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.	:	CASE NO.: 1:14-CV-42 (WLS)

ORDER

Before the Court are Plaintiff Mathis Kearse Wright, Jr.'s Motion to Exclude the Testimony of Dr. Karen L. Owen (Doc. 88), Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Doc. 89), and Motion for Judicial Notice of Census Data (Doc. 110). Also before the Court is Defendant Sumter County Board of Elections and Registration's Renewed Motion to Exclude Portion of Plaintiff's Expert Reports and Testimony. (Doc. 106.)

PROCEDURAL HISTORY

In this case, Plaintiff Mathis Kearse Wright, Jr. challenges the method of electing the two at-large members of the Sumter County Board of Education and the high concentration of African American voters in voting Districts 1 and 5 under Section 2 of the Voting Rights Act of 1965 ("Section 2"). Wright seeks injunctive relief against Sumter County and entry of an order to redraw the Sumter County voting district lines in a manner that complies with Section 2. Wright filed his Complaint and Motion for Preliminary Injunction on March 7, 2014. (Doc. 1.) On April 3, 2014, the Court denied Wright's Motion for Preliminary Injunction. (Doc. 17.) On July 14, 2015, the Court granted Sumter County's Motion for Summary Judgment and granted judgment in its favor. (Docs. 62; 63.) A year later, on July

28, 2016, that order and grant of judgment was reversed on appeal. (Doc. 71.) The Court subsequently reopened discovery at the Parties' request. (Doc. 76.)

On April 7, 2017, Wright filed his Motion to Exclude the Testimony of Dr. Karen L. Owen (Doc. 88) and Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Doc. 89). Sumter County filed its responses on April 28, 2017 (Docs. 95; 96), as well as a Notice of Defendant's Renewed Motion to Exclude Portion of Plaintiff's Expert Report and Testimony (Doc. 94). The Court stayed further briefing on the original two motions as it sorted out Sumter County's purported renewal. (Doc. 99.) Ultimately it allowed Sumter County to challenge the admissibility of Wright's expert's testimony, but required Sumter County to file a new motion to do so. (Doc. 102.) Wright filed his replies to the summary judgment motion and motion to exclude Owen's testimony on June 5, 2017. (Docs. 103; 104.) Sumter County filed its Renewed Motion to Exclude Portions of Plaintiff's Expert Reports and Testimony (Doc. 106) on June 14, 2017. Wright responded on July 5, 2017 (Doc. 109) and filed a Motion for Judicial Notice of Census Data (Doc. 110). Sumter County filed a reply pertaining to the motion to exclude Wright's expert's testimony on July 19, 2017. (Doc. 112.) On July 26, 2017, Sumter County filed a "response" to the judicial notice motion, though only to offer minor corrections. (Doc. 113.) The County does not substantively oppose the motion. (*Id.*) Wright did not file a reply and his opportunity to do so has expired. *See* M.D. Ga. L.R. 7.3. The motions are now ripe for the Court's review.

MOTION FOR JUDICIAL NOTICE OF CENSUS DATA

"The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." F.R.E. 201(b)(2). The Court agrees with the Parties that it may take judicial notice of census data. *See United States v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002). The Motion is **GRANTED**. **T**he Court takes notice of the following facts:

1. Sumter County has a total population of 31,429 persons, of whom 13,381 (42.6%) are white and 16,237 (51.7%) are black.
2. Sumter County has a voting-age population of 23,668 persons, of whom 11,182 (47.2%) are white and 11,627 (49.1%) are black.

3. Twenty-three-and-a-half percent of Sumter County's population aged 25 years and over lacks a high-school diploma or its equivalent. Among white persons, 15.5% lack a high-school diploma, whereas 31.2% of black persons lack a high school diploma.
4. Nineteen and one-tenth percent of Sumter County's population aged 25 years and over has a bachelor's degree or higher. Among white persons, 28.7% have a bachelor's degree or higher, whereas 8.8% of black persons have a bachelor's degree or higher.
5. Sumter County has an unemployment rate of 14.4% among people in the labor force aged 16 years and over. The unemployment rate is 9% for white persons and 20.1% for black persons.
6. Sumter County has a poverty rate of 33.2%. The poverty rate is 15.1% for white persons and 45.9% for black persons.
7. The median household income in Sumter County is $32,758. The median income is $46,492 for households headed by white persons and $22,610 for households headed by black persons.
8. The per capita income in Sumter County is $17,404. The per capita income is $25,656 for white persons and $11,360 for black persons.
9. Of all the households in Sumter County, 26.8% receive Supplemental Nutrition Assistance Program ("SNAP") benefits (also known as food stamps). Among households headed by a white person, 20.8% receive SNAP benefits, while 75.6% of households headed by a black person do.

RENEWED MOTION TO EXCLUDE PORTION OF PLAINTIFF'S EXPERT REPORTS AND TESTIMONY

Wright relies on the expert testimony of Frederick G. McBride. Dr. McBride has a Ph.D. in political science from Clark Atlanta University. (Doc. 89-3 at 28.) His work has focused on quantitative and qualitative research in redistricting and voting rights. (Doc. 89-3 at 2.) He has "drawn and evaluated redistricting plans, performed racially polarized voting studies, performed demographic analysis, and presented at redistricting hearings for over 100 jurisdictions in 22 states, and the District of Columbia." (*Id.*)

For this case, McBride produced a report analyzing "whether African Americans are sufficiently numerous to constitute a majority of the voting-age population in at least three single-member districts," whether African Americans in Sumter County ("the minority group") are sufficiently large and geographically compact to compromise a majority in a single-member district, whether the minority group is politically cohesive, and whether the white individuals in Sumter County vote sufficiently as a bloc to defeat the minority group's preferred candidate. (*Id.* at 5, 7–8.) The analysis tracks the legal standard applicable in this case. *See Thornburg v. Gingles*, 478 U.S. 30, 48 (1986).

Federal Rule of Evidence 702 sets the standard for admissibility of expert opinions:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. This rule contemplates that the Court will act as a gatekeeper to the admission of expert evidence. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). In that function, the Court must engage in a three-part inquiry, as follows:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998). In short, a court must determine that a proffered expert is qualified, reliable, *and* helpful to the fact finder. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004).

"[A]lthough 'rulings on admissibility under *Daubert* inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology,' . . . it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1341 (11th Cir. 2003) (citation omitted). Instead, "[v]igorous cross-examination, presentation of contrary

evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 595. *Daubert* does not supplant the role of the factfinder. *Maiz v. Virani*, 253 F.3d 641, 666 (11th Cir. 2001).

Consequently, district courts do not exclude expert testimony simply because they find one version of the facts more persuasive than another. *See* Fed. R. Evid. 702, advisory committee's note to the 2000 amendment ("The emphasis in the amendment on 'sufficient facts or data' is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."). Expert testimony must amount to more than "guess or speculation," but "where the expert testimony has a reasonable factual basis, a court should not exclude it. Rather, it is for opposing counsel to inquire into the expert's factual basis." *United States v. 0.161 Acres of Land,* 837 F.2d 1036, 1040 (11th Cir. 1988) (citation omitted).

Sumter County seeks to exclude the following portions of McBride's proffered testimony:

- "Data found in the 2008-2012 [American Community Survey ("ACS")] shows that there are significant socio-economic disparities between African American or Black (alone) and white (alone) in Sumter County."
- "Rates for the African American population in Sumter County remain significantly lower than rates for white counterparts of the county in the following: education, employment, income, and housing. This is particularly evidence [sic] in income and employment."
- "Based on data reported from the 2008-2012 U.S. Census Bureau American Community Survey for Sumter County, Georgia, African Americans are significantly behind their white counterparts in many selected socio-economic measures: education, employment, income, and housing."
- "Finally, I have determined based on data from the most recent American Community Survey that significant socio-economic disparities exist between black and white residents of Sumter County."

- "The 2010-2014 American Community Survey (ACS) 5 Year Estimates for Sumter County reveal continued socio-economic differences between black and white residents."
- "The black population remains far below their white counterparts among various economic indicators."
- "Socio-economic disparities between blacks and whites in Sumter County have not decreased. Blacks remain significantly behind whites in practically all socioeconomic indicators. The trend has continued with no evidence of change."

(Doc. 106-1 at 3–4 (citations omitted).)

The County complains that McBride has no personal knowledge of the socioeconomic situation in Sumter County and is only repeating information contained in the ACS. Yet, it continues, McBride cannot offer an opinion on the ACS data. (*Id.* at 3.) Sumter County also asserts McBride only reviewed "a limited subset of data from the [ACS]," but its citation does not support its claim. (*Id.* (citing Doc. 38 at 53:15–20).)

The Court finds no merit to Sumter County's arguments. It is of no importance that McBride lacks personal knowledge of the socioeconomic situation in Sumter County. An expert's opinion may be derived from any evidence in the record, not just his personal knowledge. *Barefoot v. Estelle*, 463 U.S. 880, 903 (1983) (*quoting Spring Co. v. Edgar*, 99 U.S. 645, 657, (1878)). All Parties agree that the ACS data provided by the Census Bureau cannot reasonably be questioned. (*See supra* at 2.) McBride is applying his expertise to interpret that data. Second, the Court expects that an expert would only review a limited subset of data from the ACS—that is, the data about Sumter County relevant to this case. It is not clear to the Court, and not elaborated on by Sumter County, why this should be a strike against McBride's report.

In its response to the Motion, Wright responds to arguments that it asserts were incorporated into Sumter County's motion from Sumter County's previously-filed *Daubert* motion. (Doc. 109 at 4 n.2 (citing Docs. 42; 45.) No such response was necessary. Sumter County did not incorporate the previous arguments, but rather used its new motion to "reiterat[e] the arguments in its previously-filed motion . . . ." (Doc. 106-1 at 3.) To reiterate

is to state something again, *Reiterate*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/reiterate (last visited October 17, 2017), while incorporating means to include certain arguments from one document in another by mere reference. *Incorporate*, Black's Law Dictionary (10th ed. 2014). Even if Sumter County had intended to incorporate the previous arguments, doing so would be inappropriate. The Court previously ordered Sumter County to refile a *Daubert* motion addressing the arguments relevant to this summary judgment rather than incorporating its previous *Daubert* motion which "challenge[d] [Dr. McBride's] ability to give opinion testimony regarding the socioeconomic conditions in Sumter County in the event that this case goes to trial . . . ." (Doc. 102 at 4 (quoting Doc. 42 at 1).) The previous *Daubert* motion also challenged an earlier version of McBride's report which is in no way relevant to the instant Motion for Summary Judgment. (*Compare* Doc. 42-2 *with* Doc. 89-3.) If Sumter County wanted to incorporate arguments, it needed to show which of its earlier arguments remained pertinent rather than leaving the Court to sift through the record.

Sumter County has not provided any reasons why the listed statements in McBride's report are inadmissible. Accordingly, its Renewed Motion to Exclude Portion of Plaintiff's Expert Reports and Testimony (Doc. 106) is **DENIED**.

MOTION TO EXCLUDE THE TESTIMONY OF DR. KAREN L. OWEN

The same standards for expert testimony elucidated above apply to Wright's Motion to Exclude the Testimony of Dr. Karen L. Owen (Doc. 88). Owen was an Assistant Professor in the School of Mathematics and Sciences at Reinhardt University. (Doc. 88-2 at 1.) Counsel asserts she recently joined the faculty at the University of West Georgia as an Assistant Professor in the Political Science department. (Doc. 96 at 3.)[1] She was awarded a Doctorate of Philosophy in Political Science from the University of Georgia in 2012 where she specialized in American Politics, Methodology, and Public Administration. (Doc. 88-2 at 1.) At Reinhardt, Owen taught graduate classes such as research methods, public

[1] Owen's alleged new employment does not appear anywhere in the record. However, it is not material and the Court has no reason to doubt its truthfulness. *See Karen Owen*, University of West Georgia, https://www.westga.edu/academics/coss/political-science/profile.php?emp_id=91943 (last visited October 19, 2017). The Court includes it for the purposes of background information.

administration and policy, leadership and organizational behavior, human services administration, and administrative law. (*Id.*)

In McBride's expert report, he conducts a racial bloc voting analysis in which he considers whether the *Gingles* preconditions have been met in this case. (Doc. 89-3 at 7.) As part of that inquiry, he conducts a bivariate ecological regression, ecological inference (EI) analysis, and a Homogeneous Precinct Analysis (HPA) on voter data in Sumter County's school board elections. (*Id.* at 9–10.) The Court understands McBride to be conducting essentially a three-step process. First, he selects the data to analyze. Second, he runs the data through three statistical analyses. Third, he takes the results and uses them to interpret the election results. McBride concludes that the *Gingles* factors have all been met. (Doc. 89-3 at 25–26.)

Owen, unsurprisingly, has a different take on the *Gingles* factors. She criticizes the McBride report principally for three reasons: (1) McBride allegedly cherry-picked elections to analyze (*see* Doc. 88-2 at 7, 11, 12); (2) his results show statistical impossibilities—vote results totaling over or under 100% of voters and multiple candidates who receive over 50% of the vote (*see id.* at 6, 9, 10, 11, 12); and (3) his results are inconsistent with themselves as they vary from the original report to the amended report (*see id.* at 7, 9, 10, 13, 14). In addition, Owen criticizes the McBride report for finding a minority-preferred candidate when no candidate had Black voter support of over fifty percent. (*Id.* at 6.)

Wright moves to exclude Owen's testimony because—he asserts—she is not an expert on the topics of homogeneous precinct analysis, bivariate ecological regression analysis, or ecological inference. (Doc. 88-1 at 1.) Owen's experience with those statistical models is admittedly limited. Owen was exposed to bivariate ecological regression in two classes. (Doc. 92 at 26:4–7, 46:10–13.) She has been informally trained on the topic, has read about it, and has learned to conduct an analysis using it. (*Id.* at 147:25–148:4, 148:5–6.) As to EI, it was covered in one of her Ph.D. methodology classes and she did homework problems on it in another class. (*Id.* at 44:18–25, 47:14–23.) She has the least experience with HPA, which was only briefly reviewed in a class she once took. (*Id.* at 46:16–19, 47:5–7.)

At this stage, Wright is moving to exclude Owen's testimony as it pertains to Sumter County's opposition to his Motion for Summary Judgment—that is, he seeks to exclude the information contained in Owen's Supplemental Expert Report (Doc. 88-2).[2] The question for the Court is not whether Owen is an expert in all aspects of this case, but whether she "is qualified to testify competently regarding the matters [s]he *intends to address* . . . ." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (emphasis added).

The Court finds that Owen is qualified to testify competently regarding her critique of McBride's supplemental report. Wright's motion only objects to Owen's expertise in homogeneous precinct analysis, bivariate ecological regression analysis, or ecological inference, but Owen's supplemental report does not conduct any of those analyses, does not criticize McBride's application of those analyses, does not suggest a better statistical method to apply, and does not, in any other way, require expertise of a particular statistical tool. Owen's report is agnostic to step two of McBride's process, the application of the statistical tools. Rather, Owen criticizes McBride for step one and three of his process: his selection of data and the meaningfulness of his results. She complains of his bias in selecting which elections to include in his analysis and which to exclude—a criticism which could apply to any statistical tool. She complains that his results must be erroneous to some degree given that they account for over 100% of voters—a criticism which could apply to any statistical tool. She complains how his inconsistent results undermine the credibility of his analysis—a criticism which could apply to any statistical tool. The expertise Owen therefore offers is not in how to conduct a set list of statistical analyses, but an expertise in general rules of research methodology and statistics. There can be no doubt Owen has the expertise to offer that testimony. She was a professor in Reinhardt's school of mathematics, taught graduate-level research methods, and has a Ph.D. for which she specialized in methodology. (Doc. 88-2 at 1, 16.)

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[2] The Court notes that Sumter County purports to rely on Owen's original expert report (Doc. 40-4) in its "Statement of Material Facts as to Which There is Genuine Issue to be Tried" (Doc. 95-2). But that report analyzed only McBride's original expert report which has since been superseded by the supplemental report and is in no way relied upon by Wright in his Motion for Summary Judgment. Owen's original report therefore appears to no longer be relevant to this case given that it did no independent analysis of its own but only criticized McBride's original (and now superseded) conclusions. (*See generally* Doc. 40-4.)

The cases cited by Wright do not command a different result. In *Harcros Chemicals*, the court found that a statistician was not qualified to opine on whether certain contract bids were evidence of collusion because a factfinder was just as capable of drawing that conclusion. 158 F.3d at 565. Here, a factfinder is not as capable as Owen in deciding whether McBride's selection of data was biased and whether his results reveal problems with his conclusions. Likewise, in *Hall v. United Ins. Co. of Am.*, the court upheld the district court's decision to exclude the testimony of a "licensed professional counselor" who asserted a decedent was competent. 367 F.3d 1255, 1262 (11th Cir. 2004). The district court reasoned that the decedent's personal representative "[had] not sufficiently demonstrated that counselors with similar training are qualified to render an opinion as to an individual's mental capacity." *Id.* Conversely in this case, it is clear that academics with training in statistics such as Owen can give opinions on the reliability of applied statistical methods.

Accordingly, the Court concludes Owen is qualified to testify competently regarding the matters she intends to address. There is no dispute her methodology is reliable and her testimony helpful to the Court. Wright's Motion to Exclude the Testimony of Dr. Karen L. Owen (Doc. 88) is therefore **DENIED**.

MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

Finally, the Court addresses Wright's Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Doc. 89). Sumter County filed a response on April 28, 2017. (Doc. 95.) Wright replied on June 5, 2017. (Doc. 103.) The Motion is now ripe for review.

I. Federal Rule of Civil Procedure 56

Federal Rule of Civil Procedure 56 allows a party to move for summary judgment where no genuine issue of material fact remains and the party is entitled to judgment as a matter of law. "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Maddox v. Stephens*, 727 F.3d 1109, 1118 (11th Cir. 2013). "A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party

for a reasonable jury to return a verdict in its favor." *Grimes v. Miami Dade Cnty.*, 552 F. App'x 902, 904 (11th Cir. 2014) (citing *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000)). "An issue of fact is 'material' if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "It is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 998 (11th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The movant bears the initial burden of showing, by reference to the record, that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Barreto v. Davie Marketplace, LLC*, 331 F. App'x 672, 673 (11th Cir. 2009). The movant can meet this burden by presenting evidence showing there is no dispute of material fact. *See Celotex*, 477 U.S. at 322–24. Once the movant has met its burden, the nonmoving party is required "to go beyond the pleadings" and identify "specific facts showing that there is a genuine issue for trial." *Id.* at 324. To avoid summary judgment, the nonmoving party "must do more than summarily deny the allegations or 'show that there is some metaphysical doubt as to the material facts.'" *Matsuhita*, 475 U.S. at 586 (citations omitted). Instead, the nonmovant must point to record evidence that would be admissible at trial. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)) (noting that hearsay may be considered on a motion for summary judgment only if it "could be reduced to admissible evidence at trial or reduced to admissible form"). Such evidence may include affidavits or declarations that are based on personal knowledge of the affiant or declarant. *See* Fed. R. Civ. P. 56(c)(4).

On a motion for summary judgment, the Court must view all evidence and factual inferences drawn therefrom in the light most favorable to the nonmoving party and determine whether that evidence could reasonably sustain a jury verdict. *See Celotex*, 477 U.S. at 322-23; *Allen*, 121 F.3d at 646. However, the Court must grant summary judgment if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

II. Local Rule 56

Local Rule 56 requires the following:

> The movant for summary judgment under Rule 56 of the Federal Rules of Civil Procedure shall attach to the motion a separate and concise statement of the material facts to which the movant contends there is no genuine dispute to be tried. Each material fact shall be numbered separately and shall be supported by specific citation to particular parts of materials in the record. Material facts not supported by specific citation to particular parts of materials in the record and statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the court. Affidavits and the introductory portions of briefs do not constitute a statement of material facts.
>
> The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response shall be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondent's statement shall be deemed to have been admitted, unless otherwise inappropriate.

M.D. Ga. L.R. 56. Here, Wright did not comply with the local rules. The lynchpin "facts" in his statement of undisputed facts are merely legal conclusions. (*See* Doc. 89-2 at ¶¶ 6, 7.) Wright does not pretend otherwise. The "facts" are nearly word-for-word recitations of the legal standards applicable to this action. (*Compare* 89-2 at ¶¶ 6, 7 ("African-Americans in Sumter County are politically cohesive in school-board elections. . . . White voters in Sumter County have voted sufficiently as a bloc to enable them . . . usually to defeat the candidate preferred by black voters in school-board elections.") *with Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) ("Second, the minority group must be able to show that it is politically cohesive. . . . Third, 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.") Moreover, the statements are not supported by specific citation to particular parts of materials in the record. For its assertion that African Americans in Sumter County are politically cohesive, Wright first cites a previous order of this Court (Doc. 62 at 11), since reversed (Doc. 71), which was construing the evidence most favorably to Wright, not Sumter County (*see* Doc. 62 at 3). (Doc. 89-2 at ¶ 6.) It is of no relevance here. Second, Wright cites four pages of McBride's report which show the varying degrees of white and black support for candidates

in school board elections. (Doc. 89-2 at ¶ 6.) Those are the facts that needed to be numbered and supported separately by Wright. In any event, many of those facts are disputed by Owen because they calculate the preferences of over 100% of voters. (*See* Doc. 88-2 at 6–7.)

For its assertion that white voters vote as a bloc to defeat the candidate preferred by African Americans, Wright again cites an irrelevant, reversed order of this Court and eight pages of McBride's report in which he discusses the racial voting breakdown by election. But again, the citation is not specific and Owen's expert report disputes the reliability of those statistics. (*See* Doc. 88-2).

The Court will therefore heed the local rules and not consider paragraphs six and seven of Wright's Statement of Undisputed Material Facts (Doc. 89-2).

Sumter County filed the appropriate response to Wright's statement, as well as its own statement of disputed facts. (Docs. 95-1; 95-2.) Having established the applicable standards, the Court will proceed to the facts.

III. Relevant Factual Background

Sumter County's Board of Education consists of seven members, two of whom are elected at large within the county and five of whom are elected from single-member districts. (Doc. 95-1 at ¶ 1.) A majority vote is required to be elected. (*Id.* at ¶ 2.) African Americans constitute 48.1% of Sumter County's voting-age population and currently are a majority in two of the five existing school-board districts. (*Id.* at ¶ 3.) However, given the County's demographics, a districting map could be drawn with seven single-member districts such that African Americans hold the majority in three. (*Id.* at ¶ 5.)

Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans and even today socioeconomic disparities exist between white and African American residents of Sumter County. (*Id.* at ¶¶ 8, 10.)[3] At least

[3] Wright cites a series of letters, court documents, reports, and newspapers articles from the 1960's, 1970's, and 1980's for this proposition. (Doc. 89-2 at ¶ 8.) Sumter County objects to these facts as hearsay. (Doc. 95-1 at ¶ 8.) But there is no shortage of individuals with personal knowledge of the discrimination purveyed by the State and County during that time frame who could testify to the facts at trial. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012) (hearsay may be considered in motion for summary judgment if the evidence could be reduced to an admissible form at trial). Moreover, many if not all of the documents are likely to be admissible as ancient documents pursuant to F.R.E. 803(16). Even if some of the documents or facts could not be admitted, the remaining evidence is more than sufficient to support Wright's statements.

some of the school board elections in Sumter County have been racially polarized. (*Id.* at ¶ 9.) No African American has been elected to an at-large seat on the school board under the challenged plan and no African Americans have been elected in districts except where African Americans constitute a majority of the voting-age population. (*Id.* at ¶¶ 11, 12.)

IV. Discussion

In this case, Wright claims that the Sumter County Board of Education's composition, five members from single-member districts and two at-large members, violates Section 2 of the Voting Rights Act of 1965. Specifically, Wright argues that the election of two at-large Board members and the packing of African American voters in single-member Districts 1 and 5 dilute African Americans' voting strength. (Doc. 89 at 1–2.)

Section 2 prohibits an election plan that

> [d]ivid[es] the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.

Colleton Cnty. Council v. McConnell, 201 F.Supp.2d 618, 633 (D. S.C., 2002). Section 2 also prohibits "packing" where minority voters are all placed in one single member district. *Id.* "[T]he critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (citations omitted).

In *Thornburg v. Gingles*, the United States Supreme Court set forth three preconditions that a plaintiff must prove in order for a Section 2 claim to go forward. *Gingles,* 478 U.S. at 50-51; *see also Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (holding that a "plaintiff cannot obtain relief unless he or she can establish" each of the three *Gingles* preconditions). The Court in *Gingles*, 478 U.S. at 47, spoke specifically of multi-member voting districts and at-large voting schemes, but in *Growe v. Emison*, 507 U.S. 25, 40 (1993), the Court extended the applicability of the *Gingles* preconditions to vote fragmentation (also known as vote-

packing or gerrymandering) challenges to single-member districts.[4] The three *Gingles* preconditions are: (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group "is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority preferred candidate." *Id.* (citations omitted).

Each of the three *Gingles* preconditions, or prongs, must be established before a reviewing court can proceed to consider the "Senate Factors," a non-exhaustive and non-exclusive list of factors set forth in a Senate Judiciary Committee Majority Report that accompanied an amendment to Section 2, which aid courts in assessing the totality of the circumstances surrounding challenged voting schemes. *Id.* at 37-38 (citing S. Rep. No. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter "Senate Factors"]). Some of the Senate Factors may have a direct bearing on the three *Gingles* preconditions, but none of the Senate Factors *must* be present in order to satisfy the *Gingles* threshold; however, "they must be examined when determining whether, considering all of the circumstances in the case, the plaintiffs are entitled to section 2 relief." *Nipper*, 39 F.3d at 1526-27. The Senate Factors include:

> the history of voting-related discrimination in the State or political subdivision;
>
> the extent to which voting in the elections of the State or political subdivision is racially polarized;
>
> the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
>
> the exclusion of members of the minority group from candidate slating processes;

[4] Two types of claims can be raised under Section 2: vote denial claims and vote dilution claims. Proof of *Gingles* preconditions is not required for vote denial claims, but Wright does not appear to make such a claim here and has not argued that his claim is not properly subject to *Gingles*. *See Brown v .Detzner*, 895 F.Supp.2d 1236, 1249-50 (11th Cir. 2012) (considering a vote denial challenge to a state's early voting statute); *Johnson v. Gov. of State of Fla.*, 405 F.3d 1214, 1237-38 (11th Cir. 2005) (considering a vote denial challenge to a state's felon disenfranchisement law).

> the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
>
> the use of overt or subtle racial appeals in political campaigns;
>
> and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44–45 (citing S. Rep. No. 97-417 at 28–29) (formatting altered).

In this case, Wright moves for summary judgment, arguing that even construing the evidence in Sumter County's favor, it has established all three *Gingles* factors and several Senate Factors. (Doc. 89-1 at 5–20.)

A. The First *Gingles* Factor: Numerosity and Compactness

As to factor one, Wright must show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. As evidence supporting this factor, Wright points to McBride's illustrative redistricting plan which creates three majority-black districts. (Doc. 89-1 at 5.) Sumter County does not dispute that Wright has established numerosity and compactness. (Doc. 95.) The Court agrees that Wright has met the requirements of factor one by demonstrating that an additional district could be created in which African Americans would constitute a majority of voters. *See Bartlett v. Strickland*, 556 U.S. 1, 20 (2009). Accordingly, a grant of partial summary judgment is appropriate as to this issue. Fed. R. Civ. P. 56(a).

B. The Second *Gingles* Factor: Minority Political Cohesiveness

As to the second factor, Wright must show the minority group is politically cohesive. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and consequently establishes minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56 (citations omitted). *Gingles* does not require that the minority group *always* vote for the same candidate but does require that the minority group *usually* or *consistently* vote for the same candidate, a standard which this Court finds, as other courts have found, demands more frequency than a *more often than not* standard but less frequency than an *always* standard. *Id.* at 48, 56.

Wright argues only that factor two has been established as the law of the case, in that the Court's previous order on Sumter County's motion for summary judgment found "that Wright has established minority political cohesion, the second *Gingles* precondition." (Doc. 62 at 11.) "[T]he law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *United States v. Siegelman*, 786 F.3d 1322, 1327 (11th Cir. 2015) (quoting *Pepper v. United States*, 562 U.S. 476, 131 (2011)). The Court's earlier finding is of no relevance on this motion. In the previous motion for summary judgment, the Court was construing the evidence in the light most favorable to Wright. (*See* Doc. 62 at 3.) Here, the Court does the opposite and construes the evidence most favorably to Sumter County. *See Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1237 n.1 (11th Cir. 2001) (law of the case does not apply when rulings are based on different factual records). Were the Court to rule otherwise, every denial of a summary judgment motion made by a defendant would be a de facto grant of judgment to the plaintiff as the Court must necessarily find that every element of a plaintiff's claim has been met when construing the evidence in his favor in order to deny the motion.

Moreover, the Court lacks the evidentiary basis to consider the issue anew given Wright's failure to comply with Local Rule 56.

C. The Third Gingles Factor: Racial Polarization

As to the third factor, Wright must show the white majority votes sufficiently as a bloc to enable it usually to defeat the minority preferred candidate. In the Court's previous order on Sumter County's motion for summary judgment, it found (construing the evidence in the light most favorable to Wright) that white voters in Sumter County voted as a bloc, but that Wright had failed to establish they usually defeat the minority preferred candidate. (Doc. 62 at 12–17.)

Wright relies on the law-of-the-case doctrine in an attempt to establish that white voters vote as a bloc. (Doc. 89-1 at 7–8.) Again, that doctrine does not apply to this motion and Wright cannot rely on findings made with a different evidentiary standard.

Next, Wright presents new statistical evidence which purports to show that white voters usually defeat the minority preferred candidate. (*Id.* 8–10.) Because that evidence was

not presented in Wright's statement of undisputed material facts, the Court declines to consider it. *See* M.D. Ga. L.R. 56.

D. The Senate Factors

Finally, Wright moves for partial summary judgment on Senate Factors One, Two, Three, Five, and Seven. (Doc. 89-1 at 10.)

Factor one is the history of voting-related discrimination in the State or political subdivision. In Wright's statement of undisputed material facts, he states "Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans. (Pl.'s First Req. Jud. Not., ECF No. 32; ECF Nos. 44-2 through 44-19.)" (Doc. 89-2 at ¶ 8.) The citations are to a series of letters, court documents, reports, and newspapers articles from the 1960's, 1970's, and 1980's. In his argument in support of partial summary judgment, Wright extensively cites those documents for various factual propositions. (Doc. 89-1 at 10–16.) But none of those facts were contained in the statement of undisputed material facts. (*See generally* Doc. 89-2.) Wright cannot rely on facts raised for the first time in his brief. *See* M.D. Ga. L.R. 56. Accordingly, the Court will not consider those facts. *Id.* And without them, there is no basis for a finding pertaining to factor one.

Factor two is the extent to which voting in the elections of the State or political subdivision is racially polarized. Wright purports to satisfy this factor on two bases. First, he argues that as with the third *Gingles* factor, the law-of-the-case doctrine applies because the Court previously held that voting in Sumter County's school board elections is racially polarized. (Doc. 89-1 at 16.) The Court adopts the same reasoning as for *Gingles* Factor Two. Because the Court's previous finding was made while construing the evidence in the light most favorable to Wright, it is not applicable here. Second, Wright cites a letter from the Board of Education to the Department of Justice in 2012 which purports to concede that voting in the district is racially polarized. (*Id.* at 17 (citing Doc. 44-7 at 6).) That fact was not included in Wright's statement of undisputed material facts. (*See generally* Doc. 89-2.) Therefore, the Court declines to consider it. *See* M.D. Ga. L.R. 56. Lacking any other arguments, there is no basis to grant partial summary judgment as to this factor.

Factor three is the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting. It is undisputed in this case that Sumter County uses a majority-vote requirement. (Docs. 89-1 at 17; 95 at 18.) Accordingly, the Court finds that fact to not genuinely be in dispute and therefore will treat it as established in this case pursuant to Federal Rule of Civil Procedure 56(g). However, Wright does not show the *extent* to which Sumter County's practices and policies enhance the opportunity for discrimination. It cites only a single case in which a minority-preferred candidate won a plurality of votes, but ultimately lost to the white-preferred candidate in the second round of elections. (Doc. 89-1 at 18.) But that fact was not in Wright's undisputed statement of material facts. (*See generally* Doc. 89-2.) Accordingly, the Court does not consider it and partial summary judgment is not appropriate as to factor three as a whole.

Factor five is the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. The Court finds the disparities revealed by the census data, noticed above, to be striking. African Americans in Sumter County are twice as likely as whites to lack a high school diploma, a third as likely to have a bachelor's degree or higher, twice as likely to be unemployed, and three times as likely to be living in poverty. Three of every four families headed by an African American receive Supplemental Nutrition Assistance Program benefits while only one out of every five families headed by a white person do. However, Wright has not presented any evidence as to how these disparities hinder African Americans' ability to participate effectively in the political process. Accordingly, there is no basis for a partial grant of summary judgment as to this factor.

Factor seven is the extent to which members of the minority group have been elected to public office in the jurisdiction. It is undisputed that no African American has been elected to an at-large seat on the school board under the challenged plan and no African Americans have been elected in districts except where African Americans constitute a majority of the voting-age population. (Doc. 95-1 at ¶ 11 and 12.) However, Wright presents

no other evidence as to African American's success in elections other than for the school board. (*See* Doc. 89-1 at 19.) The Court finds that the lack of success for African Americans running for the Sumter County school board to be not genuinely in dispute and therefore will treat it as established in this case pursuant to Federal Rule of Civil Procedure 56(g). Without evidence as to African Americans' success in elections for public office in Sumter County generally, the Court lacks a basis to grant partial summary judgment on Senate Factor Seven.

CONCLUSION

For the reasons discussed herein, Plaintiff Mathis Kearse Wright, Jr.'s Motion for Judicial Notice of Census Data (Doc. 110) is **GRANTED**. Defendant Sumter County Board of Elections and Registration's Renewed Motion to Exclude Portion of Plaintiff's Expert Reports and Testimony (Doc. 106) is **DENIED**. Wright's Motion to Exclude the Testimony of Dr. Karen L. Owen (Doc. 88) is **DENIED**. Wright's Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgment (Doc. 89) is **GRANTED IN PART AND DENIED IN PART**. Specifically, Wright has demonstrated that the African American community in Sumter County is sufficiently large and geographically compact to constitute a majority in an additional single-member district, satisfying *Gingles* Factor One. Additionally, the Court concludes the following material facts are undisputed and will be treated as established in the case: (1) Sumter County uses a majority-vote requirement. (2) No African American has been elected to an at-large seat on the school board under the challenged plan. (3) No African Americans have been elected in school board districts except where African Americans constitute a majority of the voting-age population. The remainder of the motion is **DENIED**.

SO ORDERED, this 26th day of October, 2017.

/s/ W. Louis Sands
W. LOUIS SANDS, SR. JUDGE
UNITED STATES DISTRICT COURT