Nos. 18-11510, 18-13510, 20-10394

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

APPELLANT'S SUPPLEMENTAL BRIEF

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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:

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Sumter County Board of Elections and Registration

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUPPLEMENTAL PRELIMINARY STATEMENT

The Sumter County Board of Elections and Registration (the "County") has consistently maintained that the district court erred at the liability phase "in finding that Plaintiff's illustrative remedy is effective." Appellant's Br. 22. It was not established as such at trial, the district court erroneously shifted the burden at trial, and its liability ruling issued after trial should be reversed.

Nothing at the remedial phase of this case is even relevant to the Court's review of this issue on appeal. Establishing "what the right to vote *ought to be*," *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000) (emphasis in original), was a "threshold" to liability. *Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994). It should go without saying that Plaintiff's failure to meet his *liability* burden cannot be made up at the *remedial* phase. The Court should not review any information from that phase. It can quite safely stop reading now.

Even if the Court were to review the remedial phase, it would find no support for the liability decision. At the remedial stage, Plaintiff tried and failed four times to present a workable remedial plan, and the remedial-phase evidence established that his trial-stage plan may fare *worse* for Sumter's black voters than the challenged scheme. Even after Plaintiff represented that a "special master is not likely to draw districts…any better" than Plaintiff's expert, Dkt. 256 at 9, the district court hired a special master, charged the County for his work, and adopted one of his plans as a purported remedy—which was itself premised on the flawed liability decision and underscored its flaws. Then, the district court moved the Sumter County school-board election

from May to November, which Plaintiff did not request at any stage. The remedial quagmire only confirms that the liability-stage ruling was erroneous.

Plaintiff's supplemental brief provides no reason for the Court to conclude otherwise. First, Dr. Bernard Grofman's analysis at the remedial phase only underscores Plaintiff's clear failures at the liability phase and in no way overcomes them. Second, Plaintiff is wrong that the County waived its challenge to his illustrative remedy at any point. His contention that the district court's summary-judgment finding on the first *Gingles* precondition resolved this inquiry ignores that these are separate issues. The district court did not purport to rule on summary judgment that "a reasonable alternative" exists "as a benchmark against which to measure the existing voting practice," *Holder v. Hall*, 512 U.S. 874, 880 (1994), and its liability ruling—and Plaintiff's own liability-stage briefing—treated them as separate inquiries. In short, the Court need not detain itself long with remedial-phase issues. It should reject the liability decision on its own terms and reverse the judgment below.

SUPPLEMENTAL STATEMENT OF ISSUES

Every issue the County's appellant brief raises (at 3) remains before the Court. Plaintiff's supplemental brief addresses only the second issue the County raises on appeal:

II. Did the district court err by requiring Sumter County to disprove that Plaintiff's illustrative districting scheme is effective, by failing to make factual findings on its effectiveness, and by crediting Plaintiff's expert's

ultimate conclusion that it is effective after rightly rejecting the premise underlying that conclusion?

SUPPLEMENTAL STATEMENT OF THE CASE

The following facts and procedural events are relevant to this brief:

I. At trial in 2017, Plaintiff's expert, Dr. McBride, presented a single illustrative remedial plan to try to establish an effective benchmark alternative to the two at-large seats challenged under Section 2 of the Voting Rights Act. Plaintiff had been warned by Judge Tjoflat in a prior appeal in this case that a functional analysis of the illustrative plan's performance was a prerequisite to liability. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 874 (11th Cir. 2016) (Tjoflat, J., concurring).

The County argued at trial 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.'" Dkt. 170 at 22 (quoting *Holder v. Hall*, 512 U.S. 874, 880 (1994)). The County spent seven pages of its post-trial brief arguing "that Dr. McBride's plans proposed alternative fails this test." *Id.* at 22; *id.* at 22–29. Plaintiff argued that it satisfied the test. Dkt. 171 at 46.

The district court's liability ruling agreed with the parties that "along with determining whether the *Gingles* preconditions are met…, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." T198/34 (quoting *Holder*, 512 U.S. at 880). Like the parties' trial briefing, the liability ruling devoted substantial space to this

issue. The district court agreed with the County that Dr. McBride's illustrative analysis was "guesswork" and that there was "no support" on the record for Dr. McBride's conclusion that his illustrative plan—and, in particular, the 54% BVAP district—would perform. T198/34. Even Dr. McBride conceded this point at trial: "Honestly, it's absolute guesswork." T157/198:1–11. But the district court shifted the burden to the County to *disprove* that the illustrative plan would perform, finding for Plaintiff, even though the County "makes the *argument* that this is not the case," because the County "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).

II. The case entered a remedial phase.[1] At that point, Plaintiff introduced *two* remedial plans. "The first one is new," a plan not presented to the district court at the liability phase. Dkt. 174 at 5. Plaintiff styled this new plan "Remedial Plan 1" and touted it as having achieved a "higher concentration of African Americans in the third majority-black district" than did the liability-stage illustrative plan—which was now relegated to the lowly status of "Remedial Proposal 2." Dkt. 174 at 9.

In response, the County this time did not rest on "*argument*," but instead "ask[ed] its expert to conduct an[] analysis." T198/34. Dr. Karen Owen, with the assistance of the County's non-testifying expert Clark Bensen, prepared a

[1] The district court commenced the remedial phase before it entered its liability ruling, but the liability ruling in no way relied on any of the remedial-phase evidence, which was not yet presented to the Court.

recompiled election analysis establishing that "the black-preferred candidates would perform no better, and may perform worse, under the [Plaintiff's remedial] proposals than under the invalidated plan." Dkt. 200 at 1; *see also* Dkt. 176. The analysis matched the returns from four elections Plaintiff relied on at the liability phase to the lines of Plaintiff's own remedial districts in Proposal 1 and Proposal 2 (i.e., the liability illustrative plan) and found that candidates Plaintiff identified as the black-preferred candidates would have *lost* at least as often, sometimes *more often*, than under the at-large scheme. Dkt. 200 at 4. This revelation triggered a flurry of briefing and a new round of depositions. Dist. Ct. Dkt. 177–189, 199 & 200.

During this remedial phase, Plaintiff's expert conceded that Dr. Owen's analysis was necessary to answer Judge Tjoflat's *liability* inquiry: how would each district in the current 5-2 plan be likely to vote in the proposed seven-district plan?[2] He also conceded that he had not conducted this analysis during the liability phase: "In this case, I did this very recently…[the analysis] had not been done [a month *after* trial]."[3]

III. After a hiatus in the case due to this appeal,[4] the district court reviewed the remedial briefing, found "significant flaws with both

[2] "Q. So if you were tasked with determining how each district in the current 5-2 plan would be likely to vote in the proposed seven-district plan, how would you do that? A. I would perform a similar analysis like the one Dr. Owen did." T200-1/28:21–29:1; *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 874 (11th Cir. 2016) (Tjoflat, J., concurring).
[3] *Id.* at 46:18–47:11.
[4] The Byzantine procedure here is recounted in the County's Motion to Consolidate and Expedite and for Other Relief (filed Feb. 5, 2020).

proposals"—i.e., Remedial Plans 1 and 2 and, hence, with the illustrative plan on which the court predicated liability—and ordered Plaintiff to file yet another brief to address these problems. Dkt. 254 at 2. The district court also ordered the parties to confer on the prospect of retaining a special master. *Id.*

Plaintiff responded with two new proposals, styled "Remedial Proposal 3" and "Remedial Proposal 4." Dkt. 256 at 8. Oddly, one of these proposals contained an at-large seat—the very feature of the existing plan Plaintiff challenged at the liability phase. *Id.* Plaintiff urged the court not to retain a special master because, in his view: "A special master is not likely to draw districts that both address the County's objections and remedy its violation of Section 2 any better than these plans do." *Id.* at 9.

The County responded: "If there was any doubt that this remedial proceeding has proven the County's point that no viable remedy is possible, Plaintiff's resort to more proposals makes it painfully obvious." Dkt. 260 at 4. The County contended that these new proposals were no better than Proposals 1 and 2. It also argued that "no better remedy is possible," it agreed with Plaintiff that "there is no reason to hire a special master." *Id.* at 6.

IV. The court appointed a special master. The district court chose not to adopt *any* of the proposals from Plaintiff—including the illustrative plan on which the liability decision was predicated—and hired Dr. Bernard Grofman to propose additional remedies. Dkt. 261. The Court's order appointing Dr. Grofman required the County to pay Dr. Grofman's fees. Dkt. 267 ¶ 7.

On November 22, 2019, the special master filed a report, proposing five new possible plans. Dkt. 272 ¶ 10. The report endorsed none of Plaintiff's proposals. To the contrary, Dr. Grofman conducted an extensive analysis—not presented at any time by Plaintiff—and concluded that "it is…implausible to expect a (Black) candidate of choice of the African American community to have a realistic chance of election…in a district that is only barely above 50% Black VAP." Dkt. 272-5 ¶ 95. The analysis showed that Plaintiff's illustrative plan, presented at trial, would rarely, if even, elect more than two black-preferred candidates to the school board. Dkt. 272-3 Table 9. The special master conceded that each of his own proposals contained only three minority opportunity districts, except one proposal which contained only two. *Id.* ¶ 35.

V. In response, Plaintiff initially objected to two of the special master's remedies, the one containing only two opportunity districts and a second which Plaintiff claimed also had only two opportunity districts, even though it contained three districts exceeding 60% BVAP. Dkt. 269 at 3; Dkt. 272-7 at 6. Thus, Plaintiff initially objected to a plan containing higher minority percentages than his own remedial plan that was the basis of liability. Plaintiff subsequently withdrew that objection once Plaintiff and the special master came to an agreement on the precise geography the remedial districts would cover (a factor Plaintiff ignored at the liability phase). Dkt. 271 at 1.

For its part, the County argued that Dr. Grofman's report "has only proven" that the district court's liability ruling was erroneous and that "the problems here are fundamental and stem from the liability ruling." Dkt. 268 at

1 and 4. Both parties urged the district court not hold a hearing, agreeing that it was unnecessary. Dkt. 271 at 2.

VI. The district court held a hearing, because it believed it was "presented with limited information regarding the viability of each proposed map relative to each other"—even though it was presented with far more information than was presented at the liability phase. Dkt. 273 at 2. At the hearing, the County argued that Dr. Grofman's report only confirmed the error at the liability stage. Dkt. 290 at 16.

The district court eventually selected a plan. Dkt. 277 & 303. It also moved the 2020 election from May to November. *Id.* Plaintiff did not contend at the liability phase that the election date constituted a Section 2 violation, and he expressed no view at the remedial phase on whether it should be moved. *See, e.g.*, T1; Dkt. 169; Dkt. 171; Dkt. 174.

SUPPLEMENTAL ARGUMENT

The district court's liability ruling should be reversed for three independent reasons. One is that "the alternative" Plaintiff proposed at trial "would not enhance the ability of minority voters to elect the candidates of their choice." *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018). Plaintiff's illustrative plan was no improvement over the challenged at-large seats.

To be sure, if the at-large seats offer an equal opportunity for the black community to elect its preferred candidates—as the County contends in its lead appeal argument and as seems obvious in that black registered voters outnumber white registered voters countywide—the illustrative plan *might* also

afford the same equal opportunity (and it might not). But, either way, there is no need for an illustrative plan if the County's lead argument prevails, because the challenged plan is lawful, affording the equal opportunity Section 2 guarantees.

Yet even if the black community were assumed to lack an equal opportunity under the challenged plan, there would still be no Section 2 violation because the illustrative plan was not shown at trial to be an improvement. Without a shown improvement, any "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004) (quotation marks and citation omitted). The district court erred, however, in applying a double standard, striking down the challenged plan under one standard—deeming lack of success dispositive—and finding an effective remedy under another—deeming guesswork about future success sufficient. As the County's appellant brief explains, this was legal error and calls for reversal.

That analysis stands today as it did over two years ago when the County filed its appellant brief. Nothing at the remedial phase undermines it or is even relevant, and Plaintiff's supplemental brief misses the mark.

I. The Remedial Phase Does Not Support the Liability Ruling

Binding precedent holds that, "along with determining whether the *Gingles* preconditions are met…, a 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); *see also id.* at 887 (O'Connor, J., concurring). As the County's opening (39–51) and reply (17–23) briefs explained, the district court erroneously found that Plaintiff's trial-stage illustrative plan would improve black voting strength and failed to put Plaintiff to his proof. Plaintiff's supplemental brief provides no reason for the Court to conclude otherwise.

A. Plaintiff's reliance on *remedial* phase evidence only underscores his liability-stage shortcomings. Establishing an improved alternative is a "threshold" to liability, so a failure on this element "*precludes…a finding of liability*." *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994) (emphasis added). The Court is bound to review what was before the district court at the liability stage and what the district court actually relied on (and what Plaintiff asked it to rely on) in finding liability. Had the district court correctly rejected Plaintiff's claim, nothing else would have followed. Nothing more is relevant.

B. In any event, the remedial phase only underscores the flaws in the liability ruling. The illustrative remedy Plaintiff presented at the liability phase was never a serious contender for adoption, and Dr. Grofman's report debunked Plaintiff's liability-stage contention that it would have provided three opportunity districts. According to Dr. Grofman's charts, it would afford only two, Dkt. 272-3 Table 9, and Dr. Grofman opined that "it is…implausible to expect a (Black) candidate of choice of the African American community to have a realistic chance of election…in a district that is only barely above 50% Black VAP." Dkt. 272-5 ¶ 95. The *lowest* BVAP percentage that Dr. Grofman

found to create a "minority opportunity district," was 56.3% in his Map 2; he believed that districts drawn with BVAPs of 55.1%— *higher* than Plaintiff's illustrative remedial district of 54.5% BVAP—would not result in success for the black-preferred candidate under his analysis (which, like the district court's liability ruling, erroneously assumes that lack of success amounts to lack of opportunity). *Id.* at ¶ 98; Dkt. 272-1 at 5. The liability-stage illustrative, and its bare-majority alternative, was weighed, tried, and found wanting.

Plaintiff's remedial-stage efforts fared no better. He presented three new remedial plans, and the district court rejected each of them. Even after both parties asked the court to choose one of Plaintiff's remedial plans and return the case to this court, the district court hired a special master. And even after both parties asked the court not to hold a hearing, it held a hearing. Meanwhile, Plaintiff initially objected to a remedial proposal with a higher black-voting age population than his own trial-stage illustrative plan provided, betraying that no one seriously believed the trial-stage illustrative was an improved plan. And the district court found even the new plan it adopted (proposed by Dr. Grofman) insufficient; it found it essential to move the election date from May to November—a remedy Plaintiff did not request based on a premise (that the black-preferred candidate would fare better in November than in May) not established at trial.

The district court's own uncertainty underscores its liability error. Under circuit precedent, "[t]he inquiries into remedy and liability…cannot be separated." *Nipper*, 39 F.3d at 1530–31. The district court's Hamlet-like

approach at the remedial phase exposed the error of its Hannibal-like approach at the liability stage, where it charged ahead to find liability first and left the hard questions for later.

C. Plaintiff's reliance on Dr. Grofman's work as evidence that his own liability-stage analysis was satisfactory fails for similar reasons. Plaintiff contends that Dr. Grofman's report shows that an analysis of remedial plans can occur "without [a] recompiled election analysis," Pl's Supp. Br. 17, but this misses the County's underlying point: Plaintiff presented *no* sound analysis at the liability stage, and the analysis he presented *defeated* his own position. Appellant Br. 41–44. Plaintiff's expert, Dr. McBride only sidestepped the defects in his analysis by opining that the trial-stage illustrative plan would improve *turnout*, but no analysis supported that testimony, and the district court found "no support" for it and called it "guesswork." T198/34–35.

Dr. Grofman's report does not excuse Plaintiff's failure on this, and the County only referenced a recompiled election analysis as one of the many ways Plaintiff could have met his liability burden—and did not. Plaintiff argues that the "only substantial differences" between Dr. Grofman's analysis and Dr. McBride's is that (1) Dr. Grofman included three additional elections in his analysis; and (2) Dr. Grofman reported the average result of his analyses whereas Dr. McBride reported the results of each analysis independently. Pl. Supp. Br. at 18 n.4. Not so. There were a number of additional meaningful differences between the two analyses, and they generated different results.

First, Dr. Grofman showed "the proportion of districts in each of his illustrative maps that contain more Black voters than White voters on election day" because this "data directly bears on the potential for a district to be a minority opportunity district." Dkt. 272 at ¶ 6. Dr. Grofman referred to this exercise of "project[ing]" Black registration and turnout data into proposed districts as "*invaluable* for us to examine those percentages directly." Dkt. 272-3 at ¶ 62 (emphasis added). Plaintiff's expert did not. Dr. Grofman's analysis showed that turnout in Plaintiff's illustrative district drawn at 54.5% had *below* majority turnout in *all* the elections analyzed, 40.4%, 49%, 41.9%, 50.0%, 45.6%, and 48,5%. Dkt. 272-15 at 3. Obviously, Dr. McBride did not conclude this, because he did not even attempt Dr. Grofman's analysis.

Second, Dr. Grofman assessed variance of turnout across the county and across different elections, and the comparative viability of candidates and the effect of incumbency. *See, e.g.*, Dkt. 272-1 at ¶ 26; Dkt. 272-2 at ¶ 61. Plaintiff's expert ignored these factors.

Third, Dr. Grofman compared turnout rates on different dates, since "relative levels of minority and non-minority turnout might be affected by the timing of elections or the presence of a viable minority candidate with a realistic chance of election success." Dkt. 272-1 at ¶ 26; Dkt. 272-2 at 8 n.48; Dkt. 272-2 at ¶ 61. Plaintiff's expert ignored this as well.

Fourth, Dr. Grofman discussed the power of incumbency advantage and its effect on whether a district could elect a minority candidate. Dkt. 272-2 at ¶ 61. Dr. McBride was silent on this issue.

Fifth, Dr. Grofman was concerned with the location of the Sumter County Correctional Institute and with the size of districts. Dkt. 272-3 at 1. Again, Plaintiff's expert ignored these factors.[5]

That Dr. Grofman and Dr. McBride did not conduct the same analyses should be readily obvious: *they reached different results*. Dr. Grofman concluded that a BVAP of 60.2% would create a "perfectly competitive district" for the black community, Dkt. 272-2 at ¶¶ 59-61; and that BVAP values of 55.11% and 55.06% were too low, Dkt. 272-1 at 3, 5.[6] To be sure, Dr. Grofman identified certain factors that "may lead to an expectation that a School Board district in Sumter County requires either less or more than a roughly 60.2% Black voting age percentage in order to accurately characterize it as a 'minority opportunity district,'" but these were the very factors (already discussed) that Dr. McBride ignored. Dkt. 272-2 at ¶ 61. Dr. McBride's analysis was, meanwhile, sparse and, as he admitted, could not "predict with precision how the illustrative plan's District 6 is likely to perform in future elections with its 54.5% black voting-age population." T153-87/24. The district court rightly called this analysis "guesswork" with "no support" on the record. T198/34.

D. Plaintiff is left to rely on Dr. Grofman's remedial proposals to make up for his own failed liability-stage showing. But it is improper to use

[5] Tellingly, Plaintiff later objected to one of Dr. Grofman's districts for being too large. Dkt. 269 at 3. Plaintiff knows factor is relevant but ignored it during the liability phase.

[6] Dr. Grofman's finding that his Map 2 only "has two minority opportunity districts" indicates that districts with BVAP levels of 55.11% and 55.06% were insufficient to create such districts in his view.

remedial-phase evidence (that Plaintiff did not even present or fund) to cure Plaintiff's clear and practically conceded failing at trial. And Dr. Grofman did not purport to assist in this: Dr. Grofman was hired at the remedial phase and therefore assumed (as he had to) that the district court's liability ruling was correct.

Besides, Dr. Grofman's remedial plans only underscore the County's point all along that a seven-single-member-district-scheme is a step backwards for Sumter's black residents. In the challenged scheme, black registered voters outnumber white registered voters in *four* of seven districts, but Dr. Grofman's proposals only establish *three* equal-opportunity districts. By reading Section 2 to create liability "merely because [the plaintiff's racial group] turns out in a lower percentage than whites to vote," *Salas v. Sw. Tex. Jr. College District*, 964 F.2d 1542, 1556 (5th Cir. 1992), the district court has justified a scheme to consign Sumter's black community to a permanent minority on the school board. Section 2 does not compel that result.

II. Plaintiff Bore the Burden at Trial To Establish an Effective Alternative

Plaintiff devotes most of his supplemental brief to trying to argue his way out of his liability-stage burden. These arguments are unavailing.

A. The County's Arguments Are Not Waived

Plaintiff contends that, because the County did not oppose Plaintiff's position on the first *Gingles* precondition at the summary-judgment stage, it waived any challenge to the effectiveness of Plaintiff's "reasonable

alternative." *Holder*, 512 U.S. at 880; Pl's Supp. Br. 12–16. Plaintiff is confused. As *Holder* made clear in 1994, this threshold requirement goes "*along with*" the *Gingles* preconditions. *Id*. (emphasis added). The district court's findings on those preconditions did not satisfy Plaintiff's burden to make this additional showing.

Nor did the district court even purport to find this. On summary judgment, the district court merely held that "the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." Dkt. 125 at 16. The district court did not find that the illustrative plan constituted a "reasonable alternative." *Holder*, 512 U.S. at 880. Plaintiff also knew that the district court did not make such a ruling; his post-trial brief argued that "Plaintiff's Illustrative Plan Would Increase Black Representation" a full 36 pages after his first *Gingles* precondition argument—and he made no representation that the district court's summary judgment ruling addressed or resolved the issue. Dkt. 171 at 46. The County's brief was structured similarly. Dkt. 170 at 22.

The district court's liability opinion confirms what it believed its summary-judgment ruling meant: on page 18 of its ruling, in a section titled "The First *Gingles* Factor: Numerosity and Compactness," the district court stated that it "already granted summary judgment as to" whether "the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." T198/18. Then, 16 pages later, it conducted an analysis into whether the illustrative plan "achieve[s] a more proportional

representation of minorities than did the previous multimember system," *id.* at 34 (quotation marks omitted), and it found at this stage that the County "makes the *argument* that this is not the case," *id.* at 35, plainly referring to the fact that the County contested this fact. The district court did not find the argument waived at the summary-judgment stage, Plaintiff did not argue below that it was waived, and his argument now that the position was waived is designed to trick, not enlighten. The issue is properly before this Court, just as it was properly before the district court.

B. Plaintiff's Obligation To Establish an Effective Alternative Is Clearly Embedded in Precedent

Plaintiff also attempts to argue that there is no requirement to show that his illustrative plan would perform effectively as a remedy because, in his view, Section 2 imposes only "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" Pl's Supp. Br. 12 (quoting *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion)). But this again, mistakes the first *Gingles* precondition for the analysis the Supreme Court has called a showing that goes "along with" the *Gingles* preconditions.[7] 512 U.S. at 880 (emphasis added). Plaintiff's rabbit-hole discussion of whether *Abbot v. Perez* "reject[ed] the objective, numerical test for the first *Gingles* precondition," "silently overrule[d] *Gingles*, *Bartlett*, and the many other cases that regard the first *Gingles* precondition as a bright-line

[7] Even construed as part of the *Gingles* preconditions, it is a separate facet from the 50% numerical threshold.

rule," or "require[s] a higher quantum of proof of the ultimate question" is all misguided. Pl's Supp. Br. 13–14. *Abbott* did not need to overrule anything, because the Supreme Court was always clear that the three *Gingles* elements "are necessary" but not *sufficient*. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). The Supreme Court made that explicit in *Holder* and in *Johnson v. De Grandy*, 512 U.S. 997 (1994), where it explained that it is insufficient for a plaintiff to show that "lines could have been drawn elsewhere, nothing more." *Id.* at 1015; *see also Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000).

This Court, meanwhile, in a case the district court cited for this proposition, has held that a remedial alternative must be shown to "achieve a more proportional representation of minorities than did the previous multimember system." *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1548 (11th Cir. 1990) (quoting *Solomon v. Liberty County*, 865 F.2d 1566, 1572 n.5 (11th Cir. 1988)); T198/12. And, as already described, the district court bifurcated these questions—based on the briefing of *both* parties—so even if this inquiry is technically a facet of the first *Gingles* precondition, it remains a mandatory element of Plaintiff's claim, to be satisfied as a prerequisite to liability. No finding that a 50% threshold was satisfied overcomes this burden.

Abbot was a routine application of this principle. Even though the plaintiffs in that case proposed two alternative districts with "simple Latino majorities" the Supreme Court reversed the district court's finding of liability, because the districts were not shown to be "performing districts." *Abbott*, 138 S. Ct. at 2332 & n.27. Obviously, Plaintiff cannot be correct that the 50%

requirement of the first *Gingles* precondition suffices to establish an alternative as an improved and performing district; *Abbott* rejected districts that met Plaintiff's test.

Next, Plaintiff misreads *Abbott* in contending that its rule applies only where "there is other evidence that a simple majority is *not* enough." Pl's Supp. Br. 14 (emphasis in original). To the contrary, the error *Abbott* condemned was that the district court "twisted the burden of proof beyond recognition." *Abbott*, 138 S. Ct. at 2333. The Supreme Court explained: "Courts cannot find § 2 effects violations on the basis of *uncertainty*" and characterized the district court as being "unsure how to draw these districts to comply with § 2." *Id.* (emphasis in original). A lack of clarity means the plaintiff loses. In any event, as the County's appellant brief explains, Dr. McBride's analysis affirmatively demonstrated that the illustrative remedy was insufficient to condemn the at-large seats as dilutive. Appellant Br. 43–44. The district court's error here was precisely the error *Abbott* condemned.

Plaintiff resorts to excuses, suggesting that he did not meet *Abbott*'s standard because the decision was not yet issued when this case was tried. Pl's Supp. Br. 16. But this yet again ignores the substantial case law predating *Abbott* and clarifying Plaintiff's burden, cited above. That all aside, a sitting member of this Court informed Plaintiff directly of the analysis he would need to run to establish a viable alternative. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871, 874 (11th Cir. 2016) (Tjoflat, J., concurring). Plaintiff has no excuse for his failings, and it is too late to ask whether he

"could have satisfied any such standard if it had existed at the time of the trial." Pl's Supp. Br. 16.

Finally, the same error pervades Plaintiff's suggestion that the County waived its argument on Plaintiff's illustrative remedy by failing to raise it only in its reply. This is utterly false. The County raised the argument below, Dkt. 170 at 22–29, and in its opening (39–51) and reply (17–23) briefs, and the district court actually ruled on the question (albeit erroneously). T198/34–37. Meanwhile, at every step of the remedial stage (recounted above), the County insisted that the latest round of new remedies only proved the liability error. The issue is preserved, the Court should rule on it promptly, and it should find that Plaintiff did not meet his liability burden.

CONCLUSION

The Court should reverse the judgment below.

Dated: June 1, 2020

Respectfully submitted,

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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 1st day of June 2020. I further certify that the foregoing document will be served on all those parties or their counsel of record through the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This document complies with the volume limit directed by this Court's order dated April 30, 2020, because, excluding the cover page, tables, certificates, and signature blocks, this document "contain[s] no more than 20 pages." Order 2 (Apr. 30, 2020). This document complies with the typeface and type-style requirements of Local Rule 27-1(a)(10) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT font.

Dated: June 1, 2020

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