Nos. 18-11510 and 18-13510

In the United States Court of Appeals
for the Eleventh Circuit

MATHIS WRIGHT, JR.,

Plaintiff-Appellee

v.

SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,

Defendant-Appellant.

On Appeal from the United States District Court
For the Middle District of Georgia
No. 1:14-cv-00042
The Honorable W. Louis Sands

Reply Brief of Defendant-Appellant
Sumter County Board of Elections and Registration

Kimberly A. Reid
LAWSON & REID, LLC
901 East 17th Avenue
P.O. Box 5005
Cordele, Georgia 31010
kimberly.reid@lawsonreidlaw.com
(229) 271-9323 (telephone)
(229) 271-9324 (facsimile)

E. Mark Braden
Counsel of Record
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW Suite
1100, Washington, DC 20036
(202) 861-1504 (telephone)
(202) 861-1783 (facsimile)
mbraden@bakerlaw.com

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of this Court, Appellant certifies that the below listed persons and entities have interests in the outcome of this case:

Trial Judge:

Sands, W. Louis

Attorneys for Plaintiff-Appellee:

Sells, Bryan L.
McDonald, M. Laughlin
Khondoker, Aklima

Attorneys for Defendant-Appellant:

Braden, E. Mark
McKnight, Katherine L.
Raile, Richard B.
Stanley, Trevor
Reid, Kimberly

Plaintiff:

Wright, Mathis Kearse, Jr.

Defendant:

Sumter County Board of Elections and Registration

CORPORATE DISCLOSURE STATEMENT

There is no nongovernmental corporate party to this proceeding, and no association of persons, firm, partnership, or corporation that has an interest in the case or the outcome of the appeal.

Dated: February 22, 2019

Respectfully submitted,

/s/ E. Mark Braden

E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW Suite 1100, Washington, DC 20036
(202) 861-1504 (telephone)
(202) 861-1783 (facsimile)
mbraden@bakerlaw.com

Counsel for Appellant Sumter County Board of Elections and Registration

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

INTRODUCTION

The only external barrier preventing Sumter County's black residents from electing representatives of their choice to the at-large school-board seats is the district court's permanent injunction. In August 2018, when it appeared that school-board elections would proceed, a black candidate—undeterred by Plaintiff's assertions that no black-preferred candidate can win county-wide—qualified to run for the at-large seat then up for election, and that seat's incumbent white member chose not to seek reelection. On election day, the county-wide vote went to three black candidates, including Stacey Abrams, the black gubernatorial candidate who (while carrying Sumter County) lost the statewide vote in a contest drawing national attention. The same Sumter voters who voted for Stacey Abrams would have had the opportunity to place a black candidate in an at-large school-board seat. But, by then, the district court had since intervened and enjoined the school-board election. As a result, the black candidate's campaign effort was thwarted, and the white incumbent remains in office (despite having expressed no continued interest in serving). This dissonant view that the way to guarantee racial equality in school-board elections is to prevent anyone, black residents included, from voting should indicate to anyone paying attention that something is amiss in this case.

The basis of that confused injunction is a misapprehension of what Section 2 of the Voting Rights Act protects: equal opportunity. In his appellee brief, Plaintiff doubles down on the district court's erroneous finding of liability based solely on *results*. In his view, liability must follow rigidly from the simple fact that two black candidates went "zero for three" in at-large school-board elections. Even the district court's opinion was not that extreme. Plaintiff's focus on these three results myopically ignores a sea of information indicating that the black community has an equal opportunity in the at-large races—the most salient fact being that there is no white majority voting bloc with sufficient "numerical superiority" to outvote the black community, which is not the "minority." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Plaintiff's sole rationale for a remedy is that he views somewhat disproportionate turnout rates as an insurmountable barrier to the black community's prospects of success. But, "[o]bviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992).

Defining inequality by turnout alone creates a would-be violation that cannot be remedied. No level of black voting-age population packed into a "remedial" district can cure the harm of low turnout, and Plaintiff's proposal for three majority-minority districts would cause more harm than good by

locking the black community, despite its numerical superiority, into a permanent minority on the school board. This, too, signals that something has gone awry. Section 2 does not relieve minority citizens "from the obligation to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), and Plaintiff's contrary suggestions are condescending to the very racial group whose interests he (prosecuting this case alone) purports to represent. If the 2018 election is any indicator, Sumter's black residents are eager to pull and trade, but Plaintiff successfully obtained an injunction against their efforts—frustrating the possibility of the very black majority that is currently possible but that his remedial proposal is also sure to thwart.

At very least, Plaintiff failed to show that a viable remedy is possible. His efforts to rescue the district court's opinion are unavailing when the district court itself (correctly) called his expert's analysis "guesswork" and identified "no support" for the central premise of his illustrative remedial plan. With that, the only legally tenable option was to reject Plaintiff's claim. "Courts cannot find § 2 effects violations on the basis of uncertainty." *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018). By predicating liability on guesswork, the court "twisted the burden of proof beyond recognition." *Id.*

The Section 2 effects analysis is not a mechanical, check-the-box process. There is no zero-for-three rule. The goal of the *Gingles* inquiry is to assess reality, but Plaintiff offers only caricature. Because the at-large seats afford the opportunity Section 2 guarantees better than Plaintiff's own remedial proposal, the Court should vacate the district court's injunction and allow Sumter's black residents to exercise the opportunity they currently have.

ARGUMENT

I. The District Court Applied the Wrong Legal Standard

Voting Rights Act § 2 affords racial minorities an equal "opportunity" to "elect representatives of their choice," but it affords no guarantee of success. Sumter Br. 24-30. Accordingly, the "theoretical basis" of Section 2 vote-dilution liability turns on the "numerical superiority" of a majority racial voting bloc. *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986). Where no majority bloc exists, equal opportunity ostensibly is not denied by an at-large scheme, and Section 2 plaintiffs bear "an obvious, difficult burden" to prove "that their inability to elect results from white bloc voting." *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1555 (5th Cir. 1992). The district court therefore erred in requiring the County to disprove that the purported defeats of black-preferred candidates resulted from white bloc voting. T198/25-26. At a minimum, it

erred in giving the black community's registration advantage no weight at all. Each error independently calls for vacatur.

A. The District Court Erroneously Ignored the Legal Consequence of the Black Community's Registration Advantage and Flipped the Burden

The district court correctly found "that were more African Americans…to turn out to vote…, they would likely be able to elect their preferred candidates." T198/25. It erred, however, in shifting the burden to the County to show why black turnout rates are low. T198/26. Under binding precedent, the defendant bears that burden only after a showing of "a present disproportion in voting registration." *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979). No such disparity exists. Shifting the burden was legal error.

1. Plaintiff has little to say about Section 2's scope, the governing burden, or the *Gingles* "theoretical basis" of "numerical superiority," and he fails even to cite *Cross v. Baxter*. He instead defends the injunction predominantly by characterizing it as purely factual and supported "in the trial record." Appellee's Br. 40. But appellate review of a burden shift is a quintessential *de novo* legal exercise, and the black community's numerical superiority presents a legal question. Clever wordsmithing cannot reframe it as a question of fact. *See Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018) (rejecting

district court's "intensely local appraisal" because it "cast" no "significant light" on the relevant legal question (quotations omitted)).

2. Plaintiff is also wrong that "this circuit has rejected" any inquiry into the "size" of a majority voting bloc or into whether one even exists. Appellee's Br. 46. As noted, binding precedent directly calls for an assessment of comparative registration rates. *Cross*, 604 F.2d at 881-82. By contrast, as the County explained in its opening brief (at 32-33), the case the district court cited for its burden-shifting rule, *United States v. Marengo County Comm'n*, 731 F.2d 1546 (11th Cir. 1984), involved a majority-white jurisdiction and is not on point. Plaintiff has no response.

Unlike the district court, Plaintiff relies (at 46) on *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1546 (11th Cir. 1990), for his view that white numerical superiority is irrelevant. But, as the County's opening brief explained (at 37 n.10), that case holds the very opposite. It predicates the possibility of liability on a "relevant majority voting bloc for purposes of the third *Gingles* factor." 908 F.2d at 1545-46. *Meek* found that a cohesive group of whites and Hispanics, who together voted against black-preferred candidates, constituted a "legally significant voting bloc" to satisfy the third *Gingles* factor. 908 F.2d at 1545-46. Although *Meek* did not require that the legally significant voting bloc be solely white—it could be a coalition (which is not present

here)—it nevertheless focused on identifying a bloc with the requisite numerical superiority to frustrate the minority's efforts. Its reasoning makes no sense under Plaintiff's view that the "size" of a majority voting bloc is irrelevant.

3. Because no "legally significant voting bloc" exists, *Meek*, 908 F.2d at 1545-46, there can be no presumed legal significance to the turnout disparities between white and black voters. Shifting the burden to the County is unjustified. As the County's opening brief explained (at 33-35), the legal significance of turnout disparities can be presumed only where a majority voting bloc frustrates the minority community's incentive to vote—since it makes no difference whether the minority loses by a lot or a little. Plaintiff has no response.

Instead, Plaintiff calls (at 47) "reliable voter turnout data" a better metric than registration data, but this begs the question: better for what purpose? The question here is whether Sumter's black voters have the same opportunity as white voters to elect their preferred candidates to the at-large seats. Turnout disparities may explain why a racial group's preferred candidate *lost*, but they do not alone show that the group lacked an equal *opportunity* to win. Of course, where a legally significant majority voting bloc is identified, that question answers itself: the minority group lacks equal opportunity because of its

insufficient numbers—or, to use the *Gingles* terminology, because its members are *submerged* in a voting pool dominated by an antagonistic majority. *See* 478 U.S. at 46, 48, 51, 68. But, where no antagonistic majority exists, there may be any number of causes to turnout disparities that have nothing to do with the at-large seats, state action, or the Voting Rights Act. For all the district court knows, Sumter County's black residents may be, by and large, satisfied with the current school-board members. They may be, by and large, indifferent to school-board elections, like other Sumter voters. After all, white participation rates in school-board elections are also quite low, an average of 13.1%. Sumter Br. 13. It would not be difficult for black participation levels to exceed white participation levels, and no electoral mechanism prevents this.

4. As the Fifth Circuit put it: "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. But that is the sum total of Plaintiff's claim. The district court found that, with higher turnout rates, black residents "would likely be able to elect their preferred candidate." T198/25. Plaintiff has not shown that these private voting choices result from state action.

In a case materially indistinguishable from this one, *Salas* placed the "burden" on the plaintiffs to show why turnout was low. 964 F.2d at 1555. But Plaintiff inexplicably tries to persuade the Court (at 49) that *Salas* applied "the

same totality-of-the-circumstances test applied by the district court." That is patently incorrect. Whereas the district court placed the burden on the County to prove why black turnout is low, T198/26, *Salas* placed that burden on the Section 2 plaintiffs, 964 F.2d at 1555-56.[1] The district court knew it was not applying the *Salas* standard, calling it a "stringent requirement" inapplicable in "[o]ur circuit." T198/26. For all its flaws, the district court's opinion at least acknowledged that it was splitting with the Fifth Circuit.

Plaintiff's argument (at 47) that *Salas* is "easily distinguishable" because there was no "reliable voter turnout data" is equally incoherent. *Salas* held that low turnout does not entitle a group to Section 2 relief. It is implausible that, were more accurate turnout data available, the court would have found that low turnout *does* entitle a group to Section 2 relief. *Salas* identifies where the Section 2 burden falls in a case brought by members of a group that can, at will, outvote all other groups. The case did not turn on defective data.

Nor is *Salas* materially distinguishable on the basis that minority voter registration exceeded 50% in that case. *See* Appellee's Br. 47-48. This places form over substance. What mattered in *Salas* is precisely what mattered in *Meek*: identifying a "legally significant voting bloc" that, empowered by the

[1] The County does not advocate a "heightened burden." Appellee's Br. 48. The district court's error was in shifting the Section 2 burden when it should have required Plaintiff to prove causation and related elements.

challenged voting mechanism, frustrates minority opportunity. *Meek*, 908 F.2d at 1545-46; *see also Salas*, 964 F.2d at 1555 (placing on the plaintiffs "an obvious, difficult burden in proving that their inability to elect results from white bloc voting"). Whether or not Sumter's black community constitutes "a clear majority," Appellee's Br. 47, there is clearly no *white* voting bloc when only 46.7% of the County's registered voters are white.[2] T198/2. Nor can Plaintiff claim that white voters join with another group to achieve a majority bloc, as occurred in *Meek*. As Plaintiff conceded below, the turnout numbers show "fewer than one Hispanic voter per district." Docket Entry ("DE") 163 at 4 n.1. As between the two racial groups with meaningful participation rates, about 48% percent of the registered voters are white, and 52% are black, a clear majority.[3]

[2] The Census Bureau now estimates that over 52% of Sumter County's total population is black. *See* Addendum A. This is a proper subject of judicial notice, *United States v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002), and confirms the district court's expectation of a continuing rise in that percentage, *see* T198/35.

[3] If Plaintiff is right that all the County's racial groups are legally significant in assessing bloc voting, then Plaintiff must lose because he relied solely on a bloc voting analysis involving only black and white voting data. In response to the County's argument below that these analyses are flawed for omitting other racial groups, Plaintiff argued (quite predictably) that these groups are too small and uninvolved in the process to matter. DE 163 at 4 n.1. Plaintiff cannot have it both ways.

Next, Plaintiff attempts to show (at 49) that "the record in this case" satisfies the *Salas* burden, but Plaintiff did not argue this below, and the district court made no such finding. *Stewart v. Dep't of Health & Human Servs.*, 26 F.3d 115, 115 (11th Cir. 1994) ("As a general principle, this court will not address an argument that has not been raised in the district court."). In over 200 pages of post-trial written closing arguments (DE161, DE163), proposed findings (DE169), and briefing (DE171), Plaintiff did not so much as cite *Salas*—a case the County discussed prior to those filings, DE162 at 4-5—let alone argue that the record satisfied its standard. And, were the Court were to reach this issue, it could not apply the clear-error standard, which governs what a district court actually found, not what an appellee wishes it had found. *See, e.g.*, *Youssef v. F.B.I.*, 687 F.3d 397, 403 (D.C. Cir. 2012); *In re Treadwell*, 637 F.3d 855, 863 (8th Cir. 2011).

In any event, rather than cite a specific "obstacle" to minority participation, Plaintiff makes only generic references to effects of historical discrimination, which are present across the southern states. Appellee's Br. 49-50. As in *Salas*, he "offered no evidence directly linking this low turnout with past official discrimination." *Salas*, 964 F.2d at 1556. In fact, the black candidate who lost two of the three at-large races testified that "people still should have an opportunity to come and get out and vote," and that socio-

economic inequality "might affect them, but I'm not sure how it would." T158/55-56. Nor is a specific effect identifiable from Plaintiff's arguments. Similarly, Plaintiff's position (at 47 n.5) that the National Voter Registration Act renders an inquiry into turnout rates "anachronistic" fails to explain how a federal law that assists in minority participation translates into a burden on participation. Nor is there reason to assume that effects of prior discrimination "now show up elsewhere in the electoral process," when these advances themselves facilitate voting equality. "As *de jure* restrictions on the right to vote mercifully recede further into the historical past, we should expect it to be increasingly difficult to assemble a *Zimmer* -type voting rights case against an at-large electoral district where a minority-majority population exists." *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1333 (5th Cir. 1989).[4] *Salas* places the burden on Plaintiff, and none of his speculation was proven or found by the district court.

5. In short, *Salas* is directly on point, and Plaintiff is inviting a circuit split, plain and simple. Although the County agrees that *Salas* "is obviously not binding in this circuit," Appellee's Br. 46, it disagrees that the Court should be so exuberant to split with, of all circuits, the Fifth and on, of all issues, the Voting Rights Act. As the County's opening brief explains, *Salas* applied

[4] *Opinion corrected on reh'g*, 897 F.2d 763 (5th Cir. 1990).

principles that follow directly from the text of Section 2, the Fifteenth Amendment, the *Gingles* decision, and pre-1982 precedent binding on both this and the Fifth Circuit.

Plaintiff, on the other hand, provides practically no justification for splitting with *Salas*, other than squibs of language from cases that are not factually on point. *See* Appellee's Br. 50. Plaintiff cites no analogous case in which a Section 2 claim was successful. And Plaintiff is wrong (at 46) that the County's argument "rests on a single case" (*Salas*). As should be clear, it relies on *Meek*, *Cross v. Baxter*, *Smith v. Brunswick Cty. Va., Bd. of Sup'rs*, 984 F.2d 1393 (4th Cir. 1993), and *Gingles* itself, among other authorities.

Gingles, after all, defines vote dilution as a byproduct of a majority bloc's "numerical superiority." The district court's approach (and Plaintiff's) converts Section 2's "functional view of the political process," *Gingles*, 478 U.S. at 45 (quotations omitted), into a mechanical check-the-box process. Plaintiff recites the *Gingles* formulation that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate," Appellee's Br. 41 (quoting *Gingles*, 478 U.S. at 51), but fails to appreciate what these words mean. If a court should assess whether "the white majority votes sufficiently as a bloc," it surely should also

assess whether whites can even constitute a "majority" or a legally significant "bloc." That is precisely the inquiry of *Salas* and *Meek*.

Salas is also sound in its conclusion that low turnout does not entitle a protected class to Section 2 relief. 964 F.2d at 1556. The choice to vote or not is personal. It neither amounts to state action nor implies an improper burden on the right to vote. Just as Section 2 does not relieve minority citizens "from the obligation to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), it does not relieve them of the obligation to vote. Assumptions about private choices in the absence of a state-created incentive not to vote are unwarranted, even condescending.

And these private choices cannot be remedied. Drawing a remedial district of even 80% black voting-age population would not remedy the choice not to vote because the white minority could still win simply by voting. Plaintiff's Section 2 theory is a "slippery slope, mandating new designs which segregate blacks into greater and greater concentrations until at last a black is elected," and it is at odds with "the goal of an open and pluralistic political process, where groups bargain among themselves." *Monroe*, 881 F.2d at 1329. There is reason neither to adopt this theory nor to split with the Fifth Circuit.

B. Alternatively, the District Court Erred in Giving Black Residents' Registration Advantage No Weight at All

The district court, at a minimum, should have afforded the black community's registration advantage (and the concomitant low turnout) some weight in the calculus, and it did not. Although Plaintiff claims (at 51-52) it did weigh that advantage, he cannot cite any example. He cites page two of the district court's opinion, but that page simply states the raw numbers. T198/2. He also cites page 25, but the district court there expressly *declined* to weigh comparative registration rates, disregarding them because "the voting booth is another story." T198/25.

As the County's opening brief explains (at 26-27, 37-39), the district court should have looked at overall turnout rates (not merely the black percentage thereof), which show very low participation all around, suggesting that no external barrier to opportunity exists. The court should have factored in the low overall turnout rates to assess whether turnout is too low to show cohesion or white bloc voting under both the second and third *Gingles* factors. Plaintiff responds (at 52-53) that the County did not raise this argument below. He is wrong:

> 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.

DE170 at 21 (post-trial brief); *see also* DE172 ¶ 51 (same). It is unclear why Plaintiff thinks this argument was not raised. *See also* Appellee's Br. 63 (arguing waiver again). But it bears emphasizing that "[p]arties are not limited to the precise arguments that they made below, and may present a new argument on appeal to support what has been a consistent claim." *Jones v. Golden Rule Ins. Co.*, 748 F. App'x 861, 866 (11th Cir. 2018) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)) (cleaned up). The County has consistently argued that participation levels are too low to establish the second or third *Gingles* factors, and it has consistently argued that numerically superior black registration cuts against liability. Whatever difference Plaintiff thinks he discerns between the County's positions below and on appeal is immaterial.

Plaintiff also argues (at 53) that "no court has ever adopted or endorsed the County's new formulations of the applicable standards," but he does not address the cases the County cited (at 26, 38), *N.A.A.C.P., Inc. v. City of Columbia, S.C.*, 850 F. Supp. 404, 418 (D.S.C. 1993), *aff'd*, 33 F.3d 52 (4th Cir.

1994), which finding low cohesion in part because "very few blacks have chosen to vote in at-large contests for the City Council," and *Uno v. City of Holyoke*, 72 F.3d 973, 987 (1st Cir. 1995), which held that "low turnout sometimes may be an indicium of ebbing community support for a particular minority candidate." For example, *Uno* upheld a district court's Section 2 findings only because "the district court made reasonably detailed findings concerning the relationship between depressed turnout among Hispanics and the structural attributes of Holyoke's electoral system." *Id.* These are not "new formulations" of the applicable standards, and the district court made no findings of this nature.

II. The District Court's Analysis of Plaintiff's Remedial Proposal Was Legally Flawed or, Alternatively, Clearly Erroneous

The district court erroneously found Plaintiff's burden to prove that a viable remedy can be fashioned satisfied, even though it called Plaintiff's expert's supporting analysis "guesswork" and found "no support for the idea" that one new majority-minority district will improve voter turnout. T198/34. It reached this holding despite an express warning from a sitting Judge on this Court that specific factual findings and "statistical" evidence is necessary to find this burden met. Sumter Br. 40 (quoting Judge Tjoflat's statement of the operative burden). And, now that the Supreme Court has clarified, in addressing a materially indistinguishable case, that "[c]ourts cannot find § 2

effects violations on the basis of uncertainty," *Abbott*, 138 S. Ct. at 2333, it is plain that the district court's findings are legally (if not clearly) erroneous.

Plaintiff defends the district court's superficial treatment of the illustrative remedy with equally superficial arguments. He spends over three of his roughly five pages on this topic disputing whether the standard requires that a remedy be shown viable "with certitude" or with "meaningful improvement," Appellee's Br. 53-56, and the last page and a half parroting the district court's decision, effectively asking the Court to rubber stamp it. *Id.* at 57-58. This, along with his waiver argument, does not address the substance of the County's arguments.[5]

A. No Evidence Supports the Remedial Plan

As the County's opening brief explained (at 41-46), the district court correctly found "no support" for the central premise Plaintiff's expert offered in support of the illustrative plan: that an increase in black voting-age population ("BVAP") would increase turnout. T198/25. Plaintiff does not quarrel with this finding.

[5] As noted above, the County is not restricted to the precise verbal formulations of the governing standard offered below. Nor do these wording differences matter when the district court's vetting of the illustrative plan was grossly insufficient. In any event, the Supreme Court has now made clear, in addressing an illustrative Section 2 remedy, that certitude is the standard. *Abbott*, 138 S. Ct. at 2333.

Accordingly, there is no "substantial support in the record" for the district court's decision that the illustrative remedy is viable. Appellee's Br. 59. That is because the prediction of improved future turnout was the sole foundation of Plaintiff's expert's opinion on the new proposed district. As the County's brief recounts (at 41-46)—with no serious disagreement from Plaintiff—the expert's election analysis (which looked at only four elections and none in an at-large seat) proved inconclusive, so he shifted gears and predicted that an increase in turnout would accompany an increase in BVAP. T157/144-45; T158/13-20; T198/34. Although it rejected that premise, the district court credited the ultimate conclusion that the remedy is viable. T198/34-35. That internal inconsistency is, at a minimum, clearly erroneous.

Plaintiff's responses are remarkably weak. He identifies (at 58) only three record items constituting the "support" he claims exists for the court's conclusion. One is, remarkably, "the five percentage-point increase in black voting-age population over the at-large seat." Because the district court found "no support for the idea that a five percentage point shift would have such a drastic impact on voting behaviors," it is illogical to rely on that very "five percentage-point increase" as the requisite record support.

Plaintiff also says "[t]he court observed that the change in demographics alone" could change a shift in election results, but, again, it already found "no

support" for that very idea. Nor would that idea be legally tenable. A Section 2 plaintiff must prove that a remedy can be fashioned to afford minority voters "a real opportunity," not simply that minority VAP can increase. *Abbott*, 138 S. Ct. at 2333 & n.27 (rejecting the view that simple demographic numbers can satisfy this burden). The mere change in BVAP is insufficient as a matter of law. Plaintiff further identifies (at 58) the "eight percentage-point decrease in white voting-age population compared to the at-large seat," but that is just the reverse of the BVAP increase; naturally, the small rise in black VAP results in a small drop in white VAP. This, too, is insufficient demographic information, and it is not meaningfully distinct from the increased-turnout proposition the district court correctly identified as unfounded.

The only other item of record evidence Plaintiff cites (at 58) is "the testimony of Wright's expert, based on an analysis of past election results." Plaintiff is correct that the district court ultimately credited the expert's raw conclusion, but that is precisely its error. The sole basis of that raw conclusion was the information the district court found has "no support." Indeed, the opinion cites that very testimony, including the analysis of past election results, a mere three lines before finding "no support" for the position. T198/34. There is nothing "fully consistent," Appellee's Br. 59, about crediting the conclusion and rejecting the premise. It is a night-and-day contradiction. An expert

witness cannot spout off a view and thereby establish Section 2 liability. *See Abbott*, 138 S. Ct. at 2333.

Nor does it help Plaintiff that the district court "did not…rely on any predictions about voter turnout." Appellee's Br. 58-59. That, again, just underscores the problem. The basis of Plaintiff's expert's conclusion was precisely that increased BVAP would improve turnout. Sumter Br. 44. The expert's analysis on prior results was inconclusive, so he made a future prediction about turnout. *See id.* 41-45. When the sole basis of the conclusion is "predictions about voter turnout," the district court cannot credit the conclusion and, at the same time, "not…rely on any predictions about voter turnout." That argument simply restates the error.

B. The District Court Erroneously Flipped the Burden

The actual basis for the district court's ruling was *not* that the Plaintiff met his burden, but that the County did not meet what the district court believed was *its* burden. The court found that "the only *testimony* before the Court" is that of Plaintiff's expert; "Sumter County makes the *argument*" against that testimony, "but it did not ask its expert to conduct any analysis of Wright's illustrative plan in this stage of the case." T198/35 (emphasis in original). "This observation twisted the burden of proof beyond recognition." *Abbott*, 138 S. Ct. at 2333. That is legal error.

Plaintiff confines his response to a footnote (at 58 n.8), where he claims the district court properly shifted "burden of production," but not the "burden of proof." But no burden of any kind could properly be shifted when the district court found "no support" for Plaintiff's expert's "guesswork."

The sole authority Plaintiff cites for his position is the dissenting opinion in *Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 606 (11th Cir. 1994), a Title VII case with no apparent relevance to Section 2 or redistricting. In contrast to this opinion stands *Abbot v. Perez*, where the Supreme Court, just last term, reversed a three-judge district court's finding of Section 2 liability because it failed to find that an illustrative remedy would perform and, instead, shifted the burden to the defendant. 138 S. Ct. at 2333. (Whether the burden was of "production" or "persuasion" the Court did not say, nor is that relevant.) In fact, the expert in *Abbott* did leaps and bounds more than Plaintiff's expert here. He conducted a recompiled election analysis of two districts with higher minority VAP than Plaintiff's proposed district (55.2% and 59.9%) and utilized 35 statewide elections to vet the illustrative plan. *See Perez v. Abbott*, 267 F. Supp. 3d 750, 775 (W.D. Tex. 2017) (describing the analysis). Plaintiffs' expert did not conduct a recompiled election analysis, used no locality-wide data, and looked at results from only four elections. No burden of any kind can shift on that flimsy basis.

In any event, as in *Abbott*, Plaintiff's analysis was, at best, inconclusive and, at worst, cut against the illustrative remedy. *See* 138 S. Ct. at 2333. And, as in *Abbott*, the district court here concluded that, because the County offered no evidence to disprove the effectiveness of the illustrative remedy, it would credit Plaintiff's expert's testimony (even though it rejected its fundamental premise). But "[c]ourts cannot find § 2 effects violations on the basis of uncertainty." *Id.* at 2333. The district court here admitted, however, that it found Section 2 liability based on "guesswork." T198/34. That alone calls for reversal.

III. The District Court Improperly Weighed the Evidence

The district court erred in giving dispositive weight to a small data set, including results with no probative value, and ignoring a large data set, including numerous county-wide vote totals. The November 2018 election results underscore the plain reality that the black community in Sumter County has an equal opportunity to elect its preferred candidates.[6]

A. Plaintiff does not dispute that election results in districts with BVAPs far lower than the at-large seats (which the district court weighed) have no more probative value than results in districts with BVAPs higher than the

[6] As shown in the County's December 6, 2018, brief opposing Plaintiff's motion to strike, the Court can take judicial notice of election results.

at-large seats (which the district court discounted). *See* Sumter Br. 53-43; Appellee's Br. 59-60. Plaintiff responds (at 60) that this is "really beside the point" because black-preferred candidates are zero for three in at-large school-board elections. But this is far afield from the district court's opinion, which found liability based on results in "three general categories" of elections: (1) the "seven races where a white candidate faced an African American candidate," (2) the four races "where there are multiple candidates facing a black-preferred candidate," and (3) "the one election where two white candidates faced each other." T198/22-23. Plaintiff's zero-for-three argument is not the actual basis of liability.

Plaintiff is, again, attempting to substitute his own arguments for the court's very different findings. Plaintiff argues that, because (in his view) it is *possible* that the district court *could* have found liability based solely on the three at-large elections, this Court should assume the district court in fact *would* have made that finding had it agreed with both parties that two of the six black-preferred-candidate defeats it weighed hold no probative weight. Appellee's Br. 60-61. That is not how Section 2's "searching practical evaluation of the past and present reality" works. *Gingles*, 478 U.S. at 45 (quotations omitted). It is the district court's role to weigh the evidence under the proper legal standard; it is not the appeals court's role to speculate as to what the district court *might*

have found under the proper standard. Plaintiffs' argument is backdoor advocacy for a bright-line rule that, when the *Gingles* factors are shown in three elections, Section 2 liability is a given. *See* Appellee's Br. 61. But *Gingles* draws no bright lines.

Even if Plaintiff is correct that the district court *could* find liability based solely on the three at-large school-board elections, the district court did not appear to agree on the facts of this case. *See Uno*, 72 F.3d at 989 ("[T]he district court should not confine itself to raw numbers, but must make a practical, commonsense assay of all the evidence."). Because Plaintiff vigorously asserted his zero-for-three argument below, *see, e.g.*, DE161 at 1, 9-10, and the district court did not adopt it, it seems the district court did not find the position persuasive.

B. Furthermore, a Section 2 liability determination based on only three races and four candidates would be weak, if not indefensible. *See Uno*, 72 F.3d at 989 (finding clear error where the district court found "evidence reflecting racially polarized voting in at most three or four elections (out of eleven)"); *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); *United States v. Alamosa Cty.*, 306 F. Supp. 2d 1016, 1033 (D. Colo. 2004). Plaintiff misreads *Gingles* in asserting (at 61) that the "Supreme Court

relied on only three elections" in that case. Actually, the district court decision it affirmed "evaluated data from 53 General Assembly primary and general elections involving black candidates." *Gingles*, 478 U.S. at 52. Although these were "from three election years in each district," the data included both "primary elections" and general elections. *Id.* at 59-60. That is twice the data per district than what Plaintiff relies on here, and showings of polarized voting in contiguous districts would present probative evidence in more than one district. *Gingles* does not establish a zero-for-three rule. Nor does Plaintiff cite any other case where Section 2 liability was found on only three elections.

Plaintiff argues (at 62) that three elections simply must be enough, or else minority voters would be required "to endure years of discrimination before they could vindicate their rights." But polarized voting must be proven; Section 2 "does not assume it." *Growe v. Emison*, 507 U.S. 25, 42 (1993). The Court cannot conduct the analysis in reverse, assuming discrimination and working backwards to find ways to allow it to be proven.

C. Besides, each election year presents multiple elections; if polarized voting exists, it can be proven in short order. A group that truly suffers discrimination can present locality-wide results in exogenous elections, which can show a lack of opportunity at the locality-wide level. That information is available for Sumter County. But the results would have shown that there is no

discrimination. Black candidates routinely win the county-wide vote, and three carried Sumter County just last November. Plaintiff's expert ignored this information.

Plaintiff asks the Court to ignore these results as well, just as the district court did, contending that, because no statistical analysis was conducted on them and because they occur in November (not March), they have no meaning.[7] But context should not be lost in all of this. It is *Plaintiff* who complains of the lack of county-wide data (and there are, indeed, very few county-wide offices), and it is *Plaintiff* who contends that the legal standard should be revamped to compel a vote-dilution finding on three elections alone. That his expert did not look in the most commonsensical of places for additional supporting data, other county-wide vote totals, reflects either ignorance or willful blindness to practical reality. The repeated success of black candidates in Sumter County counters Plaintiff's narrative of hopeless segregation and polarization. Either white voters are willing to vote for black candidates, or black voters' numerical superiority is sufficient to win without their help. And, if Plaintiff is correct (at 66-67) that black candidates may not

[7] Plaintiff's contention that the district court did weigh these results identifies no use the district court found for them, and the page Plaintiff cites, T198/24, indicates that "diminished relevance" effectively meant no relevance because the information received no weight.

be preferred by the black community, that would undermine the district court's finding of black cohesion.

These points together—the small amount of data weighed, the mis-weighing of non-probative data, and the sea of ignored data—show clear error cumulatively, even if not independently. Sometimes, common sense should make a cameo appearance in federal courts' assessments of what are supposed to be state and local affairs.

Plaintiff is right to wish that Sumter's dark history of discrimination had never occurred, but he is wrong to think that past so pervasive as to nullify the black community's current and constantly increasing majority status. No barrier stands between the County's largest racial group and electoral success. The current scheme provides two at-large seats where the black community has at least an equal opportunity to win, and that translates into at least an equal opportunity at a majority. There is no reason to adopt Plaintiff's view that, to "remedy" this supposed scheme, the black community—a majority of the total population—should be locked into a permanent minority.

CONCLUSION

The Court should vacate the district court's permanent injunction and reverse its order finding liability.

Dated: February 22, 2019

Respectfully submitted,

/s/ *E. Mark Braden*
E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW Suite 1100, Washington, DC 20036
(202) 861-1504 (telephone)
(202) 861-1783 (facsimile)
mbraden@bakerlaw.com

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7) because, excluding the parts of the document not exempted by Fed. R. App. P. 32(f) and 11th Circuit Rule 28-1, 32-4, it contains 6,500 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 11th Circuit Rule 32-3.

Dated: February 22, 2019

Respectfully submitted,

/s/ E. Mark Braden

E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW Suite 1100, Washington, DC 20036
(202) 861-1504 (telephone)
(202) 861-1783 (facsimile)
mbraden@bakerlaw.com

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be filed electronically with the Court by using the CM/ECF system on the 22nd day of February, 2019. I further certify that the foregoing document will be served on all those parties or their counsel of record through the CM/ECF system.

Dated: February 22, 2019

Respectfully submitted,

/s/ E. Mark Braden

E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW Suite 1100, Washington, DC 20036
(202) 861-1504 (telephone)
(202) 861-1783 (facsimile)
mbraden@bakerlaw.com

Counsel for Appellant Sumter County Board of Elections and Registration

ADDENDUM A

B02001

RACE

Universe: Total population

2013-2017 American Community Survey 5-Year Estimates

Supporting documentation on code lists, subject definitions, data accuracy, and statistical testing can be found on the American Community Survey website in the Technical Documentation section.

Sample size and data quality measures (including coverage rates, allocation rates, and response rates) can be found on the American Community Survey website in the Methodology section.

Although the American Community Survey (ACS) produces population, demographic and housing unit estimates, it is the Census Bureau's Population Estimates Program that produces and disseminates the official estimates of the population for the nation, states, counties, cities, and towns and estimates of housing units for states and counties.

	Sumter County, Georgia	
	Estimate	Margin of Error
Total:	30,687	*****
White alone	12,955	+/-258
Black or African American alone	16,085	+/-196
American Indian and Alaska Native alone	27	+/-34
Asian alone	344	+/-94
Native Hawaiian and Other Pacific Islander alone	0	+/-27
Some other race alone	681	+/-241
Two or more races:	595	+/-241
Two races including Some other race	166	+/-108
Two races excluding Some other race, and three or more races	429	+/-216

Data are based on a sample and are subject to sampling variability. The degree of uncertainty for an estimate arising from sampling variability is represented through the use of a margin of error. The value shown here is the 90 percent margin of error. The margin of error can be interpreted roughly as providing a 90 percent probability that the interval defined by the estimate minus the margin of error and the estimate plus the margin of error (the lower and upper confidence bounds) contains the true value. In addition to sampling variability, the ACS estimates are subject to nonsampling error (for a discussion of nonsampling variability, see Accuracy of the Data). The effect of nonsampling error is not represented in these tables.

While the 2013-2017 American Community Survey (ACS) data generally reflect the February 2013 Office of Management and Budget (OMB) definitions of metropolitan and micropolitan statistical areas; in certain instances the names, codes, and boundaries of the principal cities shown in ACS tables may differ from the OMB definitions due to differences in the effective dates of the geographic entities.

Estimates of urban and rural populations, housing units, and characteristics reflect boundaries of urban areas defined based on Census 2010 data. As a result, data for urban and rural areas from the ACS do not necessarily reflect the results of ongoing urbanization.

Source: U.S. Census Bureau, 2013-2017 American Community Survey 5-Year Estimates

Explanation of Symbols:

1. An '**' entry in the margin of error column indicates that either no sample observations or too few sample observations were available to compute a standard error and thus the margin of error. A statistical test is not appropriate.
2. An '-' entry in the estimate column indicates that either no sample observations or too few sample observations were available to compute an estimate, or a ratio of medians cannot be calculated because one or both of the median estimates falls in the lowest interval or upper interval of an open-ended distribution.

3. An '-' following a median estimate means the median falls in the lowest interval of an open-ended distribution.
4. An '+' following a median estimate means the median falls in the upper interval of an open-ended distribution.
5. An '***' entry in the margin of error column indicates that the median falls in the lowest interval or upper interval of an open-ended distribution. A statistical test is not appropriate.
6. An '*****' entry in the margin of error column indicates that the estimate is controlled. A statistical test for sampling variability is not appropriate.
7. An 'N' entry in the estimate and margin of error columns indicates that data for this geographic area cannot be displayed because the number of sample cases is too small.
8. An '(X)' means that the estimate is not applicable or not available.