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

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

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Mathis Kearse Wright, Jr. ("Plaintiff" or "Wright") challenges Sumter County's method for electing its Board of Education ("BOE") on the grounds that it dilutes minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301. Because the analyses by both parties' experts demonstrated that Plaintiff could not prove his claim, Defendant Sumter County Board of Elections and Registration ("Defendant" or "the County") moved for summary judgment, which this Court granted. [Doc. 62]. Plaintiff appealed, arguing that this Court had not viewed the evidence in the light most favorable to him.

The Eleventh Circuit reversed the grant of summary judgment, concluding that this Court erred weighing the evidence and making credibility determinations at the summary judgment stage. On remand, Plaintiff now asks the Court to weigh the evidence and make credibility determinations in *his* favor. For the reasons set forth below, Plaintiff has failed to show that there is no genuine issue of material fact on his Section 2 vote dilution claim and that he is entitled to judgment. Accordingly, the Court should deny his motion and set the case for trial.

I. FACTUAL BACKGROUND

At the time of the 2010 Census, Sumter County was a majority-minority county, with African-Americans comprising 51.8% of its residents. Report of Frederick G. McBride [Doc. 40-3] ("McBride Report"), p. 4. At that time – now almost seven years ago – the voting age population of Sumter County was also nearly a majority, with 48.1% African-Americans. *Id.* As of August 2014, there were more registered African-American voters in the county than registered white voters. Dep. of Frederick G. McBride [Doc. 38] ("McBride Dep.") [50:4-51:23].

Sumter County elects its seven-member BOE. McBride Report, p. 11. Five members are elected from single-member districts, while the remaining two members are elected at-large by the county as a whole. *Id.* While Plaintiff's requested relief has changed over time, at present he asks the Court to eliminate the two at-large positions and require that all seven members be elected from single-member districts. Dep. of Mathis Wright [Doc. 37, 36:14-22].

The parties agree that expert testimony is the critical evidence in a Section 2 case. Plaintiff's expert, Dr. Fred McBride, and Defendant's expert, Dr. Karen Owen, issued reports in 2014 and additional reports after remand. They were deposed after issuing those reports.

A. Dr. McBride's Original Expert Report

In his attempt to establish the second and third *Gingles* preconditions – political cohesion of the minority community and racial bloc voting by the majority to defeat the minority community's preferred candidate – Plaintiff relies exclusively on the expert testimony of Dr. McBride. Dr. McBride originally performed a statistical analysis of twelve endogenous elections for the Sumter County Board of Education that involved black candidates facing white candidates. Deposition of Frederick McBride [Doc. 38] ("McBride Dep.") [47:3-7]. He used three statistical estimating methods to determine whether the minority community was cohesive in its candidate choice, and if so, whether the minority-preferred candidate succeeded: (1)

Goodman Single-Equation Ecological Regression, (2) double-equation regression analysis (referred to as BERA), and (3) Ecological Inference (referred to as EI or King's). McBride Report, pp. 19-20; Expert Report of Karen L. Owen [Doc. 40-4] ("Owen Report"), p. 3. If the minority population is cohesive and white voters vote as a bloc to usually defeat the minority community's preferred candidates, racially-polarized voting is present, which is circumstantial evidence of racial bias in the electoral system and can show a lack of equal access by minority voters. *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994).

Dr. McBride agreed with Dr. Owen that the word "usually" in the context of *Gingles* means something that happens "more often than not." McBride Dep. [138:1-14]; Owen Report, p. 4. In his initial report, Dr. McBride found that in six of the twelve elections he analyzed, the minority-preferred candidate succeeded or was "not defeated." McBride Report, pp. 24-26; Owen Report, p. 7. At his first deposition, Dr. McBride modified that analysis, testifying that, *in at least* five of eleven (45.5% of the time), and *as many as* seven of twelve elections (58.3% of the time), the minority-preferred candidate succeeded. McBride Dep. [129:10-130:4]. Also, in at least four races, Dr. McBride's statistics revealed there was no minority-preferred candidate because the minority community was divided over the preferred candidate. Owen Report, pp. 5-7. The elections Dr. McBride originally analyzed and the relevant findings are as follows:

1. 2014 Board of Education District 6: Minority-preferred candidate Michael Mock received 58% support from the African-American community under the King estimates and won the election, which was not racially polarized. McBride Report, 41; McBride Dep. [110:19-23].

2. 2014 Board of Education District 1: Minority-preferred candidate Alice Green received 87.9% of the African-American vote under the King estimates, and she won the election. McBride Report, p. 42; McBride Dep. [111:22-24].

3. 2014 Board of Education District 2: The minority community's support for Sarah Pride was only 50.5% using the King estimates. McBride Report, p. 43. Dr. McBride agreed that with the standard error in his estimates, Pride's support could have been as low as 43.6%, and the standard error could lead to less reliable estimates. McBride Dep., [175:12-15, 114:25-115:16].

4. 2014 Board of Education District 3: Dr. McBride's estimates showed that, using the King numbers, both candidates received more than 50% of the African-American vote, which Dr. McBride categorized as an error, although he could not explain how the error occurred. McBride Report, p. 44; McBride Dep., [101:17-24; 116:4-12].

5. 2014 Board of Education District 5: Minority-preferred candidate Edith Green received 66.4% of the African-American vote under the King estimates, and she won the election. McBride Report, p. 45; McBride Dep. [116:15-19].

6. 2014 Board of Education At-Large Two-Year: In this countywide race, minority-preferred candidate Michael Coley received 68.2% of the African-American vote under the King estimates. McBride Report, p. 46. Coley was one of the top two candidates and advanced to the runoff. *Id*. Dr. Owen explained that the race was an "electoral success" for the minority-preferred candidate based on social science literature on runoffs. Deposition of Karen Owen [Doc. 39] ("Owen Dep."), [27:22-29:2]. Dr. McBride originally reported the race as one where the minority-preferred candidate was not defeated, but later confessed confusion about that conclusion because the race was a runoff, and he did not know the impact of that fact. McBride Dep., [117:6-11, 120:4-9, 121:16-122:3].

7. 2014 Board of Education At-Large Four-Year: Kelvin Pless received 72.9% of the African-American vote using the King estimates and was defeated. McBride Report, p. 47; McBride Dep., [122:4-7].

8. 2014 Board of Education At-Large Two-Year Runoff: Coley was still the minority-preferred candidate and was defeated, although Sylvia Roland received 35% of the African-American vote under the King estimates. McBride Report, p. 48; McBride Dep., [122:8-13].

9. 2010 Board of Education District 3: Kelvin Pless received 99.5% of the African-American vote according to the King estimates and was successful. McBride Report, p. 49; McBride Dep., [122:14-18].

10. 2008 Board of Education District 1: Carolyn Whitehead received 96.9% of the African-American vote according to the King estimates and was successful. McBride Report, p. 50; McBride Dep., [122:19-22].

11. 2006 Board of Education District 3: Darius Harris received 93.4% of the African-American vote using the King estimates, while Donna Minich received 43.6% of the African-American vote. McBride Report, p. 51. Because these numbers total more than 100%, Dr. McBride identified them as having a high standard error. McBride Dep. [123:2-9].

12. 2002 Board of Education District 3: In another election involving the same candidates as the 2006 race, no candidate received more than 50% support from African-American voters or white voters using the King estimates. McBride Report, p. 52. Because of the lack of bloc voting, Dr. McBride found the election was not racially polarized. *Id.* Despite this, he selected Carolyn Seay, the candidate with the *least* amount of support from the African-American community (using the King estimates) as the minority-preferred candidate, and determined she was defeated. *Id.* But Dr. McBride agreed this conclusion was "questionable at best", because that question would require "more analysis." McBride Dep. [127:3-12]. He admitted he had performed no such further analysis, and one could reasonably say the minority-preferred candidate succeeded in this race. McBride Dep. [127:13-15, 125:19-126:2].

B. Dr. McBride's Supplemental Report

In September 2016, Dr. McBride filed a supplemental report, stating that he analyzed *eleven* elections. [Doc. 91-3] ("McBride Supp. Report"), p. 1. For his new report, Dr. McBride selects certain elections and deletes others he previously analyzed, introducing selection bias and raising issues with model specification. [Doc. 92-8] ("Owen Supp. Report"), p. 7. Once again, he reports EI estimates for black voters' support that exceed 100 percent. *Id.* And he sometimes shows completely different estimates for candidates, making it appear his voter preference estimates have been switched among the candidates. *Id.*

In his Supplemental Report, Dr. McBride removed from consideration the following endogenous elections he previously chose to analyze: (1) the 2002 District 3 BOE election, which he previously found was not racially polarized, McBride Report, p. 52; (2) the 2006 District 3 BOE election, in which he found that African-American support for two candidates totaled far greater than 100% so had a high standard error, McBride Report, p. 51, McBride Dep. [123:2-9]; and (3) the 2008 District 1 BOE election, in which Carolyn Whitehead received 96.9% of the African-American vote according to the King estimates and was successful. McBride Report, p. 50; McBride Dep., [122:19-22].

Dr. McBride also added the following elections to his new analysis: **(1) 2016 Board of Education At-Large:** Michael Coley received 93.6% of the African-American vote using King estimates and was defeated. McBride Supp. Report, p. 13; **(2) 2014 Board of Education District 4:** Rick Barnes received 53.9% of the African-American vote using King estimates and was successful. McBride Supp. Report, p. 17; **(3) 2004 Sheriff At-Large**: Write-in candidate Nelson Brown received 96.5% of the African-American vote using King estimates and was defeated. McBride Supp. Report, p. 18.

Dr. McBride also chose to discount some of the elections he analyzed in his Supplemental Report. He discounted the minority-preferred candidate Coley's win in the first round of the 2014 BOE at-large contest, even though he originally reported this race as one in which the minority-preferred candidate was not defeated. McBride Report, p. 46; McBride Supp. Report, p. 13. He also fails to count the 2014 District 4 BOE contest as an electoral success for the minority-preferred candidate, even though he writes that it was "the only election where the successful candidate was both the white and black preferred candidate." McBride Supp. Report, p. 17. Further, he states that in the 2014 District 6 BOE contest, the minority-preferred candidate was Pride, who lost to Mock. McBride Supp. Report, p. 20. But originally, Dr. McBride selected Mock as the minority-preferred candidate and designated the election as a success for the minority-preferred candidate. McBride Report, p. 41.

In the Sumter County BOE elections analyzed, the minority-preferred candidate is not usually defeated. Owen Supp. Report, p. 14. Instead, the black-preferred candidate usually wins and has been successful in seven of twelve contests analyzed from 2002 to 2014 and has been successful in six of the eleven contests analyzed from 2010 to 2016. *Id*.

C. Dr. McBride's Corrected Supplemental Report

Five and a half months after Dr. McBride submitted his supplemental report and shortly before his deposition, he submitted a report purporting to "correct" that report, deciding "in discussion with counsel it would just be better to clean the report up." [Doc. 89-3] ("Corrected Report"); March 16, 2017 Dep. of Frederick G. McBride [Doc. 91] ("McBride Dep. II") [27:24-28:5]. In it, he made a number of changes, some of which are not merely "clean-up" but again substantively change his report.

First, Dr. McBride states that he analyzed twelve elections, not eleven, as he said in his Supplemental Report. Corrected Report, p. 1. He describes that error as a "miscalculation of the elections." McBride Dep. II [27:11-17]. His Corrected Report also states he analyzed four at-large elections with African-American candidates under House Bill 836, although he stated in his Supplemental Report that he analyzed three. He says this change resulted because he was "counting the runoff then" and "wanted to distinguish the runoff separately." McBride Dep. II [28:22-29:5]. That explanation is inconsistent with Dr. McBride's agreement that the runoff election and the election preceding the runoff should be counted. *Id.* [29:12-17].

Similarly, in his Corrected Report, Dr. McBride says he analyzed two general elections for districts under the prior plan, including a special election for the BOE that included black candidates; however, he says in his Supplemental Report that he analyzed one such general election. McBride Dep. II [30:9-13, 31:1-5]. Dr. McBride's explanation is that he "overlooked it" and that he has not added anything, "just described them differently." *Id.* [31:25, 32:13-17].

The Corrected Report also reflects different turnout numbers for the elections than the Supplemental Report, which Dr. McBride says is because he "found an error where [he] was only adding for total voters, [he] was only adding black and white voters and [he] had mistakenly excluded other voters, so [he] added them[.]" *Id.* [35:3-13]. Dr. McBride also altered paragraphs by adding new sentences. McBride Dep. II [33:8-22, 34:19-35:2, 36:12-21, 39:14-40:3].

II. ARGUMENT AND CITATION OF AUTHORITY

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In determining whether a genuine dispute of material fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary

judgment, drawing all justifiable inferences in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

For a Section 2 plaintiff to prevail on summary judgment or at trial, each of the three *Gingles* preconditions must be met. *See Johnson v. DeSoto County Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000). Only after establishing those preconditions does the reviewing court begin a review of the "Senate Factors" to assess the totality of the circumstances. *Nipper*, 39 F.3d at 1512; *Gingles*, 478 U.S. at 79; *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

Plaintiff is not entitled to summary judgment because he cannot establish the second and third *Gingles* prongs, *i.e.*, that the minority group is cohesive and that white voters usually vote in a bloc to defeat the minority community's preferred candidate. *Gingles*, 478 U.S. at 50-51.

A. The Law of the Case Doctrine Does Not Apply to the District Court's Previous Findings on the Second *Gingles* Prong Because Plaintiff Introduced and is Relying on New Evidence

Plaintiff argues that because Defendant did not appeal the Court's finding on the second *Gingles* prong, the finding has become the law of the case. Pl. Br., p. 6. But as Plaintiff recognized, an exception to the law of the case doctrine applies when new evidence has been presented, and Plaintiff has clearly introduced and is relying on new evidence from Dr. McBride's Supplemental Report. *See Oliver v. Orange County, Fla.*, 456 F. App'x 815, 819 (11th Cir. 2012) (per curiam) (finding that because "new evidence was presented to and considered by the district court, the district court was not bound by the law of the case" where party introduced new scientific testing and a follow-up deposition of an expert on remand).

As described above, Dr. McBride's Supplemental Report and Corrected Report introduce new elections and remove other elections from his analysis, use new voter turnout data, and contain new turnout figures. *Supra* Section I.B & C. Plaintiff relies on this new evidence to

support his Section 2 vote dilution claim. *See generally* Pl.'s Br. Accordingly, this Court is not bound by its prior finding on the second *Gingles* prong, which was made based on a different body of evidence. *Oliver*, 456 F. App'x at 819. "When the record changes, which is to say when the evidence and the inferences that may be drawn from it change, the issue presented changes as well. The first exception to the [law of the case] doctrine recognizes that the law of the case is the law on a given set of facts, not law yet to be made on different facts." *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1283 (11th Cir. 2005); *see also Newman v. Ormond*, 456 F. App'x 866 (11th Cir. 2012) (per curiam) (applying new evidence exception to law of the case doctrine where party attached new evidence to his second summary judgment motion on remand); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1237 n.1 (11th Cir. 2001). The Court should consider the parties' *Gingles* prong 2 arguments anew.

B. Plaintiff's Section 2 Claim Fails Because Plaintiff's Own Evidence Demonstrates That Minority-Preferred Candidates Are Not Usually Defeated in Sumter County Elections.

To establish the third *Gingles* precondition, plaintiffs must demonstrate that the white voters in a jurisdiction usually vote as a bloc to cause the minority-preferred candidate to lose. This prong is key, because the lack of electoral success in the challenged election system has to be "on account of race or color" and not a racially-neutral cause. 52 U.S.C. § 10301(a); *Nipper*, 39 F.3d at 1515. The Eleventh Circuit has explained that the plaintiff "must show not only that whites vote as a bloc, but also that white bloc voting *regularly causes* the candidate preferred by black voters to lose; in addition plaintiffs must show not only that blacks and whites sometimes prefer different candidates, but that blacks and whites *consistently* prefer different candidates." *Johnson v. Hamrick (Hamrick III)*, 296 F.3d 1065, 1074 (11th Cir. 2002) (emphasis in original). In addition, the racial bloc voting must be a pattern and more than just a single election. *Id.*

In *Hamrick III*, the Eleventh Circuit affirmed a district court evaluation of eleven elections in Gainesville, Georgia. *Id*. at 1077. In that Section 2 case, the minority-preferred candidate prevailed in five of eleven elections (45.5% of the time), while the minority-preferred candidate lost in five of eleven elections (45.5% of the time), leaving one election where there was no clear preference for black or white voters. *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1372 (N.D. Ga. 2001). The Eleventh Circuit determined that, when the evidence showed the minority community's candidates of choice won as frequently as they lost, plaintiffs had failed to prove the third *Gingles* prong because the minority-preferred candidate was not "usually" defeated by the white majority. *Hamrick III*, 296 F.3d at 1081.

Other Circuit Courts have reached similar conclusions in cases revolving around the third prong of *Gingles*. *See Cottier v. City of Martin*, 604 F.3d 553, 560 (8th Cir. 2010) (en banc) (finding that when Indian-preferred candidates succeed in "almost equal numbers" to non-Indian-preferred candidates, plaintiffs had not shown the white voters "usually" voted as a bloc to defeat them); *Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 616 (4th Cir. 1996) (finding that if minority-preferred candidates were successful 50% of the time, they were not "usually" defeated); *Clay v. Bd. of Educ. of City of St. Louis*, 90 F.3d 1357, 1362 (8th Cir. 1996) (finding that 57.9% success rate of minority-preferred candidates did not meet third prong of *Gingles*); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) (finding when 47% of black-preferred black candidates were elected, they were not "usually" defeated by white bloc voting).

Here, Plaintiff's evidence shows numbers nearly identical to those reviewed by the Eleventh Circuit in *Hamrick III*. Dr. McBride originally analyzed twelve endogenous elections. McBride Dep. [47:3-7]. Of those, he concluded that the black-preferred candidate was not defeated in six of twelve, or 50% of the time. McBride Report, pp. 24-26; Owen Report, p. 7. He

later backtracked on one election, but still agreed that in at least five of eleven (45.5%), and possibly as many as seven of twelve elections (58.3%), the minority-preferred candidate succeeded. McBride Dep. [129:10-130:4]. In his supplemental report, Dr. McBride reported findings on twelve elections over twelve years. McBride Supp. Report. Of those, the minority-preferred candidates won six; therefore, the third prong of *Gingles* is not met because white voters do not usually vote as a bloc to defeat the minority voters' preferred candidate. Owen Supp. Report, p. 15. The minority-preferred candidate succeeded in the following elections: 2014 District 1 BOE, 2014 District 5 BOE, 2010 District 3 BOE, 2014 BOE At-Large[1], 2014 District 4 BOE, 2014 District 6 BOE. *Id.* at p. 13. The minority-preferred candidate thus succeeds either as often or more often than not—the definition of "usually" used by both experts and by the Eleventh Circuit. McBride Dep., 138:1-14; Owen Report, p. 4; *Hamrick III*, 296 F.3d at 1081.

Plaintiff argues that the third *Gingles* prong is satisfied because the Court should look only to the three at-large elections held under the challenged plan. Pl.'s Br., p. 9.[2] But three elections over two years does not show "a *pattern* of racial bloc voting that extends over a period of time[,]" which "is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57. While Plaintiff argues that the *Gingles* court found that evidence from three elections was sufficient to establish the third precondition, it actually found that data derived from *three election years in each district* was satisfactory. *Id.* at 61 (emphasis added). Similarly, Plaintiff argues that the inquiry

[1] The Eleventh Circuit concluded that "In the light most favorable to Wright," this election "should have given rise to an inference in Wright's favor as an electoral defeat." [Doc. 71, p. 5]. Now that Defendant is the non-movant, it should give rise to an inference in Defendant's favor.
[2] Plaintiff argues that the Court's previous finding that "Wright has demonstrated that non-black voters consistently prefer the same candidate and that the candidate preferred by non-black voters is usually different from the black-preferred candidate" is the law of the case, but as explained above, the law of the case doctrine does not apply here. *Supra* Section II.A.

must focus on elections in which African-Americans do not already make up a voting majority. Pl. Br., p. 7. But the cases he cites do not support that argument and are distinguishable. For example, in *Bone Shirt*, the plaintiff claimed that a redistricting plan violated Section 2 by packing District 27 with Native-Americans at the expense of District 26. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1016 (D.S.D. 2004), aff'd 461 F.3d 1011 (8th Cir. 2006). Because the plaintiff pled that specific question, the district court analyzed whether the plaintiff was correct that the Native-American vote was diluted in District 26. *Id.* at 1020-21. In doing so, however, the district court looked at endogenous elections in District 26, as well as two exogenous elections that held "some probative value." *Id.* Here, Plaintiff argues that the at-large voting dilutes African-American votes, so it is appropriate to analyze and consider all of the endogenous elections Plaintiff submitted into evidence. *See Hamrick III*, 296 F.3d at 1075-76.

C. Plaintiff's Section 2 Claim Fails Because the Minority Community is Not Cohesive in All Elections

Plaintiff cannot prevail on the second prong of *Gingles*. To be successful on a vote dilution claim, the second prong requires that the minority population within the jurisdiction must be politically cohesive—consistently voting for the same candidate. *Gingles*, 478 U.S. at 59. The exact amount of minority support required to be "legally significant" is not set in stone but generally over 70% is sufficient. *See Solomon*, 899 F.2d at 1019-1020 (plurality); *Hamrick*, 155 F. Supp. 2d at 1370; *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1245 (5th Cir. 1988) (finding that getting 50% of the minority vote was not sufficient to be the candidate of choice).

The necessary amount of support for cohesion is based on local circumstances, because in a jurisdiction like Sumter County where even seven years ago nearly half of the voting age population was African-American, only a small amount of white crossover support is necessary to elect a minority community's preferred candidate, thus increasing the amount of minority

cohesion required to show the second prong of *Gingles*. *See Gingles*, 478 U.S. at 57-58; *Rangel v. Morales*, 8 F.3d 242, 249 (5th Cir. 1993) (finding no legally significant white bloc voting in part because the "evidence at trial revealed that Hispanic voters could control election outcomes with relatively little support from Anglo voters")

Dr. McBride did not use this specific, localized approach and was unable to explain exactly what standard he used to determine whether there was political cohesion in the minority community in selecting a candidate in particular elections. He first testified that he only used statistical analysis to determine the minority-preferred candidate. McBride Dep. [78:18-24]. Although he later testified that, in close races, "more investigation" was required beyond statistics, McBride Dep. [81:1-22], he admitted he never performed any type of additional analysis for those close races. McBride Dep. [81:23-25]. Recently, he testified that he determined the minority candidate of choice by "bas[ing] it on the estimates" using the EZI program which analyzes one candidate at a time. McBride Dep. II [90:15-91:1].

In relying on his statistics, Dr. McBride originally testified that the "sufficient number" of minority support for cohesion "could be 50" percent, but that it also could be "49, 48" percent. McBride Dep. [78:25-79:5]. In one race, Dr. McBride even designated a candidate as "minority-preferred" when that candidate received *the least* amount of African-American support – 24% –, according to the King estimates. McBride Report, p. 52.

Conversely, Dr. Owen explained that the proper standard is whether there is "an obvious candidate of choice for Black voters." Owen Report, p. 4. That is consistent with Eleventh Circuit precedent setting the number as something higher than merely crossing the 50% threshold. *Solomon*, 899 F.2d at 1019-1020 (plurality); *Hamrick*, 155 F. Supp. 2d at 1370. Dr. McBride's statistics do not demonstrate that the minority community is politically cohesive in at

least three of the eleven, or four of the twelve, elections he analyzed because his statistics do not reveal an "obvious candidate of choice" of African-American voters. Owen Supp. Report, p. 15.

In his original report, Dr. McBride's numbers for the 2006 BOE District 3 election indicate that the African-American vote was split between two candidates. McBride Report, p. 51; Owen Report, p. 6. In the 2002 BOE District 3 election, his numbers show that African-American voters evenly split their ballots among three candidates and thus indicated no preference in that election. McBride Report, p. 52. Dr. McBride testified that determining the candidate of choice required a "judgment call," McBride Dep. [125:10-18], which falls far short of an "obvious candidate of choice." Owen Report, pp. 6-7. Dr. McBride ultimately chose to remove these two elections from his supplemental report.

Two other elections which failed to show minority political cohesion remained in Dr. McBride's supplemental report. In the 2014 BOE District 3 race, Dr. McBride originally found one candidate was preferred by the minority community, despite finding that both candidates in the race, including the successful one, received more than half of the African-American vote, a finding Dr. McBride categorized as a statistical error. McBride Report, p. 44; McBride Dep. [101:17-24, 116:4-12]. Dr. McBride simply picked the candidate with a higher percentage above 50 (56.3% vs 52.1%) without any further analysis. McBride Report, p. 44; McBride Dep. [116:4-11]. With the African-American vote equally split according to the estimates, no minority-preferred candidate could be identified, and this election did not show minority community cohesion. Owen Report, p. 6. In his supplemental report, Dr. McBride shows the percentage of minority support for Fitzpatrick to be 92.3%, without explaining the variation from his original report. McBride Supp. Report, p. 16. This variation suggests unreliable estimates, which do not lead to a reasonable finding of minority political cohesion. Owen Supp. Report, p. 10.

In the 2014 BOE District 2 race, Dr. McBride's original report identified Sarah Pride as the minority community's preferred candidate, despite his estimates showing she received only 50.5% of the African-American vote. McBride Report, p. 43. This level of support is not sufficient evidence of cohesion under the Eleventh Circuit's standard, in part because it means that at least 49.5% of the African-American population voted *against* her, so the minority vote was not cohesive in its support for her. Owen Report, p. 6. In his supplemental report, Dr. McBride estimates the percentage of the black vote supporting Pride at 99.3% and 24% of the black vote supporting another candidate. McBride Supp. Report, p. 16. Voter preferences for candidates and estimate totals are bound with EI from the lower limit of zero to an upper limit of 100, and estimates exceeding 100% call into question their reliability. Owen Supp. Report, p. 9.

The lack of minority vote cohesion is relevant because in one-third of the elections Dr. McBride analyzed, the minority community was not cohesive. *Hamrick*, 155 F. Supp. 2d at 1370. This lack of cohesion further demonstrates that Plaintiff has not carried his burden to show a pattern of racial bloc voting that is legally significant. *Gingles*, 478 U.S. at 57-58.

D. The Totality of the Circumstances Does Not Support a Finding of Illegal Vote Dilution

If the Court determines that Plaintiff cannot carry his burden on the second and/or third prong of *Gingles*, the analysis of his Section 2 claim ends. "In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009). However, meeting the *Gingles* test alone does not entitle Plaintiff to summary judgment. This Court must still consider the totality of the circumstances, and a plaintiff may still fail to show a violation of Section 2 under the totality of the circumstances even after showing all three *Gingles* prongs. *Johnson v. De Grandy*, 512 U.S. 997, 1009-1012 (1994); *Nipper*, 39 F.3d at

1513-1514. Plaintiff must show that the voting practice at issue—at-large voting—denies African-Americans access to the political process "on account of their race." *Nipper*, 39 F.3d at 1523. Merely showing electoral defeat or even a tendency of racial groups in the county to support differing candidates is not enough; to support a Section 2 claim, those instances must be explained by "the interaction of racial bias in the community with the challenged voting scheme." *Nipper*, 39 F.3d at 1524. This heavy burden is not one that Plaintiff can carry here.

Although Plaintiff correctly states the totality of the circumstances analysis, Pl. Br, p. 4, this Court should review *all* the Senate Factors, not just the ones chosen by Plaintiff, to determine whether the "social and historical conditions" in the county cause an inequality of *electoral opportunity*. *Gingles*, 478 U.S. at 47.

1. *The First Senate Factor: The Extent of Any History of Official Discrimination.*

The first Senate factor reviews the "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37. Plaintiff discusses the regrettable past discrimination in Georgia but does not point to specific examples of discrimination in Sumter County that touched the right of African-Americans to participate in the democratic process and that have an electoral impact today. Pl.'s Br., pp. 10-16. Most of the exhibits he references cannot be relied on because they would be inadmissible at trial.

Plaintiff cannot rely on the newspaper articles he attached (Docs. 44-10, 44-11, 44-16, 44-17, 44-18) because they are inadmissible hearsay. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996) (holding newspaper articles inadmissible when no witnesses would be able to testify from personal knowledge at trial about those events). He cannot rely on the remaining

letters and fragments of reports (Docs. 44-7, 44-13, 44-14, 44-15, 44-19) because they are also hearsay.

Plaintiff has failed to properly show that Sumter County has a history of official discrimination that touched the right of African-Americans to participate in the democratic process, and this factor therefore weighs against him.

2. The Second Senate Factor: Racial Polarization in Voting.

The second factor reviews "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 37. This is largely a restatement of the second prong of *Gingles*, and it therefore weighs against Plaintiff. *See Supra* Section II.C.

3. The Third Senate Factor: Use of Other Discriminatory Voting Practices.

The third factor reviews "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. Defendant does not dispute that Sumter County uses a majority vote requirement, but Plaintiff has pointed to only one election in which an African-American may have won without the majority vote requirement, and has not shown that use of the majority vote requirement is usually discriminatory, so this factor weighs against him.

4. The Fourth Senate Factor: Candidate Slating Process.

The fourth factor reviews "if there is a candidate slating process, whether the members of the minority group have been denied access to that process." *Gingles*, 478 U.S. at 37. There is no candidate slating process and Plaintiff does not argue there is any candidate slating process in Sumter County's BOE elections, so this factor weighs against him.

5. The Fifth Senate Factor: Bearing Effects of Past Discrimination.

The fifth factor reviews "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37. As evidence of this factor, Plaintiff cites to the portion of Dr. McBride's report discussing American Community Survey data. Pl. Br., p. 18; McBride Supp. Report, pp. 24-25, 33-36. But Dr. McBride testified that he had no personal knowledge of the socioeconomic situation in Sumter County and had only reviewed a limited subset of Census data. McBride Dep. [53:15-20]. He admittedly lacks the necessary expertise to offer any opinion on the topic of socioeconomic disparities in Sumter County, and the Court should exclude his opinions regarding the same, as explained in Defendant's previously-filed motion to exclude portions of Dr. McBride's expert report and testimony [Doc. 42-1], which Defendant has renewed now that Plaintiff has moved for summary judgment on the totality of the circumstances. *See* [Doc. 94]. Plaintiff cites no other evidence regarding this factor, and thus this factor weighs against him.

6. *The Sixth Senate Factor: Racial Appeals in Campaigns.*

The sixth factor reviews "whether political campaigns have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37. Plaintiff does not argue that any political campaigns have been characterized by racial appeals, so this factor weights against him.

7. *The Seventh Senate Factor: Extent of Election of Members of the Minority Group.*

The seventh factor reviews "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37. Sumter County has elected African-Americans to its BOE, and elected an African-American to the county-wide office of County Clerk last year. McBride Supp. Report, pp. 15-16; Dep. of Robert Brady [Doc. 93] [202:9-203:11, 209:20-21].

But regardless, Plaintiff's belief that a lack of electoral success is a result of the at-large election system is an exercise in the age-old logical fallacy of *post hoc ergo propter hoc*. As the Eleventh Circuit recognized, "[e]ven consistent defeat at the polls by a racial minority does not, in and of itself, give rise to constitutional claims." *Lodge*, 639 F.2d at 1362. This Court must determine whether the defeats were due to race or politics, and if the losses are attributable to partisan politics, Section 2 is not implicated. *Nipper*, 39 F.3d at 1525. Plaintiff has not shown that the alleged lack of electoral success is due to the candidates' race or that white voters refuse to vote for black candidates. Because Plaintiff is unable to demonstrate that the alleged lack of electoral success is caused by the at-large voting system, this factor weighs against his claim.

III. CONCLUSION

Plaintiff has failed to make his threshold showing under *Gingles*. The African-American community is not politically cohesive in all elections, and minority-preferred candidates succeed as often as they fail. Further, even if Plaintiff had established the *Gingles* preconditions, he has failed to show that under the totality of the circumstances, African-Americans are denied meaningful access to the political process on account of race. As such, he has failed to state a Section 2 vote dilution claim and the Court should deny his motion for summary judgment.

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490
awl@sbllaw.net
Barclay S. Hendrix
Georgia Bar No. 917852
barclay.hendrix@sbllaw.com
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: 678.347.2200

Fax: 678.347.2210

s/ Kimberly A. Reid
Kimberly A. Reid
Georgia Bar No. 596699
kimberly.reid@lawsonreidlaw.com
LAWSON & REID, LLC
601 East 14th Avenue
P.O. Box 5005
Cordele, Georgia 31010
(229) 271-9323 Office
(229) 271-9324 Fax

Attorneys for Defendant Sumter County Board of Elections and Registration

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically served the within and foregoing DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT to the following attorneys of record:

Bryan L. Sells, Esq.
P.O. Box 5493
Atlanta, GA 31107
bryan@bryansellslaw.com

M. Laughlin McDonald, Esq.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490

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

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

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS

COMES NOW Sumter County Board of Elections and Registration ("Defendant" or "the County"), Defendant in the above-styled action, and in accordance with Local Rule 56 responds to Plaintiff Mathis Kearse Wright, Jr.'s ("Plaintiff" or "Mr. Wright") Statement of Undisputed Material Facts, showing the Court as follows:

1.

Sumter County's Board of Education consists of seven members, two of whom are elected at large within the county and five of whom are elected from single-member districts. (See Ex. A (Supp. Rep. of Dr. Frederick G. McBride, hereinafter "McBride Report") at 3.)

RESPONSE: Defendant does not dispute Fact No. 1.

2.

A majority vote is required for election. (McBride Report at 3.)

RESPONSE: Defendant does not dispute Fact No. 2.

3.

African Americans constitute 48.1% of Sumter County's voting-age population. (McBride Report at 4.)

RESPONSE: Defendant does not dispute that as of the 2010 Census, African Americans constitute 48.1% of Sumter County's voting-age population. .

4.

African Americans constitute a majority of the voting-age population in two of the five existing school-board districts. (McBride Report at 4.)

RESPONSE: Defendant does not dispute Fact No. 4.

5.

African Americans in Sumter County are sufficiently numerous and geographically compact that they could constitute a majority of the voting-age population in at least three districts in a redistricting plan with seven single-member districts. (McBride Report at 5-7.)

RESPONSE: Fact No. 5 is a statement of an issue or a legal conclusion, i.e., *Gingles* prong one, and therefore is improper under Local Rule 56. To the extent that the Court determines that the matter is a mixed question of law and fact, Defendant does not dispute that a third majority-minority district could be drawn in a plan with seven single-member districts.

6.

African-Americans in Sumter County are politically cohesive in school-board elections. (ECF No. 62 at 11; McBride Report at 13, 17-19.)

RESPONSE: Fact No. 6 is a statement of an issue or a legal conclusion, i.e., *Gingles* prong two, and therefore is improper under Local Rule 56. Defendant disputes Fact No. 6. African-Americans in Sumter County are not politically cohesive in all school-board elections.

Supplemental Expert Report of Karen L. Owen [Doc. 92-8] ("Owen Supp. Report"), pp. 6-7, 9-10, 15.

7.

Except in districts where African Americans constitute a majority of the voting-age population, White voters in Sumter County have voted sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the candidate preferred by black voters in school-board elections. (ECF No. 62 at 13; McBride Report at 13-20.)

RESPONSE: Fact No. 7 is a statement of an issue or a legal conclusion, i.e., Plaintiff's interpretation of *Gingles* prong three, and therefore is improper under Local Rule 56. Defendant disputes the assertion in Fact No. 7 that white voters in Sumter County have voted sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the candidate preferred by black voters in school-board elections. Expert Report of Karen L. Owen [Doc. 40-4] ("Owen Report"), p. 4; Owen Supp. Report, pp. 13-15.

8.

Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans. (Pl.'s First Req. Jud. Not., ECF No. 32; ECF Nos. 44-2 through 44-19.)

RESPONSE: Defendant disputes Fact No. 8 and objects that the fact is not supported by admissible evidence. Most of the exhibits Plaintiff references—which he previously attached to his Response to Defendant's Motion for Summary Judgment—cannot be relied on because they would be inadmissible at trial. Plaintiff cannot rely on the newspaper articles he attached (Docs. 44-10, 44-11, 44-16, 44-17, 44-18) because they are inadmissible hearsay. *McMillian v. Johnson*, 88 F.3d 1573, 1584 (11th Cir. 1996) (holding newspaper articles inadmissible when no witnesses

would be able to testify from personal knowledge at trial about those events). He cannot rely on the remaining letters and fragments of reports (Docs. 44-7, 44-13, 44-14, 44-15, 44-19) because they are hearsay.

9.

Voting in school-board elections in Sumter County is racially polarized. (ECF No. 62 at 13; McBride Report at 13; ECF No. 44-7.)

RESPONSE: Defendant disputes Fact No. 9. Voting in school-board elections in Sumter County is not always racially polarized. Owen Supp. Report, pp. 8-12; 14-15. Further, Defendant objects that Plaintiff cannot rely on ECF No. 44-7 because it is hearsay.

10.

African Americans in Sumter County bear the effects of discrimination in such areas as education, employment, income, and housing. (McBride Report at 24-25, 33-36.)

RESPONSE: Defendant disputes Fact No. 10. Defendant objects that Fact No. 10 is not supported by admissible evidence. Dr. McBride testified that he had no personal knowledge of the socioeconomic situation in Sumter County and had only reviewed a limited subset of Census data. Deposition of Frederick McBride [Doc. 38] ("McBride Dep.") [53:15-20]. Dr. McBride admitted he lacks the necessary expertise to offer any opinion on the topic of socioeconomic disparities in Sumter County, and the Court should exclude his opinions regarding the same, as explained in Defendant's previously-filed, and now renewed, motion to exclude portions of Dr. McBride's expert report and testimony. *See* [Docs. 42-1, 94].

11.

No African-American candidate has been elected to an at-large seat on the school board under the challenged plan. (McBride Report at 13-14.)

RESPONSE: Defendant does not dispute Fact No. 11 but dispute its materiality, as the inquiry is whether the minority community's candidate of choice has been elected.

12.

No African-American candidate has been elected under the current school-board plan except in districts where African Americans constitute a majority of the voting-age population. (McBride Report at 15-16.)

RESPONSE: Defendant does not dispute Fact No. 12 but dispute its materiality, as the inquiry is whether the minority community's candidate of choice has been elected.

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490
awl@sbllaw.net
Barclay S. Hendrix
Georgia Bar No. 917852
barclay.hendrix@sbllaw.com
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: 678.347.2200
Fax: 678.347.2210

s/ Kimberly A. Reid
Kimberly A. Reid
Georgia Bar No. 596699
kimberly.reid@lawsonreidlaw.com
LAWSON & REID, LLC
601 East 14th Avenue
P.O. Box 5005
Cordele, Georgia 31010
(229) 271-9323 Office
(229) 271-9324 Fax

Attorneys for Defendant Sumter County Board of Elections and Registration

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically served the within and foregoing DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS to the following attorneys of record:

Bryan L. Sells, Esq.
P.O. Box 5493
Atlanta, GA 31107
bryan@bryansellslaw.com

M. Laughlin McDonald, Esq.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490

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

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

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS GENUINE ISSUE TO BE TRIED

COMES NOW Sumter County Board of Elections and Registration ("Defendant" or "the County"), Defendant in the above-styled action, and pursuant to Local Rule 56 presents this Statement of Material Facts as to Which There Is Genuine Issue to Be Tried, showing the Court as follows:

1.

In at least four races, Dr. McBride's statistics revealed there was no minority-preferred candidate because the minority community was divided over the preferred candidate. Expert Report of Karen L. Owen [Doc. 40-4] ("Owen Report"), pp. 5-7.

2.

The 2014 Board of Education At-Large Two-Year election was an "electoral success" for minority-preferred candidate Michael Coley, who received 68.2% of the African-American vote under the King estimates and advanced to the runoff. Report of Frederick G. McBride [Doc. 40-3] ("McBride Report"), p. 46; Deposition of Karen Owen [Doc. 39] ("Owen Dep."), [27:22-29:2].

3.

Dr. McBride' Supplemental Report introduces selection bias and raises issues with model specification, as he selected some new elections to analyze, while eliminating others he previously analyzed. Supplemental Expert Report of Karen Owen [Doc.92-8] ("Owen Supp. Report"), p. 7.

4.

In the Sumter County BOE elections that Dr. McBride analyzed, the minority-preferred candidate is not usually defeated. Owen Supp. Report, p. 14.

5.

In the Sumter County BOE elections that Dr. McBride analyzed, the black-preferred candidate usually wins and has been successful in seven of twelve contests analyzed from 2002 to 2014 and has been successful in six of the eleven contests analyzed from 2010 to 2016. Owen Supp. Report, p. 14.

6.

The minority-preferred candidate succeeded in the following elections: 2014 District 1 BOE, 2014 District 5 BOE, 2010 District 3 BOE, 2014 BOE At-Large, 2014 District 4 BOE, 2014 District 6 BOE. Owen Supp. Report, p. 13.

7.

The 2006 BOE District 3 election indicates that the African-American vote was split between two candidates, so there is no clear indication of which candidate the minority group politically coalesced behind. Owen Report, p. 6.

8.

In the 2002 BOE District 3 election, Dr. McBride's numbers show that African-American voters evenly split their ballots among three candidates and thus indicated no clear preference in that election. Owen Report, p. 6.

9.

In the 2014 BOE District 3 election, Dr. McBride originally found that each candidate received greater than 50% of the African-American vote, so no minority-preferred candidate could be identified, and this election did not show minority community cohesion. Owen Report, p. 6.

10.

In his supplemental report, for the 2014 BOE District 3 election, Dr. McBride shows the percentage of minority support for Fitzpatrick to be 92.3%, without explaining the variation from his original report, which suggests unreliable estimates and does not lead to a reasonable finding of minority political cohesion. Owen Supp. Report, p. 10.

11.

In the 2014 BOE District 2 race, Dr. McBride's original report identified Sarah Pride as receiving only 50.5% of the African-American, so the minority vote was not cohesive in its support for her. Owen Report, p. 6.

12.

In his supplemental report, for the 2014 BOE District 2 race, Dr. McBride estimates African-American voting percentages that exceed 100%, which calls into question the reliability of his estimates. Owen Supp. Report, p. 9.

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490
awl@sbllaw.net
Barclay S. Hendrix
Georgia Bar No. 917852
barclay.hendrix@sbllaw.com
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: 678.347.2200
Fax: 678.347.2210

s/ Kimberly A. Reid
Kimberly A. Reid
Georgia Bar No. 596699
kimberly.reid@lawsonreidlaw.com
LAWSON & REID, LLC
601 East 14th Avenue
P.O. Box 5005
Cordele, Georgia 31010
(229) 271-9323 Office
(229) 271-9324 Fax

Attorneys for Defendant Sumter County Board of Elections and Registration

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Bryan L. Sells, Esq.
P.O. Box 5493
Atlanta, GA 31107
bryan@bryansellslaw.com

M. Laughlin McDonald, Esq.
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

This 28th day of April, 2017.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490