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.	)	
	)	

Defendant's Post-Trial Brief

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Table of Contents

Introduction

A Section 2 claim is "inherently fact-intensive." *Nipper v. Smith*, 39 F.3d 1494, 1498 (11th Cir. 1994). The Court "must conduct a 'searching practical evaluation of the past and present reality' of the electoral system's operation," which involves "a functional, rather than a formalistic, view of the political process" and an "'intensely local appraisal'" of the facts. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)). But the Section 2 claim of Rev. Mathis Kearse Wright, Jr., ("Plaintiff") is all form and no function. His challenge to the two "at-large" seats in the seven-member Sumter County School Board Plan fails to appreciate that the at-large seats *enhance* minority electoral participation by ensuring that the black community, which is larger than the white community by every relevant metric, has an equal opportunity to control a majority of the school board. Seven single-member districts cannot provide this opportunity.

The Plaintiff fails to explain why the black community has less opportunity to participate in the political process. The black community holds a numerical advantage in both registration and voting-age population and, therefore, has the ability to defeat the white-preferred candidate in instances of bloc voting. That dynamic renders this case markedly different from most Section 2 cases, where the predominant white majority can be assumed to cancel out black voting strength.

The Plaintiff also fails to prove bloc voting, which is his burden; Section 2 "does not assume" it. *Growe v. Emison*, 507 U.S. 25, 42 (1993). The evidence offered here is unreliable and skewed. The Plaintiff's expert first analyzed voting patterns in 2014 and identified victories of black-preferred candidates in districts between 44% and 49% black voting-age population (BVAP). But he abandoned that report and now offers a different opinion on polarization as if those elections never occurred. Yet those elections, together with a plethora of countywide

results showing the victories of minority and minority-preferred candidates, paints a very different picture from the narrow and edited story the Plaintiff offers.

Additionally, the Plaintiff has the burden to show "a hypothetical alternative" plan to show "what the right to vote *ought* to be," or else there is no "baseline with which to compare" the current plan and prove injury. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). But the baseline the Plaintiff provides does not show that black opportunity could be better; it shows only that it could be worse. There is no reason to believe that two single-member districts at 54% and 41% BVAP are better than two at-large districts at 49% BVAP, and the Plaintiff's plan would serve only to lock the black community into a permanent minority on the school board. Any reading of the Voting Rights Act to require that result has plainly gone awry.

Finally, although there is no doubt of an odious history of discrimination in Sumter County and in the State of Georgia more generally, the Section 2 totality-of-the-circumstances inquiry focuses on the *present*. The evidence at trial failed to connect past and present as to the black community's current ability to participate in the political process. Again, the effects of past discrimination typically are manifest in disproportionately low registration, and here black registration is higher than white registration.

In short, there is no Section 2 injury, there is no Section 2 remedy, and judicial intervention would cause more harm than good. For these reasons, and those stated below, the Court should enter judgment in favor of the Defendant.

ARGUMENT

Voting Rights Act § 2 forbids any voting "procedure" that "results in a denial or abridgment of the right…to vote on account of race or color." 52 U.S.C. § 10301(a). That

standard is met if, "based on the totality of circumstances, it is shown that the political processes…are not equally open to participation by members of a class of citizens…in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

The Supreme Court has held that electoral districts that "dilut[e] minority voting power" result in a Section 2 violation. *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). But a vote-dilution plaintiff must make every one of three required showings: (1) that the "minority group" is "'sufficiently large and geographically compact to constitute a majority in a single-member district'"; (2) that it is "'politically cohesive'"; and (3) that "'the white majority vot[es] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (quoting *Thornburg v. Gingles*, 478 U.S. at 50–51). These *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim," *id.* (quotation marks omitted), and courts also consider a plethora of factors in their local appraisal of the "totality of the circumstances," *id.* at 1010–1011. The Section 2 standard, under the circumstances of this case, is not met.

I. The Plaintiff Failed Even To Articulate How the Black Community, Which Is Larger Than the White Community, Lacks Equal "Opportunity"

The "minority" community here is not the "minority." The numbers are not in dispute, and they show that blacks outnumber whites in total population, voting-age population, and registration. *E.g.*, Dkt. 164-1 at 3; DX12 at 1; DX2 at 3.

These facts matter because a Section 2 plaintiff must prove that "'the white *majority* vot[es] sufficiently as a bloc to enable it ... usually to defeat the *minority's* preferred candidate.'" *Johnson*, 512 U.S. at 1007 (quoting *Gingles*, 478 U.S. at 50–51) (emphasis added). But, in

Sumter County, if the white and black communities both vote as blocs for opposing candidates, the *black* community has the numbers—in both voting-age population and registered voters—to outvote the white community. Ostensibly, the black community is unlikely to have "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(a).

Although courts do not bolt the courthouse door shut on Section 2 claims in such circumstances, the majority-minority group "faces an obvious, difficult burden in proving that their inability to elect," if it exists, "results from white bloc voting" and not from some other cause. *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1555 (5th Cir. 1992). Yet the Plaintiff here has done practically nothing to focus his claim on articulating why black voters lack "equal opportunity" as compared to white voters "to participate" in at-large elections.

One way to prove that a group having superior total-population or voting-age-population status lacks an equal opportunity is through proof that effects of prior discrimination have resulted in disproportionately low *registration* rates. *See, e.g.*, *Missouri State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016) (finding liability where black community held a near majority where white registration exceeded black registration by 10%); *Jordan v. City of Greenwood*, 599 F. Supp. 397, 401 (N.D. Miss. 1984) (same). Similarly, the "disproportionate effect of felony disenfranchisement" can demonstrate that a black majority on paper lacks electoral opportunity in reality. *Ferguson-Florissant*, 201 F. Supp. at 1080–81. But here, black registration exceeds white registration, and persons disenfranchised for any reason are excluded from that calculation. 3 Tr. 62:6–13.

Potentially, a Section 2 plaintiff could attempt to prove that "soft" voting rolls do not accurately reflect registration. *Salas*, 964 F.2d at 1545, 1555. There is no evidence of that here, and, in fact, the Plaintiff has agreed to stipulate that black registration exceeds white registration.

Another example of a circumstance where a protected group having a numerical majority may nevertheless lack equal electoral opportunity was present in *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1545–55 (11th Cir. 1990), where blacks and Hispanics together constituted a majority, but lacked cohesion, and thus the Hispanic and white voters could coalesce and outvote the black community. Here, however, the Plaintiff's expert provided no analysis of Hispanic voting behavior, and he argues that Hispanics vote at single-digit levels in school-board elections. No minority group, then, is joining forces with the minority-white community to outvote black-preferred candidates.

Similarly, a single-member election scheme could dilute the voting strength of an overall majority. For example, "[v]oters of the protected class, if they constitute a minority, could be spread throughout the several election districts of a county so that they constitute a voting majority in none." *Smith v. Brunswick*, 984 F.2d 1393, 1400 (4th Cir. 1993). But here, the at-large seats protect *against* that form of dilution by allowing the black community to coalesce at the county level where it enjoys a numerical majority over other groups.

Furthermore, "practical impediments to voting" may disproportionately affect members of a racial minority who comprise the majority of a jurisdiction. *Salas*, 964 F.2d at 1555–56. Conceivably, "migrant work" schedules might interfere with participation opportunity on election day. *Id.* Or, potentially, rural residents immobilized by poverty might not be able to reach polling places due to long distances. But, here, the black community is concentrated in the

City of Americus, which can be traversed on foot, and there is no evidence suggesting any practical barrier to voting.

The closest evidence on this topic suggested that black voters were unaware of the date of primary elections, 2 Tr. 177:14–22, but this perfunctory testimony lacked credibility. The Plaintiff's expert testified that black voters turned out in the 2016 primary in sufficient numbers to control the Democratic primary by an overwhelming majority, so news of the primary date obviously spreads among black voters. 1 Tr. 218:9–16. Furthermore, the Court heard extensive testimony from Dr. John Marshall who owns a newspaper with widespread circulation in Sumter County, especially in the black community. The paper reports on school board issues and surely reports election dates to its readership. 2 Tr. 115:18–16:2. Additionally, Alice Green discussed multiple organizations devoted to educating black citizens about the timing of elections, indicating that this information is actively disseminated in the Sumter County black community. 2 Tr. 128:12–131:22.

Likewise, the Plaintiff's claim that at-large campaigns are too expensive is not supported in the testimony. The only three candidates to run for both a single-member and an at-large seat were Dr. Michael Busman, Michael Coley, and Kelvin Pless. Dr. Busman testified that his at-large election cost him less than his single-member district election, Mr. Coley said it cost him somewhat more (without specifying how much), and Mr. Pless was silent on the issue.

Finally, "plaintiffs could conceivably prove that, despite a registered voter majority, low turnout at elections was the result of prior official discrimination." *Salas*, 964 F.2d at 1556. But here, as in *Salas*, there was no evidence of past discrimination "*directly linking*…low turnout with past official discrimination." *Id.* (emphasis added). The Plaintiff's witnesses failed to make

that link. Edith Green, for instance, testified that black voters were hindered—not by past discrimination—but by those mundane everyday threats to a democracy particularly at the local level: voter mobilization and education about the candidates and issues at play. Trial Tr. 179:17–180:5. Dr. Marshall testified that "possibly" the "depressed status" of the black community has an "impact on black participation," without giving any specifics. 2 Tr. 120:23–21:2. The testimony from other witnesses was equally generic. *E.g.,* Trial Tr. 148:8–15 (Alice Green). "Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Salas,* 964 F.2d at 1556. Yet that is the sum total of the claim here. Granting relief under these circumstances would amount to applying the *Gingles* factors "mechanically and without regard to the nature of the claim." *Johnson*, 512 U.S. at 1007 (1994).

The Plaintiff responds to its burden with rhetoric, not evidence.

First, he contends the black community is not the majority in Sumter County in voting-age population or registration: it is approximately 48% in each. Dkt. 163 at 3. But this ignores that (1) the black community is larger than the white community; and (2) the Plaintiff has provided no analysis of how the other racial or ethnic groups vote. In other words, the Plaintiff neither claims nor shows that the white community *together with other groups* outvotes the black community; he claims that the *white* community alone outvotes the black community. In that two-race comparison, the black community is the majority in VAP, registration, total population, and every other relevant metric.

The Plaintiff cannot have it both ways. He counts other racial groups in the total figures to claim that the black community is not a majority. Dkt. 163 at 3. But when confronted with his failure to account for how those groups vote in assessing polarized voting, he responds that they

are too small to matter. Dkt. 163 at 4 n.1. They cannot be both too small to matter and large enough to matter. After all, alleged vote dilution is "evaluated with a functional, not a formalistic, view of the political process." *Nipper v. Smith*, 39 F.3d 1494, 1527 (11th Cir. 1994). What matters is not the raw percentages but what those percentages mean in terms of *relative* voting strength if voting is polarized.

Second, the Plaintiff contends that the black community simply *must* be deprived of equal opportunity because Georgia and Sumter County have a history of discrimination. But generic claims of discrimination do not suffice in this context. *Salas*, 964 F.2d at 1556. Hard evidence must tie past discrimination to present lack of opportunity to demonstrate how a racial group with numerical superiority has less opportunity than other groups. The Plaintiff has failed to provide that evidence.

Third, the Plaintiff responds with heated rhetoric, claiming Sumter County "blames" the black community for not electing candidates the Plaintiff supported. Dkt 163 at 1. But, as shown above, Sumter County's position is the position of the courts. The Plaintiff's quarrel here is with Section 2's guarantee of opportunity, rather than outcomes. Besides, it is the *Plaintiff* doing the blaming here. Sumter County does not concede that the black-preferred candidates have lost; that is the *Plaintiff's* allegation. Nor does Sumter County concede that the school board does not serve black voters; that is the *Plaintiff's* allegation. There is only "blame" if there is a problem, and the problem here is Plaintiff's to prove. The Plaintiff does not speak for Sumter County's entire black community, and without evidence that a voting procedure places a real-life barrier to equal participation, there is no reason to read *anything* from turnout rates *per se*.

II. The Plaintiff Failed To Prove Racially Polarized Voting

Under *Gingles* prongs 2 and 3 the Plaintiff must prove polarized voting; Section 2 "does not assume" it. *Growe v. Emison*, 507 U.S. 25, 42 (1993). The question under *Gingles* prong 2 is whether a racial group is "politically cohesive," and the question under *Gingles* prong 3 is whether the "white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Id.* at 40. "[N]o single statistic provides courts with a short-cut to determine whether a set of [electoral structures] unlawfully dilutes minority voting strength." *Johnson v. De Grandy*, 114 S.Ct. 2647, 2661–62 (1994). The Plaintiff's analysis lacks credibility and fails to meet this burden.

A. Plaintiff's Expert Report Does Not Present Reliable Information

The Plaintiff relies on the 2017 "corrected" expert report of Dr. McBride to prove polarized voting. But, as the name "corrected" suggests, this was not his first attempt to analyze voting patterns in Sumter County. His first analysis indicated that the *Gingles* polarized-voting elements cannot be satisfied, and his second analysis is a transparent effort to achieve a predetermined result.

The 2014 Report. Dr. McBride's first expert report was served in 2014. It provided estimates of black and white voting behavior for 12 elections involving seats for the Sumter County School Board. The estimates were dubious: the statistical method Dr. McBride used, "ecological inference," arrived at vote totals over 100%, frequently far above 100%. Of course, over 100% of a group cannot vote in an election, and this problem was the focus of scholarly development of the "ecological inference," or "EI," technique. Dr. McBride admitted at his deposition that an EI analysis showing vote totals for all candidates over 100% would indicate

error. He was right to concede this. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1002–03 (D.S.D. 2004) (explaining how EI estimates are bound at 100%); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 598 n.17 (N.D. Ohio 2008) (same); *United States v. Alamosa Cty., Colo.*, 306 F. Supp. 2d 1016, 1023 (D. Colo. 2004) (same); *Hall v. Louisiana*, 108 F. Supp. 3d 419, 434 (M.D. La. 2015) (same). Dr. McBride's numbers did (and still do) exceed 100% for various races and racial groups, indicating mistakes in Dr. McBride's application of the EI method.

But, to the extent the numbers hold any patina of accuracy, they cut against a showing of polarized voting. Dr. McBride's first report showed black-preferred-candidate victories in 6 of the 12 races and doubtful cohesion in 5. PEX2 at 25–26; DEX6 at 41–52; DEX6 at 41, 43, 44, 51, 52. Those numbers present a weak claim under *Gingles* prongs 2 and 3. *See, e.g.*, *Williams v. Orange Cty., Fla.*, 783 F. Supp. 1348, 1362 (M.D. Fla.), aff'd 979 F.2d 1504 (11th Cir. 1992); *Jenkins v. Manning*, 116 F.3d 685, 696 (3d Cir. 1997); *Alamosa Cty.*, 306 F. Supp. 2d at 1033.

Moreover, Dr. McBride's numbers indicated that BVAP in the high 40% range was sufficient to provide the black community an equal opportunity to elect its preferred candidates. The single-district races he analyzed where white-preferred candidates won had 28%, 30%, 36.2%, and 33% BVAP. But, in races with near-even black and white voting-age populations, black-preferred candidates succeeded, with black preferred candidates winning at 48.4% BVAP, DEX6 at 49, 49.5% BVAP, DEX6 at 50, at 44.5% BVAP, DEX6 at 52.1.2 Sumter County has

[1] The last of those, the 2002 election for SBOE#3, Dr. McBride counted as a loss for the black-preferred candidate, but his EI estimate showed the highest black vote totals going to the winner, Donna Minich. DEX6 at 52. To avoid this problem, Dr. McBride departed from his view that EI is the most accurate statistical method and concluded that a separate analysis, ecological regression, gave the correct answer. This appears to have been for no other reason than that he disliked the result under EI.

2 Furthermore, black opportunity at those BVAP levels appears to be understated because Dr.

much higher BVAP than 36%, so the more probative races are those with BVAP levels in the high forties, rather than those with BVAP levels in the twenties and thirties.

These problems were, evidently, obvious even to Plaintiff's counsel who, on remand, scrapped Dr. McBride's analysis and started over. In fact, the Plaintiff did not file the charts showing Dr. McBride's 2014 analysis as an exhibit in this case. *See* PEX2; *but see* DEX6 at p. 41–52.

The 2016/2017 Report. In its place, Dr. McBride submitted a supplemental report. But that report contained errors, so Dr. McBride submitted a supplemental "corrected" report. And even *that* report has errors. 1 Tr. 189:11–190:11.

Moreover, although claiming to have added data in response to the concurrence in the Eleventh Circuit's opinion seeking additional data, Dr. McBride's supplemental analysis has the *same number* of elections he presented before. That is because Dr. McBride omitted from his 2017 report three elections he analyzed in his 2014 report—in fact, the three elections showing black-preferred candidate success in districts with BVAP levels in the high 40% range. The omitted elections, that is, were those most likely to rebut a Section 2 claim against the at-large seats.

Dr. McBride's explanation for this omission was too clever by half. He explained that, because he had *already* analyzed those elections, he did not need to again. But he *did* analyze in his 2017 report elections analyzed in his 2014 report, including those showing defeats for minority preferred candidates and those showing victories for minority preferred candidates in

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McBride's analysis systematically avoided analyzing races in District 4, which has near-even black and white voting-age populations.

the super-majority black districts (which Dr. McBride could explain away as irrelevant). His explanation for re-analyzing the elections that helped his analysis was that he had better data in the form of turnout data to use for his EI estimates. That data, of course, was *always* available, raising the question of why he did not use it the *first* time. And, more importantly, if he did have better data, he should have reanalyzed *all* the elections under that data; not merely the ones that supported his conclusion. As Dr. Owen testified (and as is obvious), this choice introduced selection bias into the analysis.[3] *Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523, 1534 (M.D. Fla. 1989) (discrediting expert where elections selected for analysis—far more than analyzed here—"were, in fact, skewed in favor of reaching the conclusions that he drew").

Additionally, the data problems present in Dr. McBride's first analysis carried over into his second, as Dr. McBride's EI estimates total over 100%. Dr. McBride attempted to explain this defect with a new story that EI only provides bounds for estimates as to *each* candidate *alone*; but *together*, the estimates may add up to over 100%. But that was exactly the opposite of his deposition testimony. And Dr. McBride admitted at trial that EI has advanced since 1997, when Dr. Gary King first published on the method, and since the invention of the program "EzI," which was designed only for two-candidate races. As Dr. Owen testified, EzI, if used properly, would have bound Dr. McBride's estimates within 100% for two-candidate races—given that running the reverse of numbers on two candidates in the same race should give the same bounds

3 The Plaintiff challenged Dr. Owen's credentials based on her admission that she "is not an expert" in ecological inference. But the context of her statement was that she is not involved in developing the theory; she is, however, competent to perform and understand EI analyses, and recognize where they are poorly performed. Courts have rejected challenge to experts under similar circumstances. *Cottier v. City of Martin*, 2005 WL 6949764, *16 (D.S.D. Mar. 22, 2005).

on both—and the program simply is not suited for multi-candidate races. Dr. McBride should have used a newer program for such races, called "R." Courts have made this same observation:

> The statistical models used by Dr. Epstein (King's "EI" method and the ecological inference program developed by Kosuke Imai, Ying Lu, and Aaron Strauss) also are problematic. These models are designed for electoral contests *with two candidates* in which each voter has a single vote. *King has developed extensions of his model that could be appropriate for multicandidate contests in which each voter can cast only a single vote*.

Levy v. Lexington Cty., S.C., Sch. Dist. Three Bd. of Trustees, 2012 WL 1229511, at *6 (D.S.C. Apr. 12, 2012), as amended (Apr. 18, 2012) (emphasis added). Dr. McBride admitted that the program he used is so outdated that he had to adjust his computer settings to run it. The obvious resolution to this battle of experts is that Dr. McBride used an outdated method, and used it incorrectly, thereby injecting into his analysis the very defects Dr. King "developed extensions" to resolve. Plaintiff's counsel's brandishing a 20-year old textbook before the non-existent jury does not provide a persuasive counter-explanation.

In fact, the Court can test some of Dr. McBride's EI estimates against reality because Dr. McBride's 2014 report made *estimates* of voter turnout for multiple races (using EzI), but his second provide the *actual* turnout data, which is collected and published by the Georgia Secretary of State. There is virtually no correlation between Dr. McBride's estimates and the actual numbers:

Race	EI Estimate Black Turnout	Actual Black Turnout	EI Estimate White Turnout	Actual White Turnout
3/18/2014 BOE#6	22.1%	Ignored in Dr. McBride's Supplemental Report	5.1%	Ignored in Dr. McBride's Supplemental Report
5/20/2014 BOE#1	12.6%	8.6%	27.6%	9.4%

5/20/2014 BOE#2	20.3%	4.4%	27.3%	20.7%
5/20/2014 BOE#3	5.9%	5.4%	25.3%	12.9%
5/20/2014 BOE#4	Ignored in Dr. McBride's initial report	4.1%	Ignored in Dr. McBride's initial report	6.9%
5/20/2014 at-large 2-yr	15.5%	6.7%	19.6%	11.1%
5/20/2014	16.0%	6.7%	19.6%	11.1%
7/22/2014 BOE at-large 2-year runoff	12.6%	4.7%	14.3%	8.2%
2/2/2010 BOE#3	12.8%	10.8%	33.9%	12.9%
2008 BOE#1	27.2%	Ignored in Dr. McBride's Supplemental Report	31.3%	Ignored in Dr. McBride's Supplemental Report
2006 BOE#3	1.1%	Ignored in Dr. McBride's Supplemental Report	27.7%	Ignored in Dr. McBride's Supplemental Report
2002 BOE#3	35.2%	Ignored in Dr. McBride's Supplemental Report	5.9%	Ignored in Dr. McBride's Supplemental Report

Compare DEX6 at 41–52; PEX6 at 21. Rarely were Dr. McBride's EI turnout estimates in the ballpark of actual turnout. Yet this same technique, and same researcher, are proffered as proving the more complex question of racial voting patterns. The numbers can hardly be so wrong as to the former question and somehow come out right on the latter.

Similarly, the conflict between Dr. McBride's 2014 EI estimates on various races and his 2017 set of EI estimates indicates that Dr. McBride has trouble performing this technique. The Court cannot trust the numbers this expert provides.

B. Plaintiff Does Not Make Tenable Inferences from the Data

Besides providing unreliable and intentionally skewed numbers, the Plaintiff views the results with blinders, ignoring the totality of the circumstances in favor of a mechanical understanding of what election results actually mean.

"Zero for Three." Perhaps recognizing the weakness of Dr. McBride's showing, the Plaintiff places minimal emphasis on most of it, contending principally that black candidates are "zero for three" in the at-large school board elections since 2014. But the analysis asks the Court to shirk its responsibility to make a fact-intensive inquiry in favor of a bright-line rule that "zero for three" is *per se* sufficient to show polarized voting. The Plaintiff's argument that *Gingles* created this *per se* rule is 180 degrees removed from the truth. The analysis presented in *Gingles* involved "*53* General Assembly primary and general elections involving black candidates" to test polarized voting in "six…multimember districts." 478 U.S. at 52–53 (emphasis added). The *Gingles* plurality determined that the lower court's careful factual analysis of all this data holistically "satisfactorily address[ed]" the "proper legal standard." *Id.* at 60. Quite the opposite of a *per se* "zero for three" rule, *Gingles* expressly held that "the number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." *Gingles*, 478 U.S. at 57 n.25.

The "circumstances" here do not support the Plaintiff's "zero for three" argument. In *context*, those election results have minimal probative value. One relevant consideration is that Dr. McBride's 2014 analysis showed black, minority-preferred candidate successes in districts between 44% and 49% BVAP, indicating that BVAP levels at or below the level present in Sumter County have been sufficient in the past for minority opportunity. Under that rubric,

minority-preferred candidates are five for nine, not zero for three. PEX6 at 134, 136-137, 138-139, 140-142; DEX6 at 50–52; see chart, *infra*.

Another relevant consideration is that county-wide election results show repeated victories for minority candidates and Democratic candidates who are almost certainly minority-preferred. For example, in 2016, black candidates were on the ballot in Sumter County in eight races and won the county-wide vote in seven. DX 010, pp. 27-28, DX 001, pp. 1283-1338, 1425-63. Similarly, in 2012, Sumter County voted for a black candidate in every one of the six races where a black candidate ran including the following candidates. DX 010, pp. 21-22; DX 001 pp. 1045-46 (Bishop primary), 1176-79 (Obama), 1186-87 (Bishop general), 1188-89 (Sims), 1208-09 (Jones), 1212-13 (Brook). *See S. Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (affirming district court's findings where "the court refused to ignore relevant evidence" of all elections in the region). The Plaintiff responds that no one conducted a polarized voting analysis on this data to know which candidate was minority-preferred. But that does not cut in the Plaintiff's favor because his expert *could* have done so and chose not to, thereby presenting a skewed dataset.

Besides, the Plaintiff's argument lacks common sense: he cannot seriously contend that Barack Obama and Sanford Bishop are *not* the preferred candidates of the Sumter County black community, and Dr. McBride testified that black voters overwhelmingly prefer Democratic candidates to Republican candidates. 1 Tr. 180:25–181:4; *id.* 185:1–8. The only question a polarized voting analysis is needed to address is the *white* community's voting preference. But that is not necessary information here because either (a) the white community crossed over to vote for these candidates, in which case voting was not polarized, or (b) the black community is

sufficiently large as to elect these candidates over white bloc voting, in which case the black community is sufficiently large to have equal opportunity. No matter how a polarized voting analysis might come out, the results indicate that Sumter County is neither hopelessly polarized nor hopelessly white-dominated.

Next, the Plaintiff contends that this information should be ignored because it concerns "exogenous" elections (those not for Sumter County at-large Board of Education seats). But "evidence of exogenous elections are part of the totality of the circumstances that must be examined when applying the *Gingles* factors," *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 773 (N.D. Ga. 1997), particularly where endogenous elections are scarce, *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987); *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1330 (5th Cir. 1989), opinion corrected on reh'g, 897 F.2d 763 (5th Cir. 1990). The Plaintiff mistakes a general principle that a district court "may consider endogenous elections more important than exogenous elections," *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000), for yet another hard rule that endogenous elections should be considered alone, in the absence of context that exogenous elections may provide. That is not the law. *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1375 (N.D. Ga. 2001).

In fact, *most* of the Plaintiff's elections are exogenous because they involve single-member BOE seats, which cover only a *subset* of the County. *See City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987). So the Plaintiff would have the Court rely on *some* exogenous elections and not others, and the exogenous elections the Plaintiff ignores implicate the *entire* County, rather than a portion of it. Far from being irrelevant, the

numerous elections in Sumter County resulting in victories for black-preferred candidates provide important context by which to understand the likely impact of the at-large scheme going forward. *See Johnson v. Hamrick*, 296 F.3d 1065, 1081 (11th Cir. 2002).

Additionally, the circumstances of the three elections in which black-preferred candidates purportedly went "zero for three" indicate that these elections are not probative. Two of those elections involved the *same two candidates*, Michael Coley and Silvia Roland. And Mr. Coley obtained more votes than Ms. Roland in the first race. In the head-to-head runoff, Ms. Roland won, but the special circumstance of an isolated runoff vote in July suggests that the vote was not indicative of what would occur in May on the date of partisan primaries. Then, in the second race, the voters had already chosen Ms. Roland over Mr. Coley once, injecting issues of incumbency advantage, so the added probative value of a second vote consistent with the first is minimal. *Cf. Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (holding that the polarized voting analysis turns on "racial bias in the community," not other considerations in the voting booth). Ms. Roland's incumbency advantage presents a consideration in assessing that election's weight. *Johnson v. Hamrick*, 296 F.3d 1065, 1078 (11th Cir. 2002) ("[I]t is important to bear in mind that such factors as incumbency, the absence of an opponent, or the use of bullet voting might explain divergences in individual elections."). Similarly, the race between Michael Bussman and Kelvin Pless involved a veteran Board of Elections member who is a popular physician and volunteer on the high school football team. Tellingly, this Court heard from six candidates for election to the School Board, and only two of those candidates never worked in the Sumter County schools: Michael Coley and Kelvin Pless. *See* 2 Tr. 124:20–22 (Alice Green testifying that she worked in the Sumter County schools for 26 years); 2 Tr. 164:19–167:9 (Edith

Green testifying that she taught for decades); 3 Tr. 43:15–22 (Sylvia Roland testifying to her teaching career, including at Sumter High School); 3 Tr. 9:5–22 (Michael Busman testifying to work as a physician for the Sumter County High School sports team). There is, in short, little reason to believe these two elections—and these two losing candidates—reflect entrenched voting patterns.

A final consideration is the very low turnout numbers from *both* racial groups. Although the Plaintiff emphasizes that black turnout is low, white turnout is rarely over 20% and is usually much lower. PEX6 at 23. This means that the "opportunity" available to the black community virtually always exists to the extent it mobilizes even 1 of 5 of black registered voters. That this did not occur in the 2014 or 2016 at-large races does not itself indicate a *barrier* to its occurring in the future. It could as easily indicate that the black community is not concerned about the composition of the School Board or its performance.

For all these reasons, the zero-for-three argument is neither holistic nor persuasive.

Plaintiff's Other Elections. Plaintiff's other election data do little to support his position. He emphasizes the defeat of the purportedly preferred minority candidate in several single-member races, but ignores that BVAP in these districts ranged from 28% to 33%, which is much lower than the 48% BVAP reported at the 2010 census and the 49% current estimate. Ironically, the Plaintiff uses differences in BVAP ranges when it is to his advantage by arguing that minority candidates' successes in 62% and 74% BVAP districts do not suggest the likelihood of black success in the 49% BVAP County. 1 Tr. 12:11–22. But, by the same token, minority-preferred candidate losses in districts ranging from 28% to 36% BVAP do not indicate that the same result will occur where blacks outnumber whites.

Taken as a whole—including the evidence Dr. McBride originally presented and then withdrew—the evidence shows that black candidates win routinely in districts at 62% BVAP and higher, that white candidates routinely win in districts at 38% BVAP and lower, and that districts between 40% and 50% BVAP can be won by candidates of (and supported by) either race. Indeed, the following table, which includes Dr. McBride's analyzed elections with alterations for accuracy and to include races excluded from his supplemental Reports, illustrates a 50/50 success rate of black-preferred candidates at BVAP levels above 43%:

	ELECTION	**BVAP**	**BLACK-PREFERRED CANDIDATE WON**
1	May 24, 2016 - 4YR (At-Large)	48.1	
2	May 20,2014 - 2 YR (At-Large)	48.1	Michael Coley earned most votes; run off.
3	May 20,2014 - 4 YR (At-Large)	48.1	
4	July 22,2014 - 2 YR (At-Large) *Run off election.*	48.1	
5	March18, 2014 06	28.0	
6	May 20, 2014 01	62.7	Alice Green won.
7	May 20, 2014 02	30.3	
8	May 20, 2014 03	36.2	
9	May 20, 2014 04	43.9	Rick Barnes won.
10	May 20, 2014 05	70.6	Edith Green won.
11	November 2, 2010 03	48.4	Kelvin Pless won.
12	November 2, 2004 (Sheriff) **Shaded to indicate that black-preferred candidate was a write-in.*	44.7	
13	2002 General Election BOE #3	44.5	Donna Minich won.

14	2006 General Election BOE #3	33	
15	2008 General Election BOE #1	49.5	Carolyn Whitehead won.

PEX6 at 134, 136-137, 138-139, 140-142; DEX6 p. 50-52. The above-described countywide evidence lends further credence to that conclusion.

The only other election the Plaintiff's expert analyzed involved a *write-in* candidate for Sherriff in 2002. But, of course, it is eminently plausible that the reason more white voters did not support the black write-in candidate was not "racial bias" but their ignorance of his campaign. *Nipper*, 39 F.3d at 1524. Moreover, the analysis ignored over 4,000 of the 11,000 total votes which were cast as absentee ballots. By contrast, Dr. McBride failed to analyze a 2016 election for Clerk of the Sumter County Superior Court in which the black candidate overwhelmingly won in the Democratic Primary, on the same day school board elections were conducted.

C. The Fact-Witness Testimony Does Not Show Polarized Voting

The Court heard two forms of fact-witness testimony: (1) candidates for the at-large seats testified about their experience running, and (2) individuals testified about their experiences in Sumter County. Neither supports a finding of polarized voting today in Sumter County.

First, the candidates testified that both white and black Sumter County residents said they would vote for each candidate, and none could identify campaign material with racial appeals. There is no basis to find polarized voting from their testimony.

Second, the other fact witnesses presented highly detailed stories from Sumter County's past—decades ago—and then provided summary statements that life and voting are still

polarized. But the latter statements were cursory and lacked clear links to present Sumter County campaigns and elections.

III. The Plaintiff Failed To Show That an Improved Plan, Accounting for His Expert's Analysis, Exists

A critical part of a Plaintiff's Section 2 case is to present an alternative plan demonstrating that a meaningful improvement is possible as compared to the challenged plan. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). The law is clear that, "along with determining whether the *Gingles* preconditions are met," the Court "must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880 (1994). It is not enough to show that the "lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). Rather, the proposed plan "must achieve a more proportional representation of minorities than did the" plan being challenged. *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1547–48 (11th Cir. 1990) (quotation marks omitted).[4]

The Plaintiff's proposed alternative fails this test. That plan proposes seven single members districts in place of the current 5/2 plan. Thus, instead of a plan with two 60%+ BVAP districts and two black/white even districts (the current plan), the proposed plan includes two 60%+ black districts (BOE 1 (64.4% BVAP) and BOE 5 (75.4% BVAP)), one 50%+ district (BOE 6 (54.5%)), and two districts near 40% (BOE 3 (41.3% and BOE 7 (41.3%). Effectively, the proposed trade is two 49% BVAP districts for one 54% BVAP district and one 41% BVAP district.

4 Although the Court held on summary judgment that a black majority of 50% +1 could be drawn in three districts, the Court did not find or assess (and could not have found or assessed at that stage) whether the alternative is a feasible alternative. Dkt. 125 at 16.

There is no reason to believe that proposal is an improvement, and every reason to believe it is a step backward for minority representation. Worse still, the plan risks poisoning race relations in Sumter County and, in doing so, violating the Constitution.

The Alternative Is Not an Improvement. Under Dr. McBride's analysis, there is no reason to believe 54% BVAP is sufficient to give the black community a meaningful opportunity to elect their preferred candidates. Assuming for the sake of argument the validity of Dr. McBride's conclusion that there is (1) polarized voting, and (2) extremely low black turnout, then there is little reason to believe that these problems can be remedied with a district only a few points above a raw majority. For these reasons, courts typically require much higher levels of minority VAP, often 60% or more, for the creation of a Section 2 district:

> This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population. Obviously if voting age population statistics are used, 5% would drop out of the formula, leaving something in the vicinity of 60% of voting age population as the target percentage.

Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1984); *see also NAACP v. Austin*, 857 F. Supp. 560, 574 n.13 (E.D. Mich. 1994); *Jeffers v. Clinton*, 756 F. Supp. 1195, 1198 (E.D. Ark. 1990); *Smith v. Clinton*, 687 F. Supp. 1361, 1363 (E.D. Ark. 1988); *Neal v. Coleburn*, 689 F. Supp. 1426, 1438 (E.D. Va. 1988); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006).

Although a rigid 60% BVAP rule would not be appropriate in all cases, Dr. McBride's analysis, were it credited, would demonstrate that a number at or above this level is necessary. As an initial matter, it bears emphasizing that Dr. McBride did not conduct a functional analysis of voting patterns *prior* to drawing a 54% district as a proposed remedy; rather, he drew the plan

and two years later attempted to defend the district with a statistical analysis predicting black candidate success at various levels. 1 Tr. 196:1–197:22.

It should come as no surprise, then, that his conclusions are a mismatch for the facts. His analysis shows four data points indicating BVAP percentages needed for black-community success: 47.1%, 77.8%, 69.5%, and 44.1%. PEX6 at 23. These numbers fail to distinguish between the relevant numbers in this case, 49% (the at-large seats) and 54% (the remedial seat). Two of the numbers, 77.8% and 69.5%, are far higher than both, providing no basis to believe *either* is sufficient for minority success. The other two, 47.1% and 44.1%, are lower than *both*, providing no basis to believe either is *in*sufficient for minority success. Although the analysis is ambiguous on whether 49% and 54% are sufficient or insufficient, it indicates that they are functionally the same. Hence, the 54% proposal is only different, not better.

Dr. McBride responded to this problem at trial with a heads-I-win-tails-you-lose trick: the 49% at-large seats (he claimed) are similar to the districts producing the 77.8% and 69.5% results (and hence are insufficient), and the 54% seat is similar to the districts producing the 47.1% and 44.1% results (and hence is sufficient). 2 Tr. 13:10–19:8. That is simply wrong. The seats producing the first set of results were *30.3%* (BOE 2) and *36.3%* (BOE 3) BVAP. PEX6 at 4. And the seats producing the second set of results were 62.7% (BOE 1) and 70.6% (BOE 5). At the risk of stating the obvious, 49% is well above 30.3% and 36.3%, and 54% is well below 62.7% and 70.6%.

Dr. McBride, however, made these comparisons with linguistic trickery, grouping the former three all together as "non-majority-minority" districts and the latter three together as "majority-minority" districts. 2 Tr. 13:10–19:8. But that choice of words answered the question

his statistical analysis purported to examine—at what point a district tips from non-performing to performing—by positing the number 50% (the line between "non-majority-minority" and "majority-minority") as the tipping point. The predisposed grouping of majority-minority and non-majority-minority would reach the same result in *every* case because all data points above and all below would be grouped together no matter how different. After all, a "non-majority-minority" district could be 10% BVAP or (as here) 49% BVAP, and a "majority-minority" district could be 51% to 100% BVAP.

A separate problem with Dr. McBride's analysis is that it makes no inquiry whatsoever into turnout rates. As described above, if a black majority cannot elect its preferred candidates where black registered voters outnumber white registered voters, that is a problem of turnout—nothing else. But there is no reason 54% BVAP is sufficient to resolve that problem. To the contrary, Dr. McBride's analysis shows that white turnout exceeded black turnout in the current plan's *62% BVAP* district (BOE 1) in 2014. PEX6 at 21. Proposing a 54% BVAP district—8 percentage points below that—to "remedy" this problem is unfounded. Moreover, Dr. McBride made no effort to ascertain what turnout rates would exist in his proposed district. As his table shows, both black and white turnout numbers vary across districts, so, for all the Court knows, Dr. McBride took the *lowest black turnout* areas of Sumter County and included them in his proposed remedial district. Dr. McBride made no effort to explain why his plan overcomes the turnout problem where the current plan does not, which is especially inexcusable when Judge Tjoflat requested a prediction of minority performance in the proposed plan in his concurring opinion on appeal. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 873–74 (11th Cir. 2016) (Tjoflat, J., concurring).

This analysis therefore yields nothing useful to the Court, except that there is no basis to distinguish the numbers 49% and 54%. Dr. McBride is therefore left to request a double standard. He concedes that his 54% district would not guarantee black success because statistical analyses are imperfect. 1 Tr. 198:8–202:21. But he asks the Court to strike down two 49% districts based on his statistical analyses because they cannot guarantee black success. A Section 2 Plaintiff, however, cannot have it both ways. If polarized voting is so severe, and black turnout so low, that at-large districts in a county where blacks outnumber whites violate Section 2, then the remedy must be over 60% BVAP—perhaps over 70% BVAP—or else it is not a remedy. If the far-lower 54% BVAP district is a remedy, then at-large seats in a county where blacks outnumber whites is almost certainly not offensive to Section 2. Only in the odd event that a hard tipping point between 49% BVAP and 54% BVAP could be shown would Dr. McBride's remedy actually be a remedy. That not being shown, there is neither a remedy nor a violation in the first place.

The Alternative Plan Is a Step Backward. The failure to distinguish 54% from 49% is all the more problematic here because Dr. McBride is not proposing to replace *one* 49% district with a 54% district; he is proposing that *two* 49% districts be replaced by *one* 54% district and one *41%* district. PEX6 at 4, 6. This alternative harms the black community by permanently entrenching the black community as a minority on the school board.

The Parties agree the fundamental challenge for any districting plan in Sumter County is that the black community is concentrated in the City of Americus. *See* DEX6 at 5–6. Thus, Dr. McBride conceded that "it is not possible" to draw four compact majority-black single-member districts "in a five-district plan." PEX6 at 5. Dr. McBride's analysis assumes that the only way to

protect black voting strength is through 3 majority-black and 4 majority-white districts. But the County itself is majority black in total population, and blacks outnumber whites among registered voters and voting age persons. So at-large seats provide, at minimum, an equal opportunity for blacks to win the at-large seats, and the combination with 2 super-majority black seats, where black candidates are practically guaranteed to win, means that the black community has an equal opportunity for a majority on the school board under the existing plan. In contrast, Dr. McBride's proposal, under his analysis of polarized voting and turnout, locks the black community in as the permanent minority. Section 2 does not require that result.

In fact, the Plaintiff does not even want it. He testified that he wants an equal opportunity for a black-supported *majority* on the school board. 2 Tr. 231:22–232:6. While his efforts in litigating this case are no doubt sincere, the requested relief is misguided and not helpful to his laudable goal.

The Alternative Plan Inflicts a Constitutional Injury. The Plaintiff also overlooks the harms of imposing a race-based remedy on an allegedly discriminatory system where the remedy has so little—indeed, practically zero—evidentiary support. As one court asked:

> supposing that the proposed new system still fails to produce a black winner, we will then be asked to continue down the slippery slope, mandating new designs which segregate blacks into greater and greater concentrations until at last a black is elected? Somewhere along this downward course, the goal of an open and pluralistic political process, where groups bargain among themselves, is transformed into one of proportional representation by persons beholden for office to discrete ethnic groups.

Monroe v. City of Woodville, Miss., 881 F.2d 1327, 1329 (5th Cir. 1989), opinion corrected on reh'g, 897 F.2d 763 (5th Cir. 1990) (quotation marks omitted).

The U.S. Supreme Court has since addressed that "slippery slope," holding that the Fourteenth Amendment "prevents a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quotation marks omitted). Where a map-drawer "purposefully established a racial target" and that target "had a direct and significant impact" on the district's "configuration," courts apply strict scrutiny to determine the justification for the race-based districting. *Id.* at 1468–69. Here, Dr. McBride clearly set out to draw a third majority-minority district, and made "considerable changes to the existing boundaries" to achieve this race-based goal, PEX6 at 5, so the plan must pass strict scrutiny to be constitutional.[5] *Cooper*, 137 S. Ct. at 1469–70.

To satisfy strict scrutiny, it must be shown that Dr. McBride's plan "serves a 'compelling interest' and is 'narrowly tailored to that end.'" *Id.* at 1464. Although the Supreme Court has presumed that Section 2 compliance is a compelling interest, *see id.*, Dr. McBride's plan is not narrowly tailored. As he conceded at trial, he made no analysis of whether 54% was either necessary or sufficient to create an opportunity district, but merely *assumed* anything above 50% satisfied Section 2. Only later did he attempt to support his choice with evidence, so his analysis consisted only of "post hoc justifications" for decisions he already made. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). And, as described above, even these efforts were entirely insufficient to explain why the specific race-based choice he made—a 54%

5 The Plaintiff contends that the Defendant did not raise the question of the alternative plan's constitutionality in its pre-trial statement. Dkt. 163 at 5. But the Defendant posed the question of whether the Plaintiff had proven that a feasible alternative exists, Pre-Trial Order at 7, and, to be feasible, the alternative must be *legal*, *see e.g.*, *Dillard v. Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987).

district—was tailored to the demands of Section 2. It is therefore not a Section 2 remedy, and, failing that, violates the Constitution. *See Cooper*, 137 S. Ct. at 1470.

IV. The Plaintiff Has Failed To Show Discrimination Under the Senate Factors

Under the totality-of-the-circumstances analysis, courts, in addition to those considerations described above, consider the so-called "Senate Factors." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006). The Plaintiff's case is not persuasive.

One factor is "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." *Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999). Although Sumter County concedes a "history of official discrimination in" Georgia and Sumter County, "the proper concern here is what effect discrimination in education has had on the level of black participation in the political process." *City of Carrollton Branch of the N.A.A.C.P. v. Stallings*, 829 F.2d 1547, 1561 (11th Cir. 1987). Similarly, courts consider whether members of the minority group "bear the effects of discrimination in such areas as education, employment and health," but the relevant question is the extent to which these disadvantages "hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37.

Here, there is no evidence of ongoing "effect" on the "level" of black participation in the political process. The prototypical "effect" is "a low level of black registration" that may be caused by "discrimination in education." *Id.* But black registration *exceeds* white registration in Sumter County. Although several fact witnesses offered opinion testimony that effects of past discrimination continue to have a causal connection to participation, their testimony was vague,

lacked foundation, often identified no more than the standard everyday barriers anyone faces in participating in an election, and reflected a lack of relevant information, such as the rates of black registration.

Another factor is the "extent" of polarized voting. *Gingles*, 478 U.S. at 37. As described above, the Plaintiff has not proven polarized voting. But even if he had, the evidence suggests the "extent" of polarized voting is minimal. Black candidates have won in districts at approximately 45% to 49% BVAP, indicating white cross-over voting, which Dr. McBride's first report showed. The results of numerous elections showing Sumter County supporting black-preferred candidates, such as Sanford Bishop and Barack Obama, also strongly suggests the willingness of white voters to vote for black-preferred candidates.

Another factor is the success *vel non* of minority candidates. *See Gingles*, 478 U.S. at 37. Black candidates have been successful in Sumter County, both in local races and in countywide votes for other offices. Multiple black candidates have succeeded in school board races, including in districts with below 50% BVAP, and black candidates routinely win countywide races.

Courts also consider whether there is a candidate slating process that has been used to deny participation by minority candidates; no such evidence exists here. *Gingles*, 478 U.S. at 37.

Yet another relevant factor is the existence *vel non* of "racial appeals" in campaigns. *Gingles*, 478 U.S. at 37. The evidence indicates that this does not occur in the SBOE elections. Four candidates described their campaigns for school board. All indicated that they campaigned in both white and black neighborhoods, and none referenced any racial appeals. To the contrary,

all testified that they had the same message to all voters, and they testified that voters of both races told them they would vote for that candidate.

As part of the analysis, courts also may assess "the policy underlying the" County's voting practice to discern whether it is "tenuous." *Gingles*, 478 U.S. at 37. The policy here is clear and weighty: ease of administering elections under the same boundaries governing County Board of Supervisors Elections. Although Alice and Edith Green testified impugning bad motive on the move from a nine-member plan to a seven-member 5/2 plan, their memories were not accurate on this point. Their testimony was that a change to the school board plan was not contemplated until after a black candidate defeated a white candidate in (what they perceived to be) a contentious race. They walked back their statements when challenged on the stand and School Board Chairman Busman provided a different timeline. The School Board records and local newspaper accounts confirm his testimony.

The change was under consideration and discussion for at least 6 months. Defendant guides this Court to Defendant's Exhibit 11 for answers to questions about the change. The language of the resolution for the change is clear. Five single-member districts and two at-large seats. All Board members approved this language. DEX11 at 3. This change passed unanimously with all board members, white and black, including Alice and Edith Green, supporting it. DX 11 p. 2. The five districts are the same as the County commissioner districts. DEX11 at 4. This change was supported by all local legislators, both white and black members of the Georgia General Assembly. Every Sumter County member voted for the change.[6]

[6] Sumter County has not consented to trying a Section 2 "purpose" claim by consent, and no such claim was pleaded or presented to the Court in the final pre-trial statement. If, however, the Court were to consider a claim of discriminatory purpose, these facts would refute that claim.

An additional consideration that may have probative value "in some cases" is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 37. The school board members testified that they do not believe they can afford to ignore the needs of the black community (as the large number of registered members of the black community would suggest), and there is no specific evidence that any needs have been ignored. Again, the Plaintiff called several witnesses who aired generalized and vague grievances, but they provided no specific instances where specific needs were presented to the school board and ignored for anything resembling racial reasons.

In short, the various ways of analyzing the totality of the circumstances counsels against a finding of Section 2 liability. To the contrary the totality of the circumstances overwhelmingly indicates the black opportunity is on par with white opportunity in at-large races in Sumter County.

V. The Plaintiff Did Not Prove a Packing Claim

The Plaintiff pleaded a claim for "packing" against Board of Education Districts 1 and 5, which are over 62% and 70% BVAP respectively. But the Plaintiff presented no evidence on this claim, and his theory to this day remains unknown.

Besides, Dr. McBride's expert report disproves a "packing" claim. A packing claim requires a showing that, without being over-concentrated in a certain number of districts, a minority group would be able to comprise a majority in *additional* districts. *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). Dr. McBride's alternative plan, however, does not show how drawing down black majorities in Districts 1 and 5 could result in a new majority-minority district; to the

contrary, his plan *raises* BVAP in both districts. Furthermore, Dr. McBride offers Districts 1 and 5 as evidence of what BVAP levels are needed for a district to perform, so they can hardly considered "packed." The claim must fail.

Conclusion

For these reasons, and those stated in the Defendant's opening and closing statements, judgment should be entered in the Defendant's favor and the claim dismissed.

Date: January 12, 2018

Respectfully submitted by:

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ATTORNEYS FOR DEFENDANT SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record in this case.

Dated this 12th day of January, 2018.

/s/ Katherine L. McKnight
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