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 REBUTTAL ARGUMENT

Until the third day of the trial in this case, the Sumter County Board of Elections and Registration denied that Sumter County and the State of Georgia had *ever* discriminated against their African-American residents. (ECF 16 ¶2, 95-1 ¶8.) Now, finally, the Board admits not only the "ugly history of racial discrimination" in the county and the state but also that "[t]he effects of discrimination remain." (ECF 162 at 15.)

The record in this case is full of those lingering effects. We heard from witness after witness that life is Sumter County is still largely divided along racial lines. We saw those effects in census data showing, for example, that African Americans in Sumter County are twice as likely as whites to lack a high school diploma, a third as likely to have a bachelor's degree or higher, twice as likely to be unemployed, and three times as likely to be living in poverty. (ECF 125 at 2-3.) We saw those effects in pervasive and extreme levels of racially polarized voting in Sumter County, with white voters crossing over to support black candidates only in the single digits in many cases. And we saw those lingering effects of historical discrimination in persistent turnout disparities, with white voters outnumbering black voters in county elections by almost

two to one as far back as the eye can see. (PX 33.)

And yet the Board, in its closing argument, now blames the *victims* of that discrimination —rather than an election system that is rigged against them—for their inability to elect candidates to the at-large seats on the school board. House Bill 836 is not a problem, the County says. It is "the right plan for Sumter County." (ECF 162 at 1.) Instead, the County suggests, the problem here is black people. By virtue of their numbers in the population, the County suggests, African Americans already have an equal opportunity to elect at large; they just choose not to exercise it. (ECF 162 at 3.) According to the County, none of that historical stuff matters here.

But that's not how the Voting Rights Act works. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). The question of equal opportunity under House Bill 836 therefore cannot be decided by population data alone. Rather, it "depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process." *Id.* at 45 (internal quotation marks and citations omitted). Context matters. History matters. Present-day reality matters.

The Present Reality of At-Large Elections under House Bill 836

The reality is that African American voters are *zero for three* in at-large elections held under House Bill 836. The evidence shows that voting in those elections has been highly polarized along racial lines. Black voters have been highly cohesive. White crossover has been low. And a white majority has defeated the candidate preferred by black voters in all three.

There is no longer any serious dispute about these facts. Not a single witness so much as suggested that Michael Coley and Kelvin Pless were not the minority-preferred candidates in

their respective elections or that voting in those elections was not racially polarized. Dr. McBride's statistical analysis of those elections is the only analysis in the record, and criticism of that analysis by the defendant's expert lacked both substance and credibility.

Nothing in the County's evidence or closing argument puts these key facts in dispute. As we noted in our closing argument, this is textbook vote dilution, and it cries out for a remedy.

The County is Wrong about the Numbers

Although it admits that majority status is not a *per se* bar to liability under Section 2, the County places a lot of weight on its contentions that "African Americans are an absolute majority of persons eligible to vote in the County" and "African Americans are an absolute majority of registered voters." (ECF 162 at 3-4.) But these factual contentions are incorrect.

African Americans are not a majority of Sumter County's voting-age population according to the 2010 Census. (ECF 95-1 ¶3; ECF 134 (48.1%).) They are not a majority of the *estimated* voting-age population according to the American Community Survey. (ECF 125 at 2 (49.1%).) And they are not a majority of the county's registered voters according to registration data from the Secretary of State. (DX 2 at 3 (48.3%); DX 3 (48.8%).)

The defendant relies solely on the oral testimony of the county registrar for the proposition that African Americans constitute a majority of the registered voters in Sumter County (ECF 162 at 3), but that testimony conflicts with official data published by the Secretary of State and is therefore not credible.

Of course, the County does not dispute that white voters outnumber black voters in actual turnout by a factor of almost two to one. It just blames black voters for that disparity. (ECF 162 at 4-5.) The County suggests that there are no longer any barriers to political participation for African Americans in Sumter County, but that was not the evidence. Witness after witness and

exhibit after exhibit documented the lingering effects of historical discrimination that continue to hinder African Americans' ability to participate in the political process. Socioeconomic factors—education, unemployment, and poverty—affect voting. That's why those factors matter.[1]

The County's Election Returns are Useless

The County also places a lot of weight on selected election returns for state and federal offices whose electorate included some or all of Sumter County. (ECF 162 at 5-6.) As we noted in our closing argument, these returns are virtually useless in this case because: (1) no one conducted a racial bloc voting analysis of them; (2) they would be much less probative than the at-large school-board elections, anyway (because they are partisan elections, held on a different election day, with more resources and different campaign tactics, etc.); and (3) we don't know how they were selected or by whom.

The County argues, however, that no analysis of the elections is needed, because the Court can just count the number of times a Democrat has carried the county. And it says that the Court "has no choice" but to consider these elections because there have only been three at-large school-board elections under House Bill 836. (ECF 162 at 6.) These arguments have no merit.

First, the Court may not simply assume which candidate was the minority-preferred candidate in a specific election based on general statements about voting trends. The identity of the minority-preferred candidate must be proven, not assumed.

Second, as we saw during cross-examination of the defendant's expert witness, three

[1] The defendant is also wrong about the number of Hispanic voters. The defendant asserts that Dr. McBride's racial bloc voting analyses are flawed because he ignored the county's Hispanic population, which makes up about 6% of the total. (ECF 162 at 10.) But Dr. McBride's analyses used turnout data, not population data. In the May 2016 school-board election, only 11 Hispanic voters turned out to vote in all of Sumter County, and that number represents just .19% of the total vote. (PX 32u, 32v.) There were similar numbers in earlier elections. (PX 32a-32v.) That's fewer than one Hispanic voter per precinct, and it would not have been possible to analyze their voting behavior with any known statistical technique.

elections are enough to establish a violation of Section 2. That number was enough for the Supreme Court in *Gingles*, and it should be enough for the Court here. There are times when a court has no choice but to look at exogenous elections—when data from the elections at issue can't be analyzed, for example, or when a plaintiff files a pre-enforcement challenge to a new districting plan—but this is not one of them.

Remedy

Finally, we return to the issue of remedy. The County does not take issue with Dr. McBride's conceptual framework for drawing effective minority districts or with his application of it. The County emphasizes the difficulty of predicting election results in the future, but it points to no evidence in the record to dispute Dr. McBride's conclusion that African-American membership on the Board would likely increase under the plaintiff's illustrative plan.

The County now argues, however, that the plaintiff's illustrative plan is a racial gerrymander and therefore cannot serve as a remedy. This argument is new. It was not included among the defendant's contentions in the pretrial order, nor has it appeared anywhere else in this case prior to the defendant's closing argument. This argument also lacks evidentiary support. None of the defendant's witnesses testified about the plaintiff's illustrative plan, and the defendant's own exhibits contain unrefuted evidence that the plan does not subordinate traditional districting principles to racial considerations. (DX 6 at 13-18.)

Conclusion

House Bill 836 is *not* the right plan for Sumter County. Lingering social and historical conditions in the county—which the defendant *finally* concedes—effectively put the plan's two at-large seats out of reach for black voters, leaving them underrepresented on the school board. That's unlawful vote dilution, and the plaintiff is entitled to a full and complete remedy.

Dated this 4th day of January, 2018.

Respectfully submitted,

/s/ Bryan L. Sells
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing PLAINTIFF'S REBUTTAL ARGUMENT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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Dated this 4th day of January, 2018.

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