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

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

DEFENDANT'S REPLY TO PLAINTIFF'S SUPPLEMENTAL REMEDIAL BRIEF

The problems common to all Plaintiff's remedial proposals stem from fundamental demographic and geographic problems in Sumter County. Plaintiff concedes that four districts cannot be created to afford a better minority equal opportunity than currently exists, and his proposal of an at-large seat, of all things, to bolster minority opportunity proves yet again that the lines may be *different* from what they currently are, but not *better*. As the County is currently arguing on appeal, this means no liability should have been found in the first instance, a point the Supreme Court has recently underscored in reversing a Section 2 liability finding no different from the one at issue here. *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018).

The good news is that, taking the Court's Section 2 finding as a given, there is a clear path forward. Plaintiff asserts that "[a] special master is not likely to draw districts that both address the County's objections and remedy its [supposed] violation of Section 2 any better than" the plans he has proposed. ECF No. 256 at 9. The County agrees. Although the parties agree on this for different reasons—Plaintiff because he thinks his plan are somehow an improvement and the County because it believes *no* remedy will be viable—the Court can promptly resolve this matter by picking whichever of the Plaintiff's equally bad plans it deems

best and sending the case back to the Eleventh Circuit to address whether any of this should have ever happened. It should do so quickly so the County can obtain prompt relief.

I. Plaintiff Has No Response to the Analysis the Experts on Both Sides Have Agreed Is the Right Analysis for This Remedial Phase

Plaintiff has no response to the recompiled election analysis Dr. Karen Owen conducted (with the technical assistance of Clark Bensen), showing that, under Plaintiff's remedial proposals 1 and 2, Sumter's black community is likely to perform the same as or *worse* than under the enjoined plan. *See* ECF No. 200 at 3–8. Inexplicably, Plaintiff's supplemental brief represents that the County "derives these numbers by fundamentally misrepresenting the analysis of the plaintiff's expert, Dr. Fred McBride." ECF No. 256 at 1–2. That is simply not true. The County has misrepresented nothing, but more importantly, it has provided its own analysis conducted by Dr. Owen. That analysis establishes that Plaintiff's remedial proposals 1 and 2 are no better than the enjoined plan and, in some electoral environments, perform worse. This confirms the County's criticism of Dr. McBride's approach, but that does not mean the County is reliant solely on Dr. McBride's approach. Yet Plaintiff does not even mention the affirmative analysis the County has presented.

As the County's prior brief explains, Dr. McBride agreed that Dr. Owen's analysis is the correct analysis for assess these remedial issues. ECF No. 200 at 2–3 (quoting Dr. McBride's remedial deposition). Furthermore, there is no dispute that Dr. Owen executed the analysis in a technically sound manner and that Dr. McBride did not—and still has not—conducted his own recompiled-election analysis on any remedial plan. Yet Plaintiff has nothing to say of this analysis. Since nothing new has been offered, the County will not repeat these arguments yet again.

Suffice it to say that Dr. Owen's analysis confirms the County's position that Plaintiff's proposed remedies are unlikely to be an improvement—and may even be a step backward—for Sumter County's black community.[1] As the County's briefing explains, Dr. Owen's recompiled-election results and Dr. McBride's results both point in the same direction—i.e., both indicate that comparatively high black voting-age populations are needed to afford additional minority electoral opportunity. ECF No. 200 at 20 ("The Experts' Analyses Agree"). Dr. McBride's analysis under the Grofman formula shows that some districts would need over 69% BVAP to be effective remedies. That Plaintiff cannot achieve those levels and that Plaintiff's plan fails Dr. Owen's analysis *both* establish that the remedies are not likely to be effective.

Plaintiff's latest brief, as noted, says nothing of Dr. Owen's analysis. It relies *solely* on the fact that two data points in Dr. McBride's remedial analysis demonstrate that BVAP levels under 50% would suffice to create equal-opportunity districts. ECF No. 256 at 3. Plaintiff accuses the County of "insist[ing] upon using" only the data points pointing out a need for much higher BVAP levels, over 69%. *Id.* This is inaccurate. The County does not ask that these other data points be ignored, but that (as the law requires) the same standard be applied to proposed remedies as was applied to the enjoined plan. The problem with this second set of data points is that it *exonerates the enjoined plan*. The at-large seats exceed the levels Dr. McBride's analysis says is necessary to create equal opportunity. Since the Court has rejected that argument, the same argument cannot be the basis for picking a remedy. The remedy must pass the standard the Court said the enacted plan failed, and the Court enjoined the duly enacted plan based *solely* on

[1] To be clear, the County assumes the validity of the Court's liability ruling and the factual information it relied on for that ruling for the sake of argument only, given the remedial posture. As should be obvious, the County continues to prosecute all its appeal positions, and nothing in any remedial filing should be construed to suggest otherwise.

the data points Plaintiff now asks this Court to ignore—data points saying 69% or better is needed. Because Plaintiff, at the liability stage, demanded liability based *solely* on those two data points, it is not at all unreasonable to ask that a remedy satisfy Plaintiff's own standard. In fact, the law requires this.

Predictably, Plaintiff falls back to his default position that the mere existence of new majority-minority districts will change voting patterns. ECF No. 256 at 3. But, as the County has already explained, this is pure speculation. ECF No. 200 at 21–22. The County will not repeat these arguments yet again, but emphasizes that Dr. McBride has conceded that the mere raising of BVAP does not establish that a change of voting patterns will be likely. *Id.* at 21 (quoting McBride Depo. at 20:1–4). The Court should look at all the evidence, including Dr Owen's recompiled election results, and not conclude (as Plaintiff would have it) that a remedy is viable simple because new majority-minority districts are created. Nor is Plaintiff's discussion of portions of precincts helpful, ECF No. 256 at 24, because those precincts are split, and Plaintiff has no reliable way to assess voting patterns within them. As Dr. McBride long ago conceded, a recompiled-election analysis is the right way to proceed, and those results cut against Plaintiff's remedies.

II. Plaintiff's New Remedial Plans Show New Renditions of the Same Old Problem

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.

Indeed, Plaintiff makes the baffling proposal that a plan *with an at-large seat* be used to remedy the Court's finding that *at-large seats* violate Section 2. ECF No. 256 at 8. Having inveighed against at-large elections for years, Plaintiff has now come around to the County's view at the liability stage that an at-large seat, whatever defects may inhere in it, is as good as if

not *better* than, anything else. That an at-large seat is now proposed to remedy at-large seats simply brings this case around to its logical, and absurd, conclusion.

Plaintiff's other new remedy (which he is calling "Remedial Proposal 4") fares no better. Although the County would normally object to new material being introduced at this late hour and with little opportunity for expert review, no objection is needed here because Dr. McBride *concedes* that the fourth opportunity district in his plan is no improvement. ECF No. 256-1 ¶ 18 ("I cannot say . . . that African-American voters would have a meaningful opportunity to elect candidates of choice in District 2. Nor can I say that success is likely at all.") That resolves the matter. The possibility of slight improvement, *see id.*, is no basis for imposing a federal judicial remedy on the County's residents (only one of whom thinks this case is worth prosecuting).

Though Plaintiff has tried to paint the County as the bogeyman in this case, the County has always agreed with Plaintiff that "it is this meaningful opportunity that matters most." ECF No. 256 at 9. The problem in Sumter County is that the black community is concentrated in the City of Americus, so creating four single-member opportunity districts—enough to empower the black community to win a majority—is not possible. The at-large seats present one way to capitalize on this geographic disadvantage. Plaintiff's objection to those seats has always been, not that they deny *opportunity*, but that actual *success* has yet to materialize (in only a few tries). Plaintiff's increasingly long list of "solutions" merely shows that "lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). This is no grounds for liability. *Id.*

III. The Court Should Choose Whichever Plan It Deems Best and Quickly Return This Case to the Eleventh Circuit

"Courts cannot find § 2 effects violations on the basis of uncertainty." *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018). The reason the parties are here in July 2019 trying to figure out a

viable remedy to govern a *single election* is that this Court found a Section 2 violation based on what it called the "guesswork" of Dr. McBride at the liability phase. ECF No. 198 at 34. Guesswork breeds more guesswork. The liability phase has proven impossible because the "basis" of the Section 2 finding is "uncertainty." *Abbott*, 138 S. Ct. at 2333.

Accordingly, the Eleventh Circuit must be afforded the opportunity to review the liability decision—before the May 2020 election. The County objects to a drawn-out remedial phase because, as appears to be Plaintiff's goal, it risks running out the clock and depriving the Eleventh Circuit of a meaningful opportunity to address the substantive problems in the Court's prior ruling.

Taking as a given that this scheme violates Section 2 (per the Court's prior ruling), there is no reason to hire a special master or draw out liability proceedings further. Plaintiff believes no better remedy is possible. ECF No. 256 at 9. The County agrees. The problem here is not a lack of technical skill on Dr. McBride's part, but fundamental geographic and demographic realities that no redistricting expert can resolve. What's more, a special master would be expensive for the County, a rural county of modest (at best) means and an already strapped tax base. This case has done nothing for the general welfare of the County, and the County simply wants the opportunity to present its position on appeal for final resolution and closure.

As shown, none of Plaintiff's *different* plans have been established as better than the enjoined plan, and they are not meaningfully better or worse than each other. But, because the Court has already rejected the County's position, it should choose whichever of Plaintiff's equally bad remedies it prefers as the remedy. Nothing better is forthcoming. There is no reason to drag this episode out further.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2019 the foregoing was filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF system.

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