DOJ under Section 5 because it "fragments the black voting strength for apparently no compelling governmental reason and such fragmentation need not exist in a fairly drawn plan." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, Dec. 17, 1982, p. 1, attached hereto as Exhibit 3. DOJ found that:

> Our analysis also has revealed evidence of racially polarized voting, non-responsiveness on the part of the school board members to the particularized needs of the black community, and other factors which, in the context of a history of racial discrimination in the county, increase the likelihood that the proposed redistricting plan will deny black voters an equal opportunity to elect representatives of their choice.

Id. DOJ further concluded that the evidence "suggests that the submitted plan was designed with the purpose of minimizing minority voting strength in the school district," and "it appears that the board consciously did not consider the alternative plan proposed by the ACLU because of racial considerations and similarly did not obtain or seek input from the minority community." *Id.*, p. 2. The board submitted a second plan but it was also objected to by DOJ, which concluded that "the present proposal fails to offer black voters a realistic opportunity to elect candidates of their choice," and that it was unable to conclude "in light of the continuing exclusion of effective participation by black citizens and their representatives in the redistricting process, that this discriminatory result was unintended." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Henry L. Crisp, Sept. 6, 1983, p. 2, attached hereto as Exhibit 4. The DOJ objection letters are clear evidence of racially polarized voting in Sumter County and the discriminatory effect of at-large elections.

Following the Section 5 objections in 1982 and 1983, the district adopted a plan of its own. It was challenged by local residents as failing to comply with Sections 5 and 2 of the Voting Rights Act, but the challenge was dismissed. The court of appeals vacated and remanded, holding that the district court erred in designing the new apportionment plan without determining whether the plan complied with Section 2 prohibiting racially discriminatory voting qualifications. *Edge II*, 775 F.2d at 1510.

On remand, the parties agreed on a new plan using six single-member districts and one at-large seat. Three of the six districts were majority black, with 66.57%, 64.49%, and 57.26%

black populations. Order, p. 2, *Edge v. Sumter Cnty. Sch. Dist.*, Civ. No. 80-20-AMER (M.D. Ga. Oct. 9, 1986), attached hereto as Exhibit 5.[6] The plan was precleared by DOJ and adopted by the court. *Id.*; Supplemental Order, *Edge v. Sumter Cnty. Sch. Dist.*, Civ. No. 80-20-AMER (M.D. Ga. Oct. 9, 1986), attached hereto as Exhibit 6.

In 2002, a plan was adopted providing for nine single-member districts. Based upon the 2010 census, the plan was malapportioned. *Bird v. Sumter Cnty. Bd. of Educ.*, No. 1:12-CV-76 (WLS), 2013 WL 5797653, at *1 (M.D. Ga. Oct. 28, 2013). In 2011, the legislature enacted Senate Bill 154 and Senate Bill 4EX ("the 2011 plan") for the Sumter County Board of Education. *Id.* The plan provided for five single-member districts and two at-large seats. The 2011 plan was submitted for Section 5 preclearance and DOJ asked for additional information. In its response to DOJ's request, the Board of Education conceded that "the redistricting might end up reducing the total number of black members serving on the school district." Letter from James M. Skipper, Jr., to T. Christian Herren, Jr., Chief, Voting Section, January 19, 2012, p. 6, attached as Exhibit 7. The Board also conceded that voting was racially polarized. It noted that the new redistricting plan created "'safe' black majority districts," and "'safe' white majority districts," and that the two at-large seats would serve only as "influence districts." *Id.* But Section 2 protects the right of minorities "to elect representatives of their choice," 52 U.S.C. § 10301, and not merely to influence the election of candidates favored by the majority. On January 31, 2012, however, the 2011 plan was withdrawn, leaving the malapportioned plan in effect. *Bird*, 2013 WL 5797653, at *1.

The suit in *Bird* was filed by a local resident challenging the plan as malapportioned, but on October 28, 2013, the court issued an order that based upon the decision in *Shelby County,*

[6] Page 5 is missing from this Order and Plaintiff has been unable to locate it.

Alabama v. Holder, 133 S. Ct. 2612 (2013), which invalidated the coverage formula of Section 5, the case was now moot. The effect of *Shelby County* was to render the 2011 plan no longer subject to preclearance. *Bird*, 2013 WL 5797653, at *3.

In response, the legislature enacted House Bill 836 in 2014. It reduced the number of members of the board of education from nine to seven members for the year 2015 and future years, with five members elected from single-member districts and two at-large. *See* McBride Report, p. 11. The districts were the same as those under the 2011 plan. The 5-2 plan diluted black voting strength by reducing the number of districts in which blacks were a majority, by packing blacks in District 1 and 5, and creating two at-large seats. Given that blacks are 48.1% of the VAP of the county, *Id.*, p. 5, the adopted plan does not provide them with an equal opportunity to elect candidates of their choice. And the use of a plan creating 2 at-large seats for the Board of Education is a return to the days of discrimination of the 1960s, 1970s, and 1980s.

B. Challenges to At-Large Elections for the County Commission and City Council

Successful challenges to at-large elections for the Sumter County Commission and the Americus City Council as diluting minority voting strength were brought in 1977. The district court entered an Amended Final Judgment as to the City Council on June 17, 1980, "that Plaintiffs have established a prima facie case that the present method of electing the Mayor and members of the City Council unconstitutionally dilutes minority voting strength in violation of the Fifteenth Amendment of the Constitution of the United States." Am. Final J., p. 1, *Wilkerson v. Ferguson*, Civ. No. 77-30-AMER (M.D. Ga. June 17, 1980), attached hereto as Exhibit 8. The district court also entered a similar final judgment concerning the County Commission on April 7, 1980, and an amended judgment and order on June 16, 1980, correcting the lines in two of the districts. 2d Am. J., p. 1, *Wilkerson v. Ferguson*, Civ. No. 77-30-AMER (M.D. Ga. June 16,

1980), attached hereto as Exhibit 9. A finding of a violation of the Fifteenth Amendment requires proof of intentional discrimination. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62 (1980) (action by a State violates the Fifteenth Amendment "only if motivated by a discriminatory purpose"). The orders of the district court are clear evidence of racially polarized voting in Sumter County and the discriminatory effect of at-large elections.

C. Discrimination Against Blacks Attempting to Register and Vote

Racial tensions in Sumter County erupted out of a voter registration campaign started in 1963 by members of the Student Nonviolent Coordinating Committee. There were also large-scale demonstrations against segregation in Americus in the summer of 1963, as well as large-scale arrests of civil rights demonstrators. Some 250 people were taken into custody and held in various jails in Americus and neighboring counties. Walter Rugaber, "Americus Adds a Wrinkle In Racial Case Jailings," *Atlanta Journal*, Oct. 3, 1963, attached hereto as Exhibit 10. They were arrested on charges such as parading without a permit or failing to obey an officer. Eleven blacks were arrested on July 11, 1963, when they tried to buy tickets at the white entrance to the Martin Theater in Americus. Claude Sitton, "Americus, Ga., Stifles Negro Drive," *N.Y. Times*, Sept. 29, 1963, attached hereto as Exhibit 11. Efforts to negotiate an agreement for desegregation of the theater, the public library, and other facilities failed. Tommy Hooks III, who is white and the former Sumter County Superior Court clerk and former president of the Americus Chamber of Commerce, was quoted as saying that as a result of the demonstrations: "The people are bitter. The people that were sitting on the fence six months ago have swung over on our side. I say our side, I mean the segregation side." Exhibits 10 & 11.

On August 8, 1963, more than 200 blacks headed toward the business section of Americus for a demonstration. Law enforcement officials halted the group and ordered them to

disperse. Confrontations erupted and Sumter County Sheriff Fred Chappell arrested four civil rights workers, John Perdew, Don Harris, Ralph Allen, and Zev Aeloney, who had been leaders in the voter registration movement. Exhibits 10 & 11. While most of the earlier arrests had been for relatively minor offenses, these four were being held without bond on charges that they had violated the Georgia "Insurrection Statute," which carried the death penalty, despite the fact that the insurrection law had been declared unconstitutional by the Supreme Court twenty-six years earlier in *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). The defendants were also charged with violating the state's "unlawful assembly statute," *Harris v. Chappell*, 8 Race Rel. L. Rep. 1355, 1356 (M.D. Ga. Nov. 1, 1967) (three-judge court), attached hereto as Exhibit 12, which had also been held unconstitutional by the Supreme Court in *Wright v. Georgia*, 373 U.S. 284, 293 (1963). Following the denial of bail by the Georgia Supreme Court to the four defendants, a federal court ruled once again that the insurrection and unlawful assembly statutes were "unconstitutional and void," ordered the four defendants admitted to bail, and enjoined their prosecution. Exhibit 12, *Harris v. Chappell*, 8 Race Rel. L. Rep. at 1356-57. The court also noted that the plaintiffs had adduced proof that the "prosecutions are being conducted by the defendants with the intent, and for the purpose of, depriving the plaintiffs of rights guaranteed to them under the Constitution of the United States." *Id.* at 1356.

The voter registration and desegregation efforts of blacks and the white response is strong evidence of white bloc voting and political cohesion of blacks.[7]

[7] Whites and the KKK also attempted to close down Koinonia Farm, a small integrated religious commune in Sumter County founded by Clarence Jordan. Koinonia survived months of attacks by night riders armed with weapons ranging from pistols to machine guns. Merchants in the area for a period of four years also refused to do business with the operators of the farm. Exhibit 11.

D. Georgia Election Law Study Committee Proposals

In 1963, the Georgia Election Law Study Committee proposed to repeal the state's literacy and understanding tests for registration and replace them with a provision "to provide severe penalties for a person assisting any voter in any manner in the casting of his ballot," except for those with physical disabilities. Election Law Study Committee Papers, Minutes, Oct. 15, 1963, p. 2, attached hereto as Exhibit 13. But Ely Horne, the Clerk of Superior Court of Sumter County, complained to Ben W. Fortson, Secretary of State, that "if we have people in this state who are willing to open the polls to everyone then we are in perfect accord with the scalawag element of this nation which is led by Kennedy and his Harvard advisers." Letter from Ely Horne to Ben W. Fortson, Oct. 18, 1963, Election Law Study Committee Papers, attached hereto as Exhibit 14. Henry L. Crisp, a native of Sumter County and a law student at the University of Georgia, wrote a similar letter to Fortson in which he complained the proposal "would allow any uninformed and illiterate citizen to be a voter," and "it would seem wise to strengthen voting requirements rather than weaken them." Letter from Henry L. Crisp to Secretary Ben W. Fortson, Nov. 12, 1963, attached hereto as Exhibit 15. In 1964, the legislature reenacted a literacy requirement for voter registration and a stringent character and understanding test. Ga. Laws 1964, Ex. Sess. pp. 57, 58-60.

E. The Racially Segregated 1965 Election

A special election was held in Americus on July 20, 1965, to fill a vacant position for Justice of the Peace. Four black women, one of whom, Mary Kate Bell, was a candidate for the office being filled, were arrested for attempting to vote in a booth reserved for "white women." The arrests triggered a series of massive demonstrations in Americus. "Americus Negroes Prepare for Siege," *The Atlanta Journal*, July 28, 1965, attached hereto as Exhibit 16. In the

days that followed hundreds of blacks marched to the Sumter County Courthouse and conducted prayer vigils, where they were met with taunts and threats from several hundred whites. *Id.* William Rau from Illinois, who had also been encouraging blacks to register to vote, was attacked in Plains by three carloads of whites. One of the whites hit him on the head with a brick. Walker Lundy, "Negroes Reject Americus Panel," *Atlanta Journal*, Aug. 5, 1965, attached hereto as Exhibit 17.

Bell was defeated and subsequently she and other women who were arrested filed suit seeking to set aside the election and enjoin the winner from taking office, and requesting that a new election be called. *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967). The plaintiffs alleged that: voting lists for the election were segregated on the basis of race; voting booths were segregated with one booth for "white males," another for "white women," and a third for "Negroes"; officials barred representatives of candidate Bell from viewing the voting; another representative was physically struck by an election official; and police allowed a large crowd of white males to gather near the polls intimidating black people from voting. *Id.* at 660-61. The court of appeals noted that two parallel companion cases were before the District Court, one by the United States against various officials of Sumter County, the other by the Bell plaintiffs against the same Georgia officials. The District Judge in those two cases "entered an injunction enjoining the defendants from maintaining racial segregation at the polls, from maintaining segregated voting lists, from arresting or interfering with Negro voters, and from prosecuting the plaintiffs for their conduct leading to their arrest on July 20, 1965." *Id.* at 661. The district court declined to set aside the July 20, 1965 election, but the court of appeals, "[c]onsidering the gross, spectacular, completely indefensible nature of this state-imposed, state-enforced racial discrimination," including segregated voting lists and polling booths, intimidation of black voters

by whites, and the arrest of black voters attempting to vote in white polling booths, "and the absence of an effective judicial remedy prior to the holding of the election," reversed and remanded for the entry of an order setting aside the election and requiring the calling of a special election. *Id.* at 664-65. The overt discrimination against black women attempting to vote in Sumter County and the maintenance of racially segregated voting is further and compelling evidence of racial bloc voting by whites and black political cohesion.

F. Segregated Schools in Sumter County

Schools in Sumter County, and the rest of Georgia, were historically segregated on the basis of race. In the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), Sumter County adopted a "freedom of choice" desegregation plan in the late 1960s, but according to a report of the U.S. Commission on Civil Rights: "Intimidation, harassment and violence have prevented school desegregation in Sumter County." Margaret Shannon, "Racial Duress Studied by U.S.," *The Atlanta Journal*, Feb. 16, 1966, attached hereto as Exhibit 18. Some black parents said they or their children received threats of physical violence. One black father was told he would lose his job and home if his child went to the white school. The mother of another black child was fired from her job as a maid after the school application was filed. The home of one of the applicants was repeatedly attacked. Bottles, stones, toilet paper and paint were thrown at the house, and there were threatening and obscene telephone calls. Black students were tripped, spat on, attacked, called derogatory names by whites, and were nearly run down by cars in the school parking lot. As of November, only 26 black students remained in the white schools. *Id.*

Schools in Sumter County remained racially segregated until the district was sued, along with 70 other districts in Georgia, by the United States in 1969 for failure to desegregate. Georgia Advisory Committee to the United States Commission on Civil Rights, "Desegregation

of Public School Districts in Georgia: A Fact-Finding Report," Dec. 2007 (Correction Issued May 2009), pp. 20, 22, attached hereto as Exhibit 19 (citing *United States v. Georgia, Troup Cnty.*, 171 F.3d 1344 (11th Cir. 1999)). The Sumter County School District remained under court order as late as 2007. Exhibit 19 at 37. And as of 2000, over one-third of the white school age population in Sumter County attended private schools. *Id.* at 50.

VI. Defendant Does Not Meet the Standards for Summary Judgment

A court may grant summary judgment only if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In addition: "A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant." *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The evidence shows Plaintiff has established the second and third *Gingles* factors, and Defendant's motion should be denied.

A. Proof of *Gingles* 2

Defendant does not dispute that blacks were politically cohesive in eight (66.6%) of the twelve elections. Def.'s SJ Br., p. 15. Thus, Plaintiff's evidence shows that in a majority of the elections, a "significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56.

- In the May 20, 2014 District 1 election, 87.9% of blacks voted for a black candidate. McBride Report, p. 42.
- In the May 20, 2014 District 3 election, 56.3% of blacks voted for a black candidate. *Id.*, p. 44.
- In the May 20, 2014 District 5 election, 66.4% of blacks voted for a black candidate. *Id.*, p. 45.
- In the May 20, 2014 at-large 2-year election, 68.2% of blacks voted for a black candidate. *Id.*, p. 46.

- In the May 20, 2014 at-large 4-year term, 72.9% of blacks voted for a black candidate. *Id.*, p. 47.

- In the July 22, 2014 at-large runoff, 65.6% of blacks voted for a black candidate. *Id.*, p. 48.

- In the 2010 District 3 election, 99.5% of blacks voted for a black candidate. *Id.*, p. 49.

- In the 2008 District 1 election, 96.9% of blacks voted for a black candidate. *Id.*, p. 50.

- In the 2006 District 3 election, 93.4% of blacks voted for a black candidate. *Id.*, p. 51.

The evidence establishes the minority political cohesiveness necessary to a Section 2 vote dilution claim.

In addition, in three of the four elections relied upon by Defendant, black voters were in fact politically cohesive in that a majority of blacks voted for black candidates.

- In the District 3 election in 2014, 56.3% of blacks voted for the black candidate. McBride Report, p. 44.

- In the District 2 election in 2014, 50.5% of blacks voted for the black candidate. *Id.*, p. 43.

- In the District 3 election in 2006, 93.4% of blacks voted for a black candidate. *Id.*, p. 51.

- In the District 3 general election in 2002, blacks were not politically cohesive. *Id.*, p. 52.

Thus, in eleven (91.7%) of the twelve elections blacks were politically cohesive, satisfying the second *Gingles* factor, *i.e.*, a "significant number of minority group members usually vote for the same candidates." 478 U.S. at 56. *Gingles* makes clear that "the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting." *Id.* at 57. *Accord*, *White v. Alabama*, 867 F. Supp. 1519, 1553 (M.D. Ala. 1994).

Defendant also contends that the "expert testimony does not reveal any pattern of racial bloc voting that extends over time." Def.'s SJ Br., p. 17. To the contrary, the expert testimony shows racial bloc voting from 2006 to 2014. The findings of polarized voting by federal courts and Section 5 objections by DOJ are further evidence of a pattern of racial bloc voting extending over time beginning with the time when blacks were first allowed to register and vote.

B. Proof of *Gingles* 3

In the 12 elections, with the exception of the 2014 election in District 6, black preferred candidates won only in four elections; each time they were a majority of the total or voting age population and a plurality of the voting age population: District 1 (62.7% BVAP) election in 2014; District 5 (70.6% BVAP) election in 2014; District 3 (48.4% BVAP) election in 2010; and District 1 (49.5% BVAP) election in 2008. McBride Report, pp. 42, 45, 49, 50. Thus, black preferred candidates won in some elections but, with one exception, only in districts in which they were a majority of the total population. No black preferred candidates were elected to any at-large seats. Defendant argues that the May 2014 at-large election should also be counted as a win for black voters, but in the subsequent runoff election the black preferred candidate was defeated. *Id.*, p. 48. While the primary is evidence of polarized voting, to count it as a win would be to say the black preferred candidate won half the election, when in fact the black preferred candidate lost the election and was defeated by white bloc voting.

CONCLUSION

Defendant has not carried its burden of showing that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Accordingly, the motion for summary judgment should be denied.

Dated: February 2, 2015

Respectfully submitted,

s/M. Laughlin McDonald
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CERTIFICATE OF SERVICE

This is to certify that I have on this day served the foregoing document on all the parties in this case using the CM/ECF system, which will send electronic notice of filing to the following:

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