No. 18-11510

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

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

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF INTERESTED PERSONS

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

Trial Judge:

Sands, W. Louis

Attorneys for Plaintiff-Appellee:

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

Attorneys for Defendant-Appellant:

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

Plaintiff:

Wright, Mathis Kearse, Jr.

Defendant:

Sumter County Board of Elections and Registration

CORPORATE DISCLOSURE STATEMENT

There is no nongovernmental corporate party to this proceeding, and no association of persons, form, partnerships or corporations that have an interest in the case or the outcome of the appeal.

Dated: May 22, 2018

Respectfully submitted,

/s/ E. Mark Braden

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

STATEMENT REGARDING ORAL ARGUMENT

This appeal raises issues of first impression and challenges the district court's view that this Court's precedent is incompatible with that of the Fifth Circuit. Oral argument is presumptively required, *see* Fed. R. App. P. 34(a), and this case does not fall within any narrow exception to that rule. The Court should hold argument and do so expeditiously to resolve this election case in this election year.

Dated: May 22, 2018

Respectfully submitted,

/s/ *E. Mark Braden*

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

The plaintiff below, Mathis Wright Jr. ("Plaintiff"), filed this case under Voting Rights Act § 2, 52 U.S.C. § 10301. Jurisdiction in the district court was proper under 28 U.S.C. § 1331.

The defendant below, the Sumter County Board of Elections and Registration ("Sumter County"), appeals from the district court's permanent injunction, which barred Sumter County from conducting school-board elections in May 2018, ordered it to conduct a special election in November 2018, and had the practical effect of enjoining future elections under the school-board districting plan. District Court Record/Appellant's Appendix Tab No. 204 at 6-7 ("T204/6-7").[1] Jurisdiction is proper under 28 U.S.C. § 1292(a)(1).

The scope of appellate review includes the injunction itself and the "basis" of the injunction, *Massey v. Cong. Life Ins. Co.*, 116 F.3d 1414, 1417 (11th Cir. 1997), including the district court's finding of liability, T198, *see* T204/4-5. The district court withheld a final judgment for the sole purpose of adopting a remedy. T198/37; T204/7.

[1] For the Court's convenience, the district-court orders on liability and permanent injunctive relief, T198 and T204, are reproduced as an Addendum to be bound with the Appellant's brief. These items will also appear in their chronological place in the Appellant's Appendix.

On April 18, 2018, Plaintiff moved to dismiss this appeal, asserting that it is moot. On May 9, a panel of this Court (Tjoflat, Marcus, J. Pryor, JJ.) denied that motion.

STATEMENT OF THE ISSUES

I. Does Sumter County's black community have less opportunity than other groups to elect its preferred candidates in at-large elections where it outnumbers those groups in voter registration and no special circumstance negates that advantage?

II. Did the district court err by requiring Sumter County to disprove that Plaintiff's illustrative districting scheme is effective, by filing 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?

III. Did the district court err in weighing the evidence, including by:

(A) affording significant weight to election results in single-member districts with black voting-age population (BVAP) levels substantially below the BVAP level in the challenged at-large seats, and

(B) affording no weight to election results in county-wide votes where Democratic Party candidates, who uniformly enjoy the support of the black community, won Sumter County?

STATEMENT OF THE CASE

A racial group with numerical superiority over all other groups in a locality is unlikely to lack an equal opportunity to elect representatives of its choice in a locality-wide election. Because Voting Rights Act § 2 affords just that, equal "opportunity," Fifth Circuit precedent requires members of such a group who claim a Section 2 injury to meet "an obvious, difficult burden" to prove "that their inability to elect results from white bloc voting." *Salas v. Sw. Tex. Jr. College District*, 964 F.2d 1542, 1555 (5th Cir. 1992). In these instances, election results alone do not prove discrimination because, "[o]bviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Id.* at 1556.

Black residents, voting-age persons, and registered voters outnumber those of all other racial groups in Sumter County, Georgia. Yet the district court found that two at-large seats in the seven-member Sumter County School Board plan discriminate against the black community and, on that basis, permanently enjoined elections under the plan. The court identified no external barrier to black residents' exercise of their numerical advantage. It instead flipped the burden to Sumter County to show why black turnout is low. Black residents' numerical advantages are, by the district court's reasoning, irrelevant—meriting no weight at all.

The district court expressly split with the Fifth Circuit on this point, but its legal conclusion was erroneous. The precedent the court cited for the split (1) addressed a majority-white jurisdiction and (2) applied pre-1981 case law requiring proof of "a present disproportion in voting registration" before shifting the burden. *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979). Here, black registration exceeds white registration, and the group's success in registering to vote, a more arduous process than voting itself, proves that it successfully participates in the political process. If a split between, of all circuits, this and the Fifth on, of all topics, the Voting Rights Act seems improbable, that is because it does not exist.

That was only the first of the district court's many errors. The court also found Plaintiff's illustrative remedial plan to be effective even after (correctly) finding "no support" for the sole argument supporting it. T198/34. Again, it flipped the burden on Sumter County to prove otherwise. And it ignored the warning of a sitting member of this Court in this very case that specific factual findings on the illustrative plan are a prerequisite to liability.

In addition, the only probative elections supporting the district court's finding that "white voters are usually able to [] defeat the candidate preferred by African Americans," T198/24, are three races involving two black-preferred candidates. The court ignored a plethora of county-wide election results

showing that black-preferred candidates win the county-wide vote, and it afforded significance to the fact that no black resident has served on the Sumter School Board except in majority-black districts, which is not true: the court's own opinion correctly identified six black members of the Board as recently as 2011, including in districts without a black majority. These errors, and others like them, warped the court's analysis and call for reversal.

And, as usual, bad law and bad analysis mean bad policy. The district court's ruling discards a plan where blacks outnumber whites in four of seven districts in favor of a plan where that occurs in only three. In other words, the ruling locks the black community into a permanent minority on the School Board. The court conceded this, *see* T198/35-36, but failed to realize that, where Section 2 becomes a vehicle to consign a formerly disenfranchised group with current numerical superiority to a court-ordered *minority*, there must be some mistake. Here, there are many.

I. Factual Background

A. Sumter County's Demographics

Sumter County is located in southwest Georgia, about 3 hours south of Atlanta by car. A U.S. Census Bureau-designated rural county, T154-6/17, the County's total population is just over 30,000. T198/2. Of those residents, over 17,000 live in the Americus, Sumter County's seat and most populous political subdivision.

Of Sumter County's residents, 42.1% are white and 52.0% are black. Of its voting-age residents, 46.7% are white and 49.5% are black. Of its active registered voters, 46.7% are white and 48.5% are black. T198/2. As between only black and white registered voters, approximately 48% are white and 52% are black. T159/61.[2] The black community is "concentrated" in Americus; the city's black population is 63.5%, its BVAP 58.4%. T154-6/17.

Like most localities in the South, Sumter County's history is marred by official racial discrimination. T198/13-14. And, as in most Southern localities, socioeconomic disparities persist between Sumter County's black and white communities. T198/2.

But unlike in many rural Southern communities, Democratic Party candidates, including black candidates, routinely win Sumter County. Among others, Hilary Clinton won the county-wide vote over Donald Trump in 2016; Barack Obama won over Mitt Romney in 2012 and John McCain in 2008; Congressman Sanford Bishop won over white Republican candidates in (among other years) 2012 and 2014; and state House of Representatives candidate Kevin T. Brown, a black Democrat, won the county-wide vote over

[2] Approximately 5% of Sumter County's residents identify as Hispanic. Plaintiff proffered no analysis of that community's voting patterns, T158/12, and what evidence exists shows that typically no more than 15 Hispanic voters turn out on election day, *see, e.g.*, T153-58, T153-59. The only relevant groups here are the black and white communities.

white candidates in 2012 and 2014. T198/12. In virtually all elections nationwide, Democratic Party candidates obtain over 92% of the black vote. T157/180-181, 185.

B. The Sumter County School Board Plan

This case challenges the seven-member Sumter County School Board districting plan. The plan consists of five single-member districts and two at-large seats. Two of the single-member seats, D1 and D5, are majority black (62.7% and 70.6% BVAP, respectively). Two, D2 and D3, are majority white (30.3% and 36.2% BVAP, respectively). And, in D4, white voting-age residents outnumber black voting-age residents 49.1% to 43.9%. T198/8. The at-large seats cover the entire County, so their demographics match the County's: blacks outnumber whites in population (52% to 42.1%), voting-age population (49.5% to 46.7%), and voter registration (48.5% to 46.7%). Thus, altogether, blacks outnumber whites by all metrics in four Board seats, and whites outnumber blacks in three.

The Georgia General Assembly enacted the plan in 2011.[3] T198/5. It did so on the recommendation of the School Board itself, which was then

[3] Under the Georgia Constitution, local redistricting legislation falls under the General Assembly's authority and cannot be instituted by a local governmental body. *See Smith v. Cobb Cty. Bd. of Elections & Registrations*, 314 F. Supp. 2d 1274, 1290 (N.D. Ga. 2002); *DeJulio v. Georgia*, 290 F.3d 1291, 1293 (11th Cir.

composed of nine members representing single-member districts. T198/4. The Board unanimously approved a resolution calling for the General Assembly to redistrict the Board, and the resolution expressly called for the current scheme of five single-member and two at-large districts. T198/4. At the time, four of the nine members were black, and they, the district court concluded, reviewed the resolution and knew it called for two at-large seats. T198/4-5. They, like the white members, voted for it. T198/4-5.

The district court found that the purpose behind the proposal was to align the School Board districts with the Sumter County Commission districts and thereby simplify election administration. T198/4. Although the County Commission scheme includes only five single-member seats and no at-large seats, the district court found that the at-large seats were established to soften the downsizing—i.e., a switch from nine to five members would eliminate four incumbents; a switch from nine to seven, only two. T198/4. The court found that the County's decisions in this regard were "entirely reasonable." T198/30-31.

School Board members serve staggered four-year terms, and, because they do not run on partisan platforms, elections occur in May of even-

---

2002). All members of the local delegation representing Sumter County (black and white) supported the plan.

numbered years. Ga. Code. § 21-2-139(a) (Jan. 1, 2013). A majority-vote requirement governs elections; if no candidate exceeds the 50% threshold, a run-off resolves the contest. T198/27.

C. Election Results in Sumter County

Because of the secret ballot, no data shows directly whether members of racial groups tend to vote for the same candidates or whether voting breaks along racial lines. Accordingly, voting-rights plaintiffs often present expert analyses with statistical estimates of racial voting patterns.[4]

Plaintiff relied for this on Dr. Fredrick McBride. Dr. McBride submitted three reports: an initial report (before the summary-judgment appeal), T154-6, a supplemental report, T154-8, and a corrected supplemental report (both on remand after the first appeal), T153-87.

The district court credited Dr. McBride's statistical estimates of white and black support for candidates in the following races (*see* T198/8-12):

- In May 2014:
  - Alice Green obtained 94.2% of the black vote and defeated two candidates in District 1 (62.7% BVAP);

[4] The parties and the district court agree that "Ecological Inference" (EI) is the superior method of estimating voter behavior. For the sake of simplicity, this brief, like the district court's opinion, T198/6-7, lists only EI estimates.

- Sarah Pride obtained 99.3% of the black vote, but was defeated in District 2 (30.3% BVAP);
- Willa Fitzpatrick obtained 92.3% of the black vote, but was defeated in District 3 (36.2% BVAP);
- Rick Barnes obtained 53.9% of the black vote and defeated one candidate in District 4 (43.9% BVAP);
- Edith Green obtained 85.3% of the black vote and defeated one candidate in District 5 (70.6% BVAP);
- Michael Coley obtained 89.1% of the black vote and won a plurality of the total vote over three other candidates to force a runoff in At-Large District 1 (49.5% BVAP); in the ensuing run-off, Michael Coley obtained 99.5% of the black vote, but lost to Sylvia Roland;
- Kelvin Pless obtained 96.7% of the black vote, but lost in At-Large District 2 (49.5% BVAP).

o In May 2016, Michael Coley challenged incumbent Sylvia Roland in At-Large District 1 and obtained 93.6% of the black vote, but was defeated a second time.

- In March 2014, Sarah Pride obtained 68% of the black vote but was defeated in District 6 (then 28% BVAP).[5]
- In November 2010, Kelvin Pless obtained 94% of the black vote and defeated one candidate in District 3 (then 48.4% BVAP).
- In November 2004, Nelson Brown, a write-in candidate whose name did not appear on the ballot, won 96.5% of the black vote but lost in a four-way race for Sherriff of Sumter County (then 44.7% BVAP).

Dr. McBride analyzed these races in his supplemental reports.

Dr. McBride analyzed three additional races in his initial report, including a 2008 race in District 1 (then 49.5% BVAP) where black candidate Carloyn Whitehead won 93% of the black vote (by Dr. McBride's estimate) and the contest. T154-6/50. But the district court declined to credit the polarized voting estimates in Dr. McBride's initial report. T198/19.

Also before the district court, as described above, were dozens of races showing the county-wide vote in federal and state elections. T154-10. The results show that Democratic Party candidates, including black candidates, routinely win the county-wide vote. T198/12. No expert in the case offered polarized voting estimates on these races.

[5] Due to a protracted Voting Rights Act § 5 preclearance process and one-person, one-vote litigation, an election was held under the previous plan in March 2014. *See* T198/6.

In addition to election results, the court was presented with actual turnout data by race. Black turnout in Sumter School Board elections ranged from a low of 4.4% to a high of 18.4% with an average of 7.9%. T198/8. White turnout ranged from a low of 6.9% to a high of 29.1% with an average of 13.1%. T198/8. In numerical terms, this translates roughly into turnout of less than 1,000 voters for a single-member race and less than 5,000 for an at-large race. *See* T154-6/41-52.

D. Plaintiff's Proposed Alternative Plan

Dr. McBride prepared an illustrative remedial plan "to determine whether African Americans are sufficiently numerous to constitute a majority of the voting-age population in at least three single-member districts." T153-87/5, T198/14-16. The plan has seven single-member districts. Blacks comprise a voting-age majority in three: D1 (64.4%), D5 (75.39%), and D7 (54.50%). Whites comprise a voting-age majority in four: D2, D3, D4, and D6. T198/15. Because black population is concentrated in Americus, Dr. McBride found it impossible to create a five-member plan with more than two majority-black districts or a seven-member plan with more than three. T153-87/5, 7; T157/199-200.

Dr. McBride presented this illustrative plan in his initial report, but did not there assess how any of these districts might perform. *See* T154-6/13-18.

On remand from the first appeal to this Court, Dr. McBride presented the *same* illustrative plan again in his supplemental report. T153-87/5-7. This time he included an analysis attempting to show what BVAP level would afford black voters an equal opportunity to elect their preferred candidates. T153-87/23-24.

The method he used, developed by redistricting experts Bernard Grofman, Lisa Handley, and David Lublin, analyzes cohesion, crossover voting, and turnout to identify what BVAP level would equalize turnout in light of crossover voting. *See* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001). Dr. McBride ran this analysis on four school-board elections in 2014 and came up with the following four numbers, representing what BVAP level is likely necessary for an equal-opportunity district: 47.1%, 77.8%, 69.5%, and 44.1%. T153-87/23.

From this, the district court concluded that black-preferred candidates would likely win in D1 and D5 of the illustrative plan. T198/15-16. But because 54% BVAP in D7 "would be sufficient in some cases but not others," the district court found likely black success there to be "a close call." T198/15. The court credited both Dr. McBride's concession that his analysis was "guesswork" and his conclusion that "he believed [54%] was sufficient." T198/16.

II. Procedural History

A. Filing, Summary Judgment, and the First Appeal

Plaintiff filed this case on March 7, 2014, in the Middle District of Georgia, claiming that the Plan's two at-large seats violate Section 2 of the Voting Rights Act.[6] T1. He moved for a preliminary injunction, which the court (the Honorable W. Louis Sands) denied. T17.

The case entered discovery. Dr. McBride submitted his first expert report in August 2014. The report included Dr. McBride's illustrative plan (with no supporting analysis), socio-demographic information, and an analysis of racial voting patterns in 12 Sumter County elections. T154-6. Sumter County responded with a report by Dr. Karen Owen, opining that Dr. McBride's estimates exceeded 100%, even though the method Dr. McBride used, EI (*see* note 4, *supra*), bounds results within a 0% to 100% range; that this oddity suggested Dr. McBride was using the technique incorrectly; and that his numbers at face value showed low black cohesion and black-preferred-candidate success. T154-4.

Sumter County moved for summary judgment, contending that Dr. McBride's analysis failed to establish the legally required prerequisites that (1)

[6] Plaintiff also alleged that the two majority-black districts are "packed," but he presented no evidence on this claim, and the district court summarily rejected it. T198/16.

the black community is cohesive and (2) the white voters routinely vote as a bloc to defeat the black candidates of choice. The district court rejected the former argument, but accepted latter. T62, *Wright v. Sumter Cty. Bd. of Elections & Registration*, 2015 WL 4255685, at *8 (M.D. Ga. July 14, 2015). It discounted elections for which Dr. McBride's estimates exceeded 100%, it declined to give weight to the results of the four-way 2014 at-large race that resulted in a run-off, and it concluded from the remaining data that Plaintiff could not show that white bloc voting typically results in the defeat of black-preferred candidates.

Plaintiff appealed, and this Court reversed, finding in a *per curiam* order that the district court made improper credibility determinations. T71, *Wright v. Sumter Cty. Bd. of Elections & Registration*, 657 F. App'x 871 (11th Cir. 2016).

Judge Tjoflat concurred. He opined that, credibility determinations aside, there was no record before the district court on whether Plaintiff's "alternative plan…would increase African-American membership on the Board." *Id.* at 873. It is not enough to show "that the majority voting-age population in three of the newly drawn districts would be African American…without statistical evidence from past elections." *Id.* Thus, the district court, "[a]mong other things…must determine" how voters in each district in the 5/2 plan voted in the May 2014 at-large elections, how voters in

each district in the proposed plan would likely vote, and how black candidates have previously performed in at-large elections. *Id.* at 874.

B. The Second Round of Discovery and Trial

On remand, the district court re-opened discovery. Dr. McBride submitted a supplemental report, which contained errors. T154-8. He then issued a "corrected" supplemental report, which also contained errors. T157/189-190. This round of reports addressed 12 elections (or 11, if the 2014 At Large District 1 run-off is not counted separately), including three new races and omitting three races the initial report analyzed. T153-87. The 12 races from the supplemental report are set forth above (§ I.C) and involve markedly different estimates from those Dr. McBride initially reported.

Dr. Owen submitted a supplemental report, observing among other things that some of Dr. McBride's EI estimates still exceeded 100%, that omitting elections previously included introduced selection bias tainting the results, and that the chasm between Dr. McBride's estimates for the same races cast doubt on both reports. T154-5.

The case was tried from December 11 through 14, 2017. The parties filed written closing statements and simultaneous post-trial briefs and proposed findings, with no responses or replies.

C. The Court's Liability Ruling and Permanent Injunction

On, Saturday, March 17, the court issued a 38-page order finding liability.[7] T198. In relevant part, the court found that Plaintiff's expert had shown "minority" political cohesion through his analysis of the 12 above-described elections. T198/18-21. It then found "majority" bloc voting based on the same analysis. T198/21-26. It conceded that black voter registration exceeds white voter registration and therefore found that, "of course,…were more African Americans to…turn out to vote…, they would likely be able to elect their preferred candidates." T198/25. But it placed the burden on Sumter County to show why black turnout was low and, without evidence either way, it found the "majority" bloc voting to be legally significant. T198/25-26.

[7] The district court's actions were puzzling. The day before, Friday, March 16, it scheduled briefing on Plaintiff's then-outstanding preliminary-injunction motion and then stated: "[t]he Court will not now rush to judgment." T197/2. That echoed a statement accompanying a previous order on remedial-stage case events: "[the court] will not rush to issue a judgment on a matter of such constitutional importance." T179/2. In issuing its March 17 liability order, the court cancelled the preliminary-injunction briefing it scheduled the day before. T198/37-38. And, though it represented that the preliminary-injunction briefing would "allow time for both sides to present their arguments," T197/2, it entered a permanent injunction on March 30, Good Friday, with no adversarial briefing on an emergency temporary-restraining-order motion Plaintiff filed that very day. Although the court allowed Sumter County to lodge objections to the injunction *after* it issued, the court proceeded to find some of them waived. T206. The court's mixed-signal rulings have exacerbated an already complex election-administration situation.

The court then found that the following factors favor Plaintiff: (1) Sumter County has a history of discrimination; (2) voting is polarized; (3) Sumter County uses staggered terms, a majority-vote requirement, and at-large districts; (4) the black community in Sumter County experiences disproportionately low educational, employment, income level, and living conditions; (5) "[n]o African American has been elected in a School Board district except in districts where African Americans make up a majority of the voting-age population" (which is false, *see, e.g.*, T154-6/50); and (6) blacks do not hold a share of seats on the school board proportionate to their share of the population. T198/26-33. The court, however, found evidence neither of racial appeals nor of black exclusion from any candidate slating process. It also found a substantial policy justification for the plan. T198/20. The court then weighed these factors to find that, under the totality of the circumstances, the at-large seats do not afford a "meaningful opportunity" for black residents to elect their preferred candidates. T198/33.

The court then turned to Plaintiff's illustrative plan. T198/34-37. It found that illustrative Districts 1 and 5 (both above 65% BVAP) would likely perform and found that District 6 (54% BVAP) is a "close call." T198/15. Dr. McBride, the court acknowledged, argued that 54% BVAP would suffice on the basis that crossing a 50% BVAP threshold would improve turnout. The

court rejected this argument, finding "no support for the idea that a five percentage point shift would have such a drastic impact on voting behaviors." T198/34.

But the court credited Dr. McBride's ultimate conclusion that "black voters would have a meaningful opportunity to elect candidates" because Sumter County presented no contrary evidence. T198/35. Thus, it found the illustrative plan sufficient to meet Plaintiff's *prima facie* burden. It cautioned though that the illustrative plan, which is "far from perfect," would probably not be suitable for use in actual elections and advised the parties to be "creative in exploring possible remedies" in a second, bifurcated remedial stage. T198/36.

With that, the Court found liability. T198/37.

It issued no relief at the time, citing the ongoing remedial proceedings. T198/37. (Though these proceedings have ended, the court gave itself until July 23 to implement a remedial plan. T204/7.)

On March 30, Plaintiff filed an "emergency" motion for a temporary restraining order or preliminary injunction to prohibit Sumter County from conducting the May election. The same day, the court issued a permanent injunction, prohibiting the May school board elections and instituting an alternative election schedule the court adopted in a prior order, which, among

other things, mandates a special election on November 4. T204; T189/1. The court predicated the injunction on its prior finding of liability. T204/4.

Sumter County filed a timely notice of appeal on April 11. T207.

STANDARD OF REVIEW

This Court reviews the district court's factual findings for clear error and its analysis of law *de novo*. *Davis v. Chiles*, 139 F.3d 1414, 1420 (11th Cir. 1998). The Court is also empowered to correct "a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quotations omitted).

SUMMARY OF THE ARGUMENT

The district court's decision is erroneous and should be reversed.

I. The court failed to require Plaintiff to identify an obstacle negating the black community's numerical registration advantage. With the normal vote-dilution "theoretical basis"—that "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters," *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)—unavailable, it became Plaintiff's "obvious, difficult burden" to prove that the blacks' "inability to elect results from white bloc voting," *Salas v. Sw. Tex. Jr. College District*, 964 F.2d 1542, 1555 (5th Cir. 1992). No evidence of that nature exists here, and the court's failure to demand it is legal error.

For the same reason, the court erred in shifting the burden to Sumter County to prove that black turnout is low for some reason other than prior discrimination. That burden shift only applies after a plaintiff shows "a present disproportion in voting registration." *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979). This rule both clarifies why this Court's decision in *United States v. Marengo County Commission*, 731 F.2d 1546, 1568 (11th Cir. 1984), is in harmony with the Fifth Circuit's *Salas* decision and honors the constitutional and statutory imperative that liability attach only to a voting "procedure" that causes the complained-of injury. A group's success in registering to vote proves that it successfully participates in the political process. And, though some plaintiffs may be able to show why a group that has registered at high rates in the past cannot vote at high rates in the future, Plaintiff here has not even tried.

II. The court erred again in finding that Plaintiff's illustrative remedy is effective, even after rejecting the central premise offered to support it: that a BVAP shift from slightly below to slightly above 50% will improve black turnout. Again, the court shifted the burden to Sumter County to present evidence against the illustrative remedy, but, with no creditable evidence in support of the remedy, that shift was legal error. At minimum, the court committed plain error because its decision is internally inconsistent in both

rejecting the premise behind Dr. McBride's testimony and crediting its ultimate conclusion.

III. The court also erred in weighing the evidence, and this error was informed by misapprehension of the law. The court declined to weigh election results in districts with BVAP far above that of the at-large seats, but chose to weigh election results in districts with BVAP far below that of the at-large seats. This tilted the analysis in one direction, exaggerating the amount of evidence available to suggest that "white voters are usually able to [] defeat the candidate preferred by African Americans." T198/24. In fact, only three races involving two black candidates suggest this.

At the same time, the court gave no weight to dozens of county-wide races showing that black voters have significant electoral influence, supporting Democratic Party candidates (white and black) who regularly win county-wide. And the court found that no black members have sat on the Sumter School Board except in majority-black districts when its own opinion states that, at one time, the Board had "six African American members." T198/5. These errors and others defeat the court's ultimate liability finding. That finding should be reversed and the permanent injunction vacated.

ARGUMENT

I. The District Court Applied the Wrong Legal Standard to This Case

A. The Legal Framework

Voting Rights Act § 2 forbids any voting "procedure" that "results in a denial or abridgment of the right…to vote on account of race or color." 52 U.S.C. § 10301(a). That standard is met if, "based on the totality of circumstances, it is shown that the political processes…are not equally open to participation by members of a class of citizens…in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

In *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), the Supreme Court recognized that "multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Id.* (quotation and edit marks omitted). It set three "preconditions" that a plaintiff challenging such a scheme must establish as a threshold matter: (1) that the "minority group" is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that it is "politically cohesive"; and (3) that "the white majority vot[es] sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Id.* at 50-51. These *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." *Johnson v. De Grandy*, 512 U.S.

997, 1007 (1994). Once these factors are met, courts evaluate a series of factors in an "an intensely local appraisal of the design and impact of the contested electoral mechanisms" in an analysis of the "totality of the circumstances." *Gingles*, 478 U.S. at 48-49, 79 (quotation marks omitted).

B. This Case Is a Mismatch for Section 2 Liability

Because black registrants outnumber white registrants in Sumter County, this case is an unnatural fit for the *Gingles* vote-dilution test. "The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, *by virtue of its numerical superiority*, will regularly defeat the choices of minority voters." *Gingles*, 478 U.S. at 47 (emphasis added); *see also Johnson v. Hamrick*, 296 F.3d 1065, 1072 (11th Cir. 2002). But black registered voters' numerical advantage in Sumter County allows them to defeat the choices of the white community if voting is polarized.

This poses several Section 2 problems. The most obvious is under the third *Gingles* precondition, which requires proof that "the white *majority* votes sufficiently as a bloc to enable it…to defeat the *minority's* preferred candidate." 478 U.S. at 51 (emphasis added). With this showing, "the minority group demonstrates that submergence in a white multimember [or at-large] district impedes its ability to elect its chosen representatives." *Id.* But, here, there is

neither "a white [at-large] district" nor "submergence" of the "minority" group in it. It is highly unlikely that the election scheme enables white bloc voting to frustrate the black community's will.

The black community's registration superiority also creates a problem under the second *Gingles* precondition: the "minority group must be able to show that it is politically cohesive," which means that "a *significant number* of minority group members usually vote for the same candidates." 478 U.S. at 51, 56 (emphasis added). But a group with numerical superiority over other groups that fails to win at-large elections is probably not cohesive. Here, a small fraction of black registrants, an average of 7.9%, T198/8, voted in elections the district court examined. Even if this fraction voted as a bloc, the court had no way to identify a preferred candidate of the remaining 90% or more of the black community. *Cf. N.A.A.C.P., Inc. v. City of Columbia, S.C.*, 850 F. Supp. 404, 418 (D.S.C. 1993), *sum. aff'd* 33 F.3d 52 (4th Cir. 1994). Finding "cohesion" here means imputing the decisions of that small fraction on the entire black community on the guess that they will "think alike, share the same political interests, and will prefer the same candidates at the polls" solely because they "belong to the same race." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). These "racial stereotypes" are "impermissible," *id.*, and thus can hardly form the basis of a cohesion finding.

These problems are not superficial; they go the heart of Section 2's plain text and even its validity as law.

First, Section 2 creates a remedy for a "standard, practice, or procedure" that is "imposed or applied by any State or political subdivision." 52 U.S.C. § 10301(a). This textual limit to the statute's reach is constitutionally necessary because the provision enforces the Fifteenth Amendment, *City of Rome v. United States*, 446 U.S. 156, 176-77 (1980), which addresses state, not private, action. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461, 473 (1953). Because Congress "cannot be said to be enforcing" a constitutional provision by "legislation which alters [its] meaning," *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), it lacks power to prohibit an election procedure based solely on private decisions.

But, without a showing that the state-imposed election procedure enables a bloc of one group to frustrate the will of another, there is no cognizable state action to penalize. Here, the district court found that, "were more African Americans to…turn out to vote…, they would likely be able to elect their preferred candidate." T198/25. It also concluded that "[t]he problem for African Americans in Sumter County is not the number of voters, but how often they turn out to cast votes." T198/36. This case is therefore unlike the ordinary vote-dilution case, where minority-preferred-candidate defeats are "due to the operation of a challenged voting scheme," *Nipper v. Smith*, 39 F.3d

1494, 1498 (11th Cir. 1994), because the "minority group" here was, according to the court below, not denied "meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme." *Solomon v. Liberty Cty., Fla.*, 899 F.2d 1012, 1036 (11th Cir. 1990) (opinion of Tjoflat, J.). Rather, the alleged injury is independent of that scheme; higher turnout would change the result, with or without it. T198/25. The liability finding was thus predicated on neither an election procedure nor state action.

Second and relatedly, Section 2 requires a causal link between the election scheme and the alleged inequality, prohibiting only a voting procedure that "*results in* a denial or abridgement of the right of any citizen to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). Thus, the "essence" of a vote-dilution claim "is that a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities." *Gingles*, 478 U.S. at 47 (emphasis added); *see also Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986); *Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1358-59 (4th Cir.1989); *Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3d Cir. 1994); *see also* S. Rep. No. 97-417 at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 206 ("If *as a result of the challenged practice or structure* plaintiffs do not have an equal

opportunity to participate in the political process and to elect candidates of their choice, there is a violation of this section" (emphasis added)). But where, as here, private decision-makers can change a result independent of any change in the election scheme, then either the scheme did not cause the alleged injury or the private decisions are an intervening cause defeating any other causal nexus.

Third, Voting Rights Act § 2 is triggered only where members of a racial group "have less *opportunity* than other members of the electorate to *participate* in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). This language clarifies that the statute guarantees only the right to equal participation, not to any electoral outcome. *See, e.g.*, *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir. 1995). And, were that not clear enough, the principle appears again in the statute's express disclaimer that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

But where the "theoretical basis" of a Section 2 case becomes detached from an inquiry into whether white "numerical superiority" frustrates black participation, it quickly devolves into an inquiry into "whether members of the protected group are elected." *Smith v. Brunswick Cty., Va., Bd. of Sup'rs*, 984 F.2d

1393, 1400 (4th Cir. 1993). That shift erroneously turns a statute guaranteeing "opportunity" into a statute guaranteeing success. *Id.* Here, the court found liability because black-preferred candidates lost, T198/24, and Sumter County's black community is historically disadvantaged, T198/26-33. That reasoning, along with the court's attribution of election results to low black turnout, hinges on electoral success, not inequality of opportunity.

The statute does not allow that. Thus, except in unique cases, "[w]hen protected voters have equal access to the polls, when they are free of undue influence in voting, and when they represent the majority in a majority of the political unit's voting districts"—or, by the same token, in an at-large scheme—"they can claim no further rights from the Fifteenth Amendment and the Voting Rights Act." *Smith*, 984 F.2d at 1400.

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

The district court ignored all of this. It proceeded to analyze Plaintiff's claim in mechanical fashion, checking Section 2 boxes along the way, nearly oblivious that the entire "theoretical basis" of Plaintiff's claim, *Gingles*, 478 U.S. at 47, was compromised. When, 25 pages in to its analysis, the court finally reached this issue, it declined to require Plaintiff to identify an obstacle to participation negating the black community's registration advantage.

Instead, it placed the burden *on Sumter County* to show why Plaintiff*'s* racial group turned out in low numbers. T198/25-26. That was an error of law.

1. The Court Ignored the Correct Legal Principles

The correct statement of law for a case like this is in the Fifth Circuit's decision in *Salas v. Sw. Texas Jr. College District*, 964 F.2d 1542, 1555 (5th Cir. 1992), a case brought by Hispanic voters in a locality where Hispanic registrants outnumbered registrants of other racial and ethnic groups. The court, relying on pre-1981 Fifth Circuit precedent, held that majority-minority status does not create a *per se* bar to relief, *id.* at 1147-50, but, seeing the problem inherent in determining "whether the alleged vote dilution is attributable to the challenged election practice—use of an at-large district," *id.* at 1552, it placed "an obvious, difficult burden" on Plaintiffs to prove "that their inability to elect results from white bloc voting," *id.* at 1555. Unique evidence, it observed, may show that the ostensible electoral advantage is illusory and thereby justify Section 2 relief. But low turnout, without more, does not suffice because, "[o]bviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote." *Id.* at 1556; *see also Ortiz*, 28 F.3d at 314 (adopting this view).

The district court did not find evidence negating the black community's registration advantage, and it expressly declined to impose the "obvious,

difficult burden" on Plaintiffs to prove "that their inability to elect results from white bloc voting." *Salas*, 964 F.2d at 1555. The district court instead rejected *Salas* as inconsistent with this Circuit's law and declined to follow it. T198/26.

2. There Is No Circuit Split

The district court cited *United States v. Marengo County Commission*, 731 F.2d 1546, 1550 (11th Cir. 1984), for its burden-shifting rule and for its split with *Salas*. T198/26. But that case did not address any issues presented in *Salas* or here; the black community in *Marengo County* had "always constituted a minority of registered voters," 731 F.2d at 1550-51 & n.2, whereas the Hispanics in *Salas* were "a registered voter majority," 964 F.2d at 1543. *Marengo County* did not purport to address the unique problems present where a group claiming dilution holds a registration advantage. Thus, though *Marengo County* did place the burden on the defendant to prove that low turnout did not result from past discrimination, 731 F.2d at 1569, neither its reasoning nor holding is applicable here. *Salas*, by contrast, is directly on point.

In fact, the law *Marengo County* applied is expressly limited to cases involving a voter-registration disparity. *Marengo* relied on *Cross v. Baxter*, 604 F.2d 875, 881-82 (5th Cir. 1979), in shifting the burden, *see* 731 F.2d at 1569, and that case, in turn, gives a fulsome articulation of the burden-shifting rule that expressly carves out cases of registration parity:

> Once plaintiffs have demonstrated a history of pervasive discrimination and *a present disproportion in voting registration* and election of minority representatives, they have carried their burden of proving that the past discrimination has present effects. The defendants must then come forward with rebutting evidence proving that current disproportions are not an effect of the past.

604 F.2d at 881-82 (emphasis added). In other words, only if registration rates disproportionately favor the white community does this burden-shifting approach apply.

There is then no split. The burden shifted in *Marengo County* because all three elements named in *Cross v. Baxter* were met: (1) there was a history of pervasive discrimination, (2) a present disproportion in voting registration, and (3) a present disproportion in the election of minority representatives. But in *Salas*, the second prong was not met: Hispanic registrants outnumbered white registrants. Neither case pretends to address the circumstances addressed in the other, and pre-1981 precedent common to both Circuits compels both the divergent principles and outcomes. *Salas* controls here, *Marengo County* is irrelevant.

3. Proof of Registration Disparity Is a Necessary Prerequisite to Shifting the Burden

This line—between scenarios where Plaintiff's group enjoys a registration advantage and those where it does not—stands as much to reason

as to precedent. Low minority turnout where whites outnumber blacks (or other racial groups) in registration can presumptively be connected to the challenged election scheme; it therefore does not break the Section 2 chain of causation. Many decisions—including *Marengo County* and the Fifth Circuit's decision in *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 295 (5th Cir. 1996)—have rejected "voter apathy" defenses because, where the *Gingles* "submergence" theory applies, a state-imposed at-large scheme creates a natural incentive for a minority group to "think it futile to register" due to "bloc voting by the white majority." *Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146 n.13 (5th Cir. 1977) (cited in *Marengo Cty.*, 731 F.2d at 1568 and in *Teague*, 92 F.3d at 295). There is in those cases a natural and probable connection between the challenged scheme and the adverse election results. Low turnout is neither independent of the state action nor an intervening cause of inequality.[8]

Similarly, some decisions have noted that a "[f]ailure to register may be…a residual effect of past non-access, or of disproportionate education, employment, income level or living conditions." *Kirksey*, 554 F.2d at 146 n.13. In those circumstances, disproportionate registration rates are strong indicia that prior state-sponsored discrimination, combined with the state-imposed

[8] That the Fifth Circuit's *Teague* decision is in all material ways consistent with *Marengo County* is further evidence that the Fifth Circuit's law is not in conflict with this Circuit's.

process of registration, present a barrier to electoral participation for the registration minority. There, too, low turnout can be presumed the effect of state action and election schemes, not of independent, private decisions.

But where a racial group outnumbers the white "majority" in registration, both theories break down. An at-large election is highly unlikely to dissuade members of the numerically superior group from voting, and their choice to register proves that they do not "think it futile to register"—or otherwise participate. *Kirksey*, 554 F.2d at 146 n.13. Likewise, a racial group's registration advantage "is persuasive evidence that" the group's members "are not deterred from participation in the political process because of effects of prior discrimination." *Salas*, 964 F.2d at 1556. If racial groups have successfully registered to vote, a more arduous process than voting itself, then they have already participated in the process. It is then hardly plausible that an external barrier prevents their future participation. Moreover, a locality's registration scheme itself belongs to the state-imposed election apparatus; the choice of a registered voter not to vote, by contrast, is a private prerogative that the state has no business second-guessing.[9]

[9] For all these reasons, the district court incorrectly viewed registration data as no different from population data. T198/25. Population data says far less about private choices and electoral burdens than registration data says and therefore does far less to break the chain of Section 2 causation. Aside from *Cross*, cases distinguishing between registration and population data include

D. No Evidence Shows Negation of the Black Community's Registration Advantage

There may be instances where a group with registration superiority will suffer actionable vote dilution under Section 2. *Salas* therefore correctly held that, while a plaintiff in such a case must meet "an obvious, difficult burden," the claim "is not precluded as a matter of law." 964 F.2d at 1555. The error below was not that the court allowed the claim to proceed but that it declined to hold Plaintiff to his "obvious, difficult burden." At a minimum, the court should not have shifted the burden to Sumter County.

Ultimately, the court should have rejected the Section 2 claim because no evidence even targeted at the "obvious, difficult burden" exists. But just because it does not exist here does not mean it will never exist. A group may, for example, "attempt to prove…that its registered voter majority is illusory," that "practical impediments to voting"—such as migrant work schedules that conflict with election dates—prevent it from taking advantage of its numerical superiority, or that there is "evidence directly linking this low turnout with past official discrimination." *Salas*, 964 F.2d at 1556. Evidence like this may tie the

---

Rogers v. Lodge, 458 U.S. 613, 623 (1982), *Zimmer v. McKeithen*, 485 F.2d 1297, 1300, 1303, 1306 (5th Cir. 1973) (en banc), and *Jordan v. City of Greenwood, Miss.*, 599 F. Supp. 397, 401 (N.D. Miss. 1984).

group's electoral failure to an at-large scheme and white bloc voting, notwithstanding the apparent equal opportunity the group has on paper.[10]

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

Even if the district court did not err as a matter of law, its analysis was clearly erroneous. A district court errs, even on matters within its discretion, when "it fails to afford consideration to relevant factors that were due significant weight." *United States v. Irey*, 612 F.3d 1160, 1188-89 (11th Cir. 2010) (en banc).

If nothing else, the court should have given *some* weight to the black community's registration, population, and voting-age population advantages. *Gingles* demands that district courts make "a 'searching practical evaluation of the past and present reality' of the electoral system's operation," which involves "a functional, rather than a formalistic, view of the political process"

[10] Indeed, this Court encountered that type of evidence in *Meek v. Metropolitan Dade Cty.*, 908 F.2d 1540, 1543 (11th Cir. 1990), which involved an at-large scheme in a county where whites were only 37% of the population and 48% of the registered voters, and blacks and Hispanics together outnumbered whites. *Id.* at 1541-42. Although whites ostensibly lacked the numbers to "cause the election losses suffered by Black and Hispanic voters," the Court cited a unique set of facts to justify liability: "Black and Hispanic voters are hostile toward each other in the electoral arena." *Id.* at 1546 (quotations omitted). This "anti-minority majority" held "legal significance" as "the relevant majority voting bloc for the purpose of the third *Gingles* factor." *Id.* at 1545-46. The entire discussion is meaningless under the district court's logic, but it mirrors the logic of *Salas* in every respect.

and an "'intensely local appraisal'" of the facts, *Nipper v. Smith*, 39 F.3d 1494, 1498 (11th Cir. 1994) (quoting *Gingles*, 478 U.S. at 45), and surely basic demographic realities count. Yet, as far as the district court was concerned, a group complaining of vote dilution could as easily be 5% as 95% of a locality's registered voters, and it would not change the analysis.

The failure to give these facts any weight infected the court's analyses of at least the second and third *Gingles* preconditions and the totality-of-the-circumstances. As to the second *Gingles* factor, the court should have considered, not only the polarized voting estimates for those voters who turned out, but also the overall turnout percentages to ascertain whether turnout is too low to show cohesion, *cf. Uno*, 72 F.3d at 987, especially in light of the registration advantage that would seem to demonstrate past participation and incentivize future participation. As to the third *Gingles* factor, the Court should have asked, not only whether black-preferred candidates have previously succeeded, but also whether the black community's registration advantage is likely to allow it to succeed in future at-large elections. That is especially important since the court weighed *single-member* races (*see* infra § III) and since it found that growth in the black community will likely allow it to obtain a majority of the school board in the future, T198/35-36, which Plaintiff's proposed alternative inhibits (*see* infra § II). As to the totality-of-the-

circumstances inquiry, the Court should have inquired how the black community's registration advantage affects each of the various factors it identified as supporting liability.

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

The district court also erred in concluding that Plaintiff met his burden to show that "a reasonable alternative practice" exists "against which to measure the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880 (1994) (footnote omitted). Plaintiff failed to show this, and the court exonerated this failure by again shifting the burden to Sumter County. That was error of law and fact.

A. The Legal Framework

Under Section 2, "[t]he inquiries into remedy and liability…cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994). That burden follows from Section 2's prohibition only of practices that "abridge[] the right to vote," which "necessarily entails a comparison." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). Because a Section 2 case challenges "the status quo," a "comparison must be made with a hypothetical alternative." *Id.* It is, then, not enough to show that the "lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015

(1994). The alternative must show "what the right to vote *ought to be*," *Reno*, 528 U.S. at 334 (emphasis in original), and therefore "must achieve a more proportional representation of minorities than did the" challenged plan, *Meek v. Metro. Date Cty.*, 908 F.2d 1540, 1547-48 (11th Cir. 1990) (quotations omitted). "[M]ust" here means "with certitude." *United States v. Dallas Cty. Comm'n, Dallas Cty., Ala.*, 850 F.2d 1433, 1438 (11th Cir. 1988) (quotation marks omitted).

Judge Tjoflat summarized in this case's first appeal what this burden means here:

> [Plaintiff] has shown that the majority voting-age population in three of the newly drawn districts would be African American, but without statistical evidence from past elections, it is pure speculation to say that African-American membership on the Board would thereby increase. It would be impossible for us to review the District Court's order on summary judgment without findings with regard to the at-large elections. Among other things, to decide this § 2 case, the District Court *must* determine:
>
> • How each district in the current 5/2 plan voted in the May 2014 at-large elections;
>
> • How each district in the current 5/2 plan would be likely to vote in the proposed seven-district plan; and
>
> • How African Americans have previously performed in at-large elections.

Wright v. Sumter Cty. Bd. of Elections & Registration, 657 F. App'x 871, 874 (11th Cir. 2016) (emphasis added).

B. The District Court Did Not Make the Necessary Findings Because Plaintiff Failed To Support the Illustrative Plan With Creditable Evidence

Plaintiff did not make these showings, and the district court did not require them. True, Plaintiff's expert presented a "statistical" analysis, but it only concerned four races—none of them at-large races—and the numbers it produced were inconclusive at best; at worst, they count against the plan. The district court conceded this, admitting the analysis was "guesswork" and finding "no support for the idea" that the new district would improve voter turnout. T198/25.

But rather than conclude that Plaintiff failed to meet his burden, the court again flipped the burden to Sumter County. T198/34-35. It held that, simply because Plaintiff's expert *stated* that the district would perform, it would presumably perform without expert analysis from Sumter County to the contrary. That was erroneous.

1. The Court Correctly Found "No Support" for the Underlying Premise of the Illustrative Plan

The district court found "no support for the" central premise of Dr. McBride's illustrative plan argument: "that a five percentage point shift would

have…a drastic impact on voting behaviors." T198/34. That finding was sound.

Plaintiff's proposed alternative created seven single-member districts in place of the current 5/2 plan. Effectively, the proposed trade is two 49% BVAP districts (the two at-large seats) for one 54% BVAP district and one 41% BVAP district (the two new single-member districts in the seven-seat illustrative plan). No one claims the 41% district will be an equal-opportunity district, so the illustrative plan turns on the 54% district.

In his first report, Plaintiff's expert provided *no* analysis on how the 54% BVAP district was likely to perform; Plaintiff instead assumed that crossing the 50% BVAP line rendered the alternative district legally sufficient. T157/194-95. As Judge Tjoflat's concurrence gently observed, that is wrong.

On remand, Plaintiff did not present a new alternative. Dr. McBride rather stood by his first alternative and attempted to support it with evidence. To that end, he purported to apply a method redistricting experts Bernard Grofman, Lisa Handley, and David Lublin described in their law review article *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1390 (2001) ("Grofman"). The article proposes that, to identify the level of minority VAP a district needs to be an equal opportunity district, a map-drawer may compare racial turnout numbers

and white crossover voting numbers from past elections. With those numbers, a map-drawer can use simple arithmetic to identify what BVAP level would compensate for low black turnout, minus the crossover vote of white voters for minority-preferred candidates. *Id.* at 1405 & n.68. That number suggests what BVAP a district occupying similar geography likely will need to ensure equal voting opportunity for the black community.

But unlike Dr. Grofman's analysis, which analyzed hundreds of elections, *id.* at 1406-23, Dr. McBride analyzed only four: the 2014 races in single-member districts D1 (62.7% BVAP), D2 (30.3% BVAP), D3 (36.2% BVAP), and D5 (70.6% BVAP). T153-87/22-23. The ability-to-elect numbers he arrived at were: 47%, 77%, 69%, and 44%, respectively. Two are above 54% BVAP and two are below 49% BVAP. T153-87/23. These were the *only* data points Dr. McBride cited in support of the alternative district.[11]

But these four data points are plainly inconclusive. None distinguish a 54% BVAP district, like the remedial seat, from a 49% BVAP district, like the two challenged at-large seats. Two of the data points, 47.1% and 44.1% suggest that *both* the remedial seat and the at-large districts have sufficient BVAP to

[11] To be sure, Dr. McBride presented another analysis on his alternative plan with his supplemental report, but he there conceded it "does not tell us how the [54% BVAP district] is likely to perform." T153-87/23.

afford an equal opportunity; two of the data points, 77.85% and 69.5% suggest that *neither* has sufficient BVAP.

There is then no basis in these four numbers to *both* condemn the at-large seats *and* approve the alternative; they are either both deficient—in which case, the alternative shows only that the "lines could have been drawn elsewhere, nothing more," *Johnson*, 512 U.S. at 1015—or they are both sufficient—in which case, the at-large seats satisfy Section 2. The data points, on their own, cannot carry Plaintiff's burden.

In response to this problem, Dr. McBride changed the terms of the debate. He testified at trial that the proposed remedial district, as a "majority-minority" district, will have an effect on turnout because black turnout in majority-minority districts is higher than in majority-white districts. T157/144-45; T158/13-20; T198/34. Relying on this hard line between districts above and below 50% BVAP, Dr. McBride concluded that his data points 44.1% and 47.1% BVAP would be sufficient in "majority-minority" districts and so would be sufficient in the proposed new of 54% BVAP because it is above 50%. But because the at-large seats of 49% BVAP are slightly below 50%, they do not (he said) enjoy the benefit the 44.1% and 47.1% data points. Having grouped these districts together as units based on a rigid 50% cutoff—"majority minority" and "non-majority minority"—Dr. McBride concluded that the at-large seats

fail, and the 54% proposed seat passes, the Grofman/Handley test. On this distinction alone, Dr. McBride concluded that his remedial 54% district, but not the two 49.5% seats, will perform. T158/13-20.

But this is nothing but a dressed-up version of Dr. McBride's initial view, prior to the first appeal, that crossing the 50% mark is all that counts. As Judge Tjoflat remarked, that is legally incorrect. Data must support that conclusion, and no data here did. Dr. McBride did no analysis to show that a change in BVAP from 49% to 54% would improve turnout; the Grofman/Handley framework does not address the impact of BVAP level changes on turnout, and it expressly criticizes the use of labels such as "majority-minority" and "rigid demographic 'cutoff lines' such as 50% black population." Grofman, *supra*, at 1385. And that is for good reason: a "majority-minority" district could be 51% or 95%, and a "non-majority-minority" district could be 49% or 3%. There is nothing functional or informative about this line.

The district court therefore correctly concluded that the record contained "no support for the idea that a five percentage point shift would have such a drastic impact on voting behaviors." T198/34.

2. No Other Evidence Supports the Illustrative Plan

But even after finding "no support" for Dr. McBride's conclusion and calling his method "guesswork," the district court found for the Plaintiff on this essential element. T198/34-35. This was triple error.

a. It was, first, legal error because the district court could only find liability by flipping the burden. After rejecting the sole argument for the plan and making no other findings in its favor, the only legally tenable conclusion was that Plaintiff had not met his burden. The district court sidestepped this problem by turning the tables: Sumter County "makes the *argument* that" the alternative is ineffective, but "it did not ask its expert to conduct any analysis of Wright's illustrative plan in this stage of the case." T198/35. Thus, because Sumter County did not present evidence and Plaintiff did, the failure of Plaintiff's showing ceased to matter. The onus was on Sumter County.

That is not how legal burdens work. The failure of a party bearing a burden to meet it means the other party need not present evidence. *See, e.g.*, *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004); *Blankenship v. Metro. Life Ins. Co.*, 644 F.3d 1350, 1355 (11th Cir. 2011); *Williams v. Thrasher*, 62 F.2d 944, 946 (5th Cir. 1933); *Humphreys v. Gen. Motors Corp.*, 839 F. Supp. 822, 828 n.6 (N.D. Fla. 1993), *sum. aff'd*, 47 F.3d 430 (11th

Cir. 1995). Sumter County did not merely "make[] the *argument* that" the alternative plan was ineffective; it pointed to the absence of evidence proving that—and the court *agreed* that Dr. McBride's sole contention had "no support." Finding in Plaintiff's favor anyway was legal error.

b. The court's findings were, second, insufficient as a matter of law to allow it to "determine…whether it can fashion a permissible remedy in the particular context of the challenged system." *Nipper*, 39 F.3d at 1530-31. Indeed, Dr. McBride took *none* of the steps Judge Tjoflat advised to support the illustrative plan, so the court did not and could not make the necessary findings.

Judge Tjoflat advised that Dr. McBride assess how each district in the current 5/2 plan voted in the May 2014 elections. *Wright*, 657 F. App'x at 874. That information was essential, among other reasons, because it would have indicated where in Sumter County black turnout is low and what geography a remedial district should occupy. Dr. McBride could have conducted an informative analysis by disaggregating at-large voting data down to the census block level and re-aggregating it according to the lines of each district in the 5/2 plan, thereby showing how each district performed. But that evidence is not on the record because Plaintiff did not introduce it. The court made no finding on this question.

Judge Tjoflat also advised the court to analyze how voters in "the current 5/2 plan would be likely to vote in the proposed seven-district plan." *Wright*, 657 F. App'x at 874. The information is essential because, without it (or a similar analysis), there is no way to know how the districts proposed to replace the current plan would perform—i.e., whether all else would remain equal plan-wide under the proposal. For example, D1 and D5 in the current plan have afforded the black community an equal opportunity, but those districts do not exist in the proposed plan; although two new predominantly black districts, D1 and D5, have similar BVAP levels, it is pure speculation that the different geographical units they occupy will perform as D1 and D5 did in the challenged plan. Again, this analysis is possible by disaggregating and re-aggregating election-results data to match the lines of the proposed districts.[12] Thus, without data from actual elections on how voters "would be likely to vote in the proposed seven-district plan," it is speculation whether these districts will elect minority-preferred candidates. For all anyone knows, the alternative may afford worse minority representation than the challenged plan. Again, neither Dr. McBride nor the district court identified any evidence on this point.

[12] At his deposition in remedial proceedings, Dr. McBride conceded that this method is the correct way to answer Judge Tjoflat's question, that he can do the analysis, and that he did not do it in this case. T200-1/9-10.

Judge Tjoflat also advised Plaintiff to supplement the record with information on how "African Americans have previously performed in at-large elections." *Wright*, 657 F. App'x at 874. But Dr. McBride did not make any assessment of at-large races in support of his proposed remedy. In fact, dozens of county-wide races exist, *see infra* § III, but none made their way into his illustrative-plan analysis.

Because Plaintiff failed to support his illustrative plan with the evidence a sitting member of this Court in this very case explicitly requested, the district court could not, and did not, make the findings necessary for liability. It instead relied on "guesswork," speculation that the new district "*could* create a potentially sizable shift in the election result," and a generic conclusion with no credible premise. T198/34-35 (emphasis added). In fact, the court expressed no confidence that "Wright's illustrative plan is the one which should ultimately be put into place," conceded the plan is "far from perfect," and held out hope that the General Assembly would come up with something else. T198/35. But the court's duty was to "determine…whether it can fashion a permissible remedy," *Nipper*, 39 F.3d at 1530–31, that "with certitude"

increases black representation, *Dallas Cty.*, 850 F.2d at 1438 (quotations omitted), not to speculate that some *other* remedy may be forthcoming.[13]

c. The court's ruling was, third, internally inconsistent and therefore clearly erroneous under Federal Rule of Civil Procedure 52. *See, e.g.*, *McCarthney v. Griffin-Spalding Cty. Bd. of Educ.*, 791 F.2d 1549, 1552 (11th Cir. 1986) (stating that findings of fact "should be set aside" when they are internally inconsistent); *Aponte v. Calderon*, 284 F.3d 184, 194 (1st Cir. 2002) (same); *cf. Grant v. Astrue*, 255 F. App'x 374, 375 (11th Cir. 2007) (vacating ALJ decision that both misconstrued the relevant burden and made internally inconsistent factual findings). The district court both found "no support" for Dr. McBride's view that a 54% district would meaningfully improve turnout and, in the next breath, credited "the *testimony* before the Court that 'black voters would have a meaningful opportunity to elect candidates…of their choice in [Illustrative District 6].'" T198/35 (quoting T153-87/24). But the only basis for the "*testimony*" that a 54% district would afford "a meaningful opportunity" was Dr. McBride's conclusion that a 54% district would meaningfully improve turnout. It was clear error both to credit Dr. McBride's conclusion and to reject the reasoning behind it.

[13] For that reason, the possibility of an effective remedy's emergence *deus ex machina* from the ongoing remedial phase is irrelevant; the court found liability and issued a permanent injunction on the illustrative plan presented at trial.

3. The Court's Error Carries Real-World Harm

The district court's errors in validating Plaintiff's remedial proposal illustrate why this element of a plaintiff's Section 2 burden matters: the court effectively consigned a racial group with numerical superiority in population, voting-age population, and voter registration to a permanent *minority* on the Sumter County School Board. That Section 2 would require this is, to say the least, improbable.

It is undisputed that neither a five-seat plan with three majority-minority single-member districts nor a seven-seat plan with four can be drawn in Sumter County. The current plan accounts for this problem: the two at-large seats together with the two single-member majority-minority seats create a scheme by which blacks outnumber whites under all relevant metrics—population, voting-age population, and registration—in four of seven seats. This places majority control of the School Board within reach; if the black community coalesces around candidates and turns out, it will likely (as the court found) win. T198/25, 35-36.

But in Plaintiff's alternative, blacks outnumber whites in only three seats; whites hold the advantage in four. Thus, under the remedial plan, "[e]ven with a growing share of the population," the district court found it "unlikely" that the black community will hold a majority of the school board seats "in the

foreseeable future." T198/35. It is hardly obvious why that is a "remedy" for the current scheme; it could as easily be the other way around.

III. The District Court Erred in Weighing the Facts

A. The Legal Framework

Whether the political process is equally open to voters of all racial and language groups is "peculiarly dependent upon the facts of each case." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quotations omitted). A district court, then, must make "a 'searching practical evaluation of the past and present reality' of the electoral system's operation," which involves "a functional, rather than a formalistic, view of the political process" and an "'intensely local appraisal'" of the facts, *Nipper v. Smith*, 39 F.3d 1494, 1498 (11th Cir. 1994) (quoting *Gingles*, 478 U.S. at 45). Appeals courts, however, maintain the right to review the fact finding for clear error under Rule 52(a) and to correct "factual findings predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79 (quotations omitted).

B. The Court's Decision Fails To Make a "Practical," "Functional" Review of Sumter County Elections

The district court's myopic analysis gave dispositive weight to a few isolated facts and no weight both to significant facts bearing heavily on relevant questions and to evidence that, altogether, cuts against liability. Several relevant facts, including the black community's registration, voting-age

population, and total population advantages, are discussed above. They cannot be divorced from the other facts in this case.

The court also erred in the following ways, which cumulatively amount to reversible error requiring reversal or, at minimum, remand:

1. The court weighed black-preferred-candidate defeats in districts with BVAP well below the County's BVAP in analyzing both the third *Gingles* precondition, T198/21-26, and the totality of the circumstances, T198/26-27. But districts with BVAP between 28% and 36% are not probative in evaluating the likely performance of a 49.5% BVAP at-large seat.

Indeed, the court correctly recognized this in discounting data from "predominantly black" districts. T198/22-24. That was appropriate because the demographics in districts exceeding 60% BVAP are not probative of voting patterns and results in a 49% BVAP district. *See, e.g.*, *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000) (excluding data from majority-Indian district from analysis of 4.8% Indian locality because counting Indian wins in such a district would "be antithetical to the directive in *Gingles* that legally significant white bloc voting be determined on a fact-specific "district to district" basis). But, in crediting races in districts between 28% and 36% BVAP, the district court made that precise error.

The court compounded this error by excluding data from 60%+ BVAP districts. Had it weighed all those races, the error would arguably have cancelled itself out. Instead, the court tilted the analysis in one direction by excluding only one side of two sets of similarly situated data. The error breaks down as follows:

- In districts at or above 62% BVAP, black-preferred candidates were successful in 2 of 2 races (D1 and D5 in May 2014). The court discounted this information. T198/22, 24.
- In districts at or below 36% BVAP, black-preferred candidates were unsuccessful in 2 of 2 races (D2 and D3 in May 2014).[14] The court weighed this information. T198/22.

This error was informed by a misunderstanding of the governing law, *Gingles*, 478 U.S. at 79, and, at minimum, was internally inconsistent.

2. The court's error in weighing these non-probative races compounded a related problem: the court found liability on a tiny amount of probative data. Ultimately, Plaintiff's claim depends solely on the electoral fortunes of just two black-preferred candidates in three races. That hardly reflects entrenched voting patterns.

[14] The court discounted the March 2018 race in D6 (28% BVAP) because black voting was not cohesive.

The court had only (what it viewed as) 12 races to begin. T198/18. It then discounted five races: (A) the two majority-black races, T198/22, 24; (B) the March 2014 race in D6 because it was not polarized, T198/22; (C) the May 2014 race in D4 because it involved two white candidates and was not polarized, T198/23; and (D) for purposes of the third *Gingles* precondition, the 2004 countywide sheriff's race because there was no way to assess whether white voters even knew that the black-preferred write-in candidate was running, T198/22.

That leaves seven data points. Two of those, the May 2014 D2 and D3 races, come from majority-white districts, and they should also have been discounted for reasons stated above.

So that leaves five elections.

A black-preferred candidate won one of those, the 2010 race in D3 (then 48.4% BVAP). T198/24.

Two others involve the same seat in the same year: the 2014 at-large race was inconclusive, resulting in a run-off. T198/10-11. Black-preferred candidate Michael Coley was ahead after the first round of voting (hence, not a black-preferred loss), but lost the runoff to Sylvia Roland. T198/10-11. This is one black-preferred loss, not two.

The third, the 2016 At-Large Seat 1 race, involved the *same* candidates again, and Sylvia Roland, now an incumbent, again defeated Michael Coley. T198/11. This is a black-preferred loss but comes with a special circumstance, both in Ms. Roland's incumbency and in the identity of the two candidates, which limits its probative value. *See Johnson v. Hamrick*, 296 F.3d 1065, 1078 (11th Cir. 2002).

The fourth was the May 2014 race for At-Large Seat 2, in which, according to Dr. McBride's analysis, Kelvin Pless obtained 96.7% but was defeated. T198/10.

Thus, the only support for the district court's conclusion that "white voters are usually able to the defeat the candidate preferred by African Americans" were three elections involving two black-preferred candidates. T198/24. That is an exceptionally weak inference. *See Uno v. City of Holyoke*, 72 F.3d 973, 989 (1st Cir. 1995) (finding clear error where only four of eleven elections analyzed supported the second and third *Gingles* preconditions).

That inference is all the weaker in light of exceptionally low turnout from members of *all* races: 7.9% on average for black voters and 13% on average for white voters, T198/8, or roughly less than 1,000 voters for a single-member race and less than 5,000 for an at-large race. *See* T154-6/41-52. This means small sample sizes for the statistical analyses—it is a truism that smaller

sample sizes yield less dependable results—and a key-hole view at best of life and elections in Sumter County. And, as stated above, it counts heavily against findings of bloc voting for either race.

3. On the other hand, the court turned a blind eye to dozens of races where Democratic Party candidates (black and white) won the Sumter County total vote, some by large margins. T198/23-24; T154/10. Dr. McBride testified that, as between a Democratic and Republican candidate, the Democratic candidate is "the candidate of choice of the black community" and that, nationwide, blacks uniformly align with Democratic candidates—typically with over 92% support. T157/180-181, 185. That the County more often than not votes Democratic should have counted against the dispositive weight the court afforded three elections and two black-preferred candidates.

The court instead gave this evidence no weight because neither party's expert offered estimates of voting behavior in those specific races. T198/23-24. But it is beyond implausible that Sumter County, Georgia, is the single place in the United States where the black community votes Republican. No one doubts that President Obama and Congressman Bishop were the candidates of choice of Sumter County's black voters, and, though it is unknown whether they were the candidates of choice for the *white* community, this omission does not matter because those candidates won the county-wide vote. Whether

because of its numerical advantage alone or because of white crossover voting, the black community's vote plainly succeeded county-wide in these elections.

Besides, the court did not need to find this evidence dispositive to afford it some probative weight. Together with the lack of data Plaintiff offered—a mere three probative races with two black-preferred candidates—it speaks volumes. For one thing, it supports the inference that two black-preferred candidate at-large failures are not the norm. For another, it illustrates how much information about Sumter County Plaintiff's case omits; Dr. McBride could have analyzed dozens of races but focused narrowly on twelve. This appears to reflect ignorance of "local" circumstances: when asked at trial whether he knew if Hilary Clinton carried Sumter in 2016, Dr. McBride responded, "I doubt it."[15] T157/181.

4. The court also ignored that black members have served on the Sumter County Board of Education, including in districts without a black majority. Dr. McBride initially reported on one of these races: the 2008 race in D1 (49.5% BVAP) where black candidate Carolyn Whitehead defeated a white candidate; Dr. McBride believed Ms. Whitehead obtained 93.3% of the black vote. T154-6/50. Dr. McBride omitted this race from his supplemental report.

[15] The other possibility is that the omission of this data was the result of intentional cherry-picking.

Yet, somehow, the court concluded that: "No African American has been elected in a School Board district except in districts where African Americans make up a majority of the voting-age population." T198/30. This finding was incorrect, but the court weighed it. It contradicts not only the 2008 D1 race, but also the court's own opinion, which found as fact that, in 2011, there were "six African-American members and three white members" of the School Board. T198/5. Obviously, black candidates have won school-board races in districts without a black majority, yet those races, like numerous county-wide votes, were absent from Dr. McBride's reports.

In short, the court's findings are not merely erroneous on the margins; they are the very opposite of "an intensely local appraisal of the design and impact of the" at-large "district in the light of past and present reality, political and otherwise." *Gingles*, 478 U.S. at 78 (quotations omitted). They place dispositive weight on two candidates and ignore dozens of others—perhaps hundreds. That is not the type of analysis the law requires. *See Johnson*, 196 F.3d at 1223.

CONCLUSION

For these reasons, the Court should vacate the district court's permanent injunction and reverse the underlying order finding liability.

Dated: May 22, 2018

Respectfully submitted,

/s/ E. Mark Braden

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limit set forth in Fed. R. App. P. 32(a)(7) because, excluding the parts of the document not exempted by Fed. R. App. P. 32(f) and 11th Circuit Rule 28-1, 32-4, it contains 12,849 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 11th Circuit Rule 32-3.

Dated: May 22, 2018

Respectfully submitted,

/s/ E. Mark Braden

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be filed electronically with the Court by using the CM/ECF system on the 22nd day of May, 2018. I further certify that the foregoing document will be served on all those parties or their counsel of record through the CM/ECF system.

Dated: May 22, 2018

Respectfully submitted,

/s/ E. Mark Braden

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

No. 18-11510

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

Addendum to Brief of Defendant-Appellant
Sumter County Board of Elections and Registration

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

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

Counsel for Appellant Sumter County Board of Elections and Registration

INDEX OF ADDENDUM TO BRIEF OF DEFENDANT-APPELLANT SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION

Tab 198

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

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

ORDER

This case is a challenge to the method of electing members of the Board of Education in Sumter County, Georgia. (Doc. 1.). The plaintiff, Mathis Kearse Wright, Jr., contends that the current election plan's two at-large seats and high concentration of African-American voters in Districts 1 and 5 dilute African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301. (*Id.*)

The Court held a four-day bench trial on December 11–14, 2017. (Docs. 144; 145; 146; 148.) In issuing these findings of fact and conclusions of law, the Court has considered the evidence presented at trial, the Parties' written closing arguments (Docs. 161; 162; 163), their proposed findings of fact (Docs. 169; 172), and their trial briefs. (Doc. 170; 171.)

FINDINGS OF FACT

Plaintiff Mathis Kearse Wright, Jr. is an African-American resident and registered voter in Sumter County.[1] (MUF at ¶ 1.) Defendant Sumter County Board of Elections and Registration was established by state law in 2001 and is responsible for conducting elections for members of the Sumter County Board of Education. 2001 Ga. Laws 3865.

[1] The Parties submitted a set of material undisputed facts as Exhibit A to their proposed pretrial order. The Court has adopted the proposed pretrial order. (Doc. 134.) All references to Exhibit A will be to "MUF."

I. County Demographics

Sumter County has a total population of 31,070 people.[2] Of those, 12,399 (39.9%) are non-Hispanic white and 16,122 (51.9%) are non-Hispanic black; 13,095 (42.1%) are white and 16,159 (52.0%) are black. (Doc. 164-1 at 1, 3). Most—23,541—of those people are voting-age. (Doc. 164-1 at 5–10.) Their demographics are similar to the general population: 10,991 (46.7%) are white and 11,652 (49.5%) are black. *Id.* Sumter County has 15,683 total active registered voters, 7,327 (46.7%) are white and 7,604 (48.5%) are black. (Doc. 166 at 2.)

The socioeconomic disparities between black and white residents of Sumter County are striking. Only 13.6% of white residents lack a high school diploma. The rate is over double—29.9%—for African Americans. (Doc. 164 at 4.) White residents are over three times more likely to have a bachelor's degree or higher—30.9% versus 8.8% of African Americans. (*Id.*.) The educational differences are reflected in employment numbers as well. Among those in the workforce aged sixteen years or over, the unemployment rate is 7.1% for white residents and 18.2% for African Americans. (*Id.*) Only 15.3% of white residents live in poverty compared to an astonishing 46.2% of African Americans. (*Id.* at 5.) Three in four African American households receive Supplemental Nutrition Assistance Program benefits. (*Id.*) The number is reversed for white residents: only one in five households receive the same benefits. (*Id.*) The median African American household earns $22,736, less than half of the median $48,672 for white households. (*Id.*)

These disparities result in decreased political participation. (*See* Doc. 157 at 110:18–111:25.) Despite African Americans outnumbering white residents in population, voting-age population, and registered voters, white voters have outnumbered black voters in school-general elections by an almost two-to-one margin since 1996. (Docs. 153-38–153-60.)

II. School Board

A. Historical Composition

Before passage of the Voting Rights Act, members of the Sumter County Board of Education were appointed by the Sumter County grand jury. *See Edge v. Sumter Cty. Sch.*

[2] All demographic data is the most up-to-date available to the Court.

Dist., 775 F.2d 1509, 1510 (11th Cir. 1985). In 1964, the General Assembly reorganized the Board to consist of seven members elected from four single-member districts, one two-member district, and one member elected at-large. *See Edge v. Sumter Cty. Sch. Dist.*, 541 F. Supp. 55, 56 (M.D. Ga. 1981). The composition has changed some times since. In 1973, it moved to at-large elections for the entire Board after a federal judge concluded the prior districts were unconstitutionally apportioned. 1992 Ga. Laws 5171; *see Edge*, 541 F. Supp. at 56. The United States Attorney General found the at-large system would "have a racially discriminatory effect," but it continued nonetheless until 1981. (Doc. 153-62); *see Edge*, 541 F. Supp. at 56. That year, a three-judge panel found the system violated the Voting Rights Act and enjoined its further use. *Edge*, 541 F. Supp. at 56.

The Board struggled to make a permissible change. It first proposed six single-member districts and one at-large seat, but the Attorney General found that the evidence "suggests that the submitted plan was designed with the purpose of minimizing minority voting strength in the school district." (Doc. 153-63 at 2.) The Board proposed another "six-one" plan, but again the Attorney General objected. (Doc. 153-64.) The district court eventually proposed its plan for all single-member districts, but the United States Court of Appeals for the Eleventh Circuit vacated because the district court had failed to consider whether it violated Section 2 of the Voting Rights Act. *Edge*, 775 F.2d at 1510. Eventually, in 1986, all parties involved settled on a six-one plan with three majority-black districts. (Doc. 153-65.)

The composition was short-lived: following the 1990 census, the Georgia General Assembly adopted a new election plan consisting of seven single-member districts. (Doc. 153-81.) Four years later, the Assembly upped the count to nine single-member districts. (Doc. 153-83.) The Board stuck with nine single-member districts after the 2000 census, though the district borders changed. (Doc. 153-84.) Under the updated plan, four districts were majority African American in voting-age population. (Doc. 153-23 at 13.)

B. Recent Changes to the Board

The Board had five white members and four black members in 2010. (Doc. 153-61.) That year, it began discussing redistricting and downsizing. In June, it approved a plan—with

a 5-3 vote along racial lines—to reduce the size of the Board to five or seven members with details to be worked out later. (Docs. 153-67 at 3; 159 at 39:10–18.) The nine-member School Board at the time was the largest in the state, despite Sumter County's relatively small population. (Doc. 159 at 14:3–18.) The Southern Association of Colleges and Schools (SACS), the organization which accredits Sumter County's schools, said on several occasions that the School Board was large. (*Id.* at 15:1–16.) Defendants assert that the Board's size put Sumter County's accreditation at risk. (*See* Doc. 172 at ¶ 45.) This assertion is not credible. Michael Busman, the School Board's chairman and whose testimony Sumter County relies on, testified that SACS accredits the schools and that a loss of accreditation would be detrimental to the students. (Doc. 159 at 15:1–11.) He did not testify that SACS's observation regarding the Board's size would have any impact on the accreditation process.

It is somewhat unclear the justification for landing on the number seven, however. The five single-member districts mirror the five single-member Board of Commissioners districts—a reason cited by the School Board when it submitted the new plan for preclearance. (Doc. 153-23 at 2.) But the Board of Commissioners doesn't have any at-large districts. (Doc. 159 at 16:8–15.) Busman testified only that it was "easier" to go from nine to seven members rather than down to five. (*Id.* at 16:10–15.) The Court infers, based on the testimony, that the smaller shift was "easier" because fewer incumbent seats were put at risk.

On November 2, 2010, an African-American candidate, Kelvin Pless, defeated a white incumbent, Donna Minich, in District 3. (Doc. 153-61 at 3.) For the first time, the Board had an African American majority.

On December 9, 2010, before Pless was installed, the Board unanimously approved a resolution calling for the legislature to move it to a five-two plan—five district seats and two at-large seats. (Docs. 153-67 at 3; 154-11; 159 at 17:14–16.) African American board members testified that they did not knowingly vote to support the addition of two at-large seats. (Doc. 158 at 154:5–10, 174:2–10.) The Court does not find them credible on this point. The resolution was covered extensively in both newspapers and on the radio. (Doc 159 at 40:6–10.) Moreover, the resolution was reviewed by the members before the vote. (*Id.* at 17:3–13.) The Court does not believe that responsible Board members would vote in

support of a resolution to change the Board composition with no knowledge of what the change entailed.

The General Assembly adopted the change, and the Governor subsequently signed it into law. 2001 Ga. Laws 4020.

On July 31, 2011, the incumbent in District 7, who was not African American, resigned his seat. (Doc. 153-24 at 44.) Michael Lewis, an African-American, was appointed to fill the seat, bringing the racial makeup of the Board to six African American members and three white members. (Doc. 158 at 143:21–144:8.)

Shortly after that, the General Assembly redrew the new district boundaries based on the 2010 census. 2011 Ga Laws. 280. The changes were submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act. (Docs. 153-23; 153-24.) The Department found the information submitted insufficient for its analysis and requested additional information from the Board. (Doc. 153-23.) The Board refused. On January 12, 2012, the Board voted to move from the five-two plan to seven single-member districts, and on January 18, 2012, it voted to withdraw its request for preclearance. (Docs. 153-23 at 43; 159 at 22:20–23:7.)

The decision to withdraw the request for preclearance left the nine single-member districts configuration in place, but following the 2010 census, they were malapportioned. In June 2012, this Court granted the plaintiff's motion for a preliminary injunction and thereby canceled the 2012 elections for members of the Board of Education. *See* Order, *Bird v. Sumter County Board of Education*, 1:12-cv-76-WLS (M.D. Ga. June 21, 2012). Board members whose terms were set to expire after the 2012 elections were held over—maintaining the six-three black majority.

On June 25, 2013, the majority's strategy backfired. The Supreme Court struck down Section 4 of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 2 (2013). Preclearance was no longer required, and the General Assembly's post-census plan went into immediate effect. *See* Order, *Bird v. Sumter County Board of Education*, 1:12-cv-76-WLS (M.D. Ga. Oct. 28, 2013). The General Assembly—perhaps out of an abundance of caution—then readopted the same five-two plan through House Bill 836 on February 17, 2014. The bill also moved

school board elections from the November general election to the nonpartisan general election held in May. It also adopted a transition procedure: a special election would be held for Districts 1, 2, 4 and 6 as those districts existed under the nine-member plan. Members elected at that special election were to serve only until December 31, 2014, when the new plan would be put in place. (Doc. 153-22); 2014 Ga. Laws 3503.

That brings us to today. The Board still has its five-two composition. Elections take place in May of even-numbered years, with candidates running on a staggered four-three basis. One at-large seat is filled each election, and a majority vote is required for all Board members. African Americans constitute a majority of the voting-age population in two of the five existing school-board districts. (MUF ¶ 8.) They represent 62.7% of the voting-age population in District 1 and 70.6% of the voting-age population in District 5. (Doc. 153-87 at 4.)

C. Elections Under the Current Plan

Wright relies on a racial bloc voting analysis of Sumter County elections performed by his expert, Dr. Frederick G. McBride, and contained in McBride's supplemental report. (Doc. 153-87.) Dr. McBride has a doctorate in Political Science from Clark Atlanta University. His work has focused on quantitative and qualitative research in redistricting and voting rights. 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 twenty-two states, and the District of Columbia. (Docs. 153-1; 153-87 at 2; 157 at 23:6–28:10.)

McBride's analysis in this case used three statistical methods to estimate the voting patterns of black and white voters in Sumter County: (1) homogeneous precinct analysis; (2) bivariate ecological regression analysis; and (3) Ecological Inference (EI). (Doc. 153-87 at 8–9.) All three methods have been accepted by the courts as reliable for use in voting cases, and their reliability is not at issue here. *See*, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 53 n.20 (1986) (discussing ecological regression and homogeneous precinct analysis). There is also no dispute that the EI method is currently the "gold standard" for use in racial bloc

voting analyses, so the Court will include only the results of Dr. McBride's EI analyses unless otherwise noted. (Docs. 157 at 40:3–10; 159 at 207:24–208:3.)

The data for Dr. McBride's analysis consisted of precinct election returns and racial turnout data from the Georgia Secretary of State. (Doc. 153-87 at 10.) There is no dispute as to the data used in Dr. McBride's analysis. (Doc. 159 at 209:2–210:4.) Dr. McBride analyzed a total of twelve Sumter County elections in his supplemental report. These included all three general elections and one runoff election held under House Bill 836 for the at-large seats on the Board of Education, plus a variety of other local elections. (Doc. 153-87 at 11.)

Dr. McBride's analysis shows that African-American voters have been highly cohesive in ten of the twelve elections analyzed by Dr. McBride. The two exceptions are first, the District 4 race on May 20, 2014, when 53.9% of black voters supported Rick Barnes and 46.6% of black voters supported Gary Houston. Both Barnes and Houston are white. The second race was the March 18, 2014, District 6 election. There, 68.8% of black voters supported Sarah Pride while 52.1% of black voters supported Michael Mock. Pride is an African American; Mock is white. Of the remaining races, the lowest level of support for the black-preferred candidate among black voters was an astonishingly high 85.3%.

Of particular note is the November 2, 2004 race for Sheriff. There, Nelson Brown—the only African American candidate in the race and the black-preferred candidate—won the support of 96.5% of black voter despite being a write-in candidate.

The results of McBride's analysis are shown below. First, the Court shows the general demographic and turnout data provided by McBride:

Table 1. Demographics of the Sumter County School Board's Districts.

Seat	Population	% White	% Black	% 18+ White	% 18+ Black
1	6,432	31.1%	65.9%	34.4%	62.7%
2	6,654	56.4%	34.6%	62.2%	30.3%
3	6,546	54.1%	38.8%	57.8%	36.2%
4	6,679	44.8%	47.7%	49.1%	43.9%
5	6,508	24.1%	72.8%	27.0%	70.6%
At-Large[3]	31,070	41.2%	51.0%	46.7%	49.5%

Table 2. Voter Turnout Data for the Elections Analyzed.

Election Date	Seat	White Turnout	Black Turnout
May 20, 2014	1	9.4%	8.6%
May 20, 2014	2	20.7%	4.4%
May 20, 2014	3	12.9%	5.4%
May 20, 2014	4	6.9%	4.1%
May 20, 2014	5	6.7%	9.3%
May 20, 2014	At-Large #1	11.1%	6.7%
May 20, 2014	At-Large #2	11.2%	6.7%
July 22, 2014	At-Large #1	8.2%	4.7%
May 24, 2016	At-Large #2	14.3%	8.4%
November 2, 2004	Sheriff	29.1%	18.4%
November 2, 2010	3	12.9%	10.8%

Next, the Court lists the elections analyzed by McBride, categorized by election date. African American candidates are denoted with an asterisk.

[3] For the at-large seats, the Court accepts the updated 2012–2016 American Community Survey date rather than that in McBride's report.

1. May 20, 2014 Elections

Table 3. District 1 Results.

Candidate	Overall Support	White Support	Black Support
Alice Green*	52.8%	15.0%	94.2%
E. Lockhart	11.6%	21.2%	1.2%
Allen Smith	35.4%	66.8%	1.1%

Table 4. District 2 Results.

Candidate	Overall Support	White Support	Black Support
Everette Byrd	28.9%	30.1%	23.3%
Meda Krenson	48.7%	59.0%	0.0%
Sarah Pride*	22.2%	5.8%	99.3%

Table 5. District 3 Results.

Candidate	Overall Support	White Support	Black Support
W. Fitzpatrick*	30.5%	4.6%	92.3%
J.C. Reid	69.4%	95.0%	8.5%

Table 6. District 4 Results.

Candidate	Overall Support	White Support	Black Support
Rick Barnes	54.4%	54.7%	53.9%
Gary Houston	45.5%	44.9%	46.6%

Table 7. District 5 Results.

Candidate	Overall Support	White Support	Black Support
Edith Green*	55.4%	13.9%	85.3%
Mark Griggs	44.5%	86.4%	14.3%

Table 8. At-Large Seat #1 Results.

Candidate	Overall Support	White Support	Black Support
Michael Coley*	36.7%	4.1%	89.1%
David Kitchens	20.4%	32.7%	0.0%
Sylvia Roland	36.4%	53.0%	9.7%
Patricia Taft*	6.3%	6.5%	6.2%

Roland is a career public school educator having served as an English teacher in middle and high school in Arkansas for twelve years and a literacy coach in middle school in Florida for six years. (Doc. 159 at 43:15–22.) She moved to Sumter County in 2012 and became a school improvement specialist in Americus High School in Sumter County. (*Id.*) Roland never had a child in Sumter County schools and had never voted in a city election. (Doc. 159 at 54:10–17.)

Coley has lived in Sumter County for almost his entire life. (Doc. 158 at 33:23–37:11.) He served on the Sumter County Board of Education from 1996 until 2005, but never worked in Sumter County schools. (*Id.* at 42:1–8.) Coley's three children all graduated from Americus High School. (*Id.* at 38:3–10.)

Table 9. At-Large Seat #2 Results.

Candidate	Overall Support	White Support	Black Support
Michael Busman	59.8%	94.4%	3.0%
Kelvin Pless*	40.1%	5.8%	96.7%

Busman has lived in Americus, Georgia for over 19 years and is a family medicine and sports medicine physician. (Doc. 159 at 8:19–20, 9:2–4.) He is the volunteer team physician for the high school, and he performs free physicals for the school athletes and Special Olympics athletes. (*Id.* at 9:15–22.) Busman has four children—one graduated from Americus Sumter High School, and the other three are now homeschooled. (Doc. 159 at 28:11–20.)

Pless has lived in Americus, Georgia his whole life. (Doc. 158 at 60:23–24.) He was elected to the School Board as the representative for District 3 in 2010. (*Id.* at 65:25–66:4.) Pless has a degree in education, though he has never worked for the Sumter County schools. (*Id.* at 66:22–23.)

2. July 22, 2014 Elections

Table 10. At-Large Seat #1 Runoff Results.

Candidate	Overall Support	White Support	Black Support
Michael Coley*	41.0%	7.5%	99.5%
Sylvia Roland	58.9%	92.4%	0.0%

3. May 24, 2016 Elections

Table 11. At-Large Seat #1 Results.

Candidate	Overall Support	White Support	Black Support
Michael Coley	44.5%	15.3%	93.6%
Sylvia Roland	55.4%	84.7%	6.2%

4. Other Elections

Table 12. November 2, 2004 Sheriff Election Results.

Candidate	Overall Support	White Support	Black Support
Pete Smith	40.3%	54.6%	0.0%
James Driver	32.3%	39.9%	6.3%
Nelson Brown* (Write In)	27.3%	4.4%	96.5%

Table 13. November 2, 2010 School Board District 3 Results

Candidate	Overall Support	White Support	Black Support
Donna Minich	44.4%	76.7%	6.3%
Kelvin Pless*	55.3%	22.9%	94.0%

Table 14. March 18, 2014: School Board District 6 Results

Candidate	Overall Support	White Support	Black Support
Michael Mock	71.0%	85.1%	52.1%
Sarah Pride*	28.9%	28.8%	68.0%

In addition, there were other races presented during the trial that were not analyzed by Dr. McBride. The Court notes the races in which there was a contested choice between an African American and a white candidate.[4]

In the 2012 general election, Barack Obama (African American) defeated Gary Johnson (white) and Mitt Romney (white) in Sumter County for President. (Doc. 154-10 at 21; Doc. 159 at 103.) Sanford Bishop (African American) defeated John House (white) in Sumter County for a United States House of Representatives seat. (Doc. 154-10 at 21; Doc. 159 at 102–03.) Kevin T. Brown (African American) defeated Michael Arthur Cheokas (white) for a State House of Representatives seat. (Doc. 154-10 at 21; Doc. 159 at 104.) George R. Torbert (white) defeated Tangalia Robinson (African American) in Sumter County for a County Commission seat, but Andrea F. Brookes (African American) defeated Carey Harbuck for a second seat. (Doc. 154-10 at 22; Doc. 159 at 105.)

In the 2014 general election, Sanford Bishop (African American) defeated Greg Duke (white) in Sumter County for a United States House of Representatives seat. (Doc. 154-10 at 25; Doc. 159 at 102.) Kevin T. Brown (African American) again defeated Michael Arthur Cheokas (white) for a State House of Representatives seat. (Doc. 154-10 at 25; Doc. 159 at 104.)

That makes six wins for African American candidates over white candidates, and one win for a white candidate over an African American candidate in the 2012 and 2014 general

[4] Defendants list in their Proposed Findings of Fact and Conclusions of Law what they allege to be the race of each candidate in the 2012, 2014, and 2016 elections. (Doc. 172 at ¶¶ 19–42.) However, their citations to the record do not identify the race of any candidate. As far as the Court is aware, the only testimony adduced at trial as to the race of any candidate other than those for school board was that of Robert Edward Brady. The Court relies solely on his testimony in identifying the races of the candidates in these elections.

elections. Of the races where the entire county voted in a single race, African American candidates were five for five in defeating white candidates.

In the 2016 primary election, Cortisa Barthell (African American) defeated C. Cromer (white) and M. Harry (white) in Sumter County to be the Democratic nominee for the Clerk of Superior Clerk. (Docs. 154-10 at 27; 159 at 89.) In that election, African Americans made up 81.9% of the electorate. (Doc. 157 at 218:12–14.) Barthell did not face an opponent in the general election. There were no examples of races in the 2016 general election, based on the evidence presented, where the Court can find an African American candidate went against a white candidate. (Doc. 159 at 91–97.)

III. Discrimination in Sumter County

Georgia's history of discrimination "has been rehashed so many times that the Court can all but take judicial notice thereof. Generally, Georgia has a history chocked full of racial discrimination at all levels. This discrimination was ratified into state constitutions, enacted into state statutes, and promulgated in state policy. Racism and race discrimination were apparent and conspicuous realities, the norm rather than the exception." *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1560 (S.D. Ga. 1994), *appeal dismissed and remanded sub nom. Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114 (11th Cir. 1995). The Parties' have stipulated to this sordid history in both Georgia generally and Sumter County more specifically. (*See* Doc. 155 ("Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans.")) Given the stipulation, the Court declines to make the litany of factual findings about Georgia requested by Wright. (*See* Doc. 169 at ¶¶ 174–383.) However, the Court does make the following findings specific to Sumter County to provide better context for this challenge.

In 1967 in *Bell v. Southwell*, the court set aside an election in Sumter County because of "gross, unsophisticated, significant, and obvious racial discrimination," including segregated voting lists and polling booths, intimidation of black voters by whites, and the arrest of black voters attempting to vote in white polling booths. 376 F.2d 659, 660–61, 664 (5th Cir. 1967).

In 1981 in *Edge v. Sumter County School District*, this court noted that "[o]n July

13, 1973 the Attorney General interposed an objection to the change [to at-large elections for the board of education]. In spite of this objection the at-large system has been utilized for Board elections up to the present time." 541 F. Supp. 55, 56 (M.D. Ga. 1981), *aff'd*, *Sumter County School District v. Edge*, 456 U.S. 1002 (1982). In a later ruling, the Eleventh Circuit Court of Appeals noted that "[n]o black person has ever served on the county school board" and that "[i]n 1964, prior to the Voting Rights Act, Georgia law provided that the Sumter County grand jury appoint school board members." 775 F.2d 1509 (11th Cir. 1985).

While its worst days may be behind it, Sumter County remains a largely segregated community, with separate neighborhoods, civic organizations, and churches. (Docs. 158 at 39:7–41:6, 64:1–65:20, 107:4–108:15, 116:3–13, 125:15–133:22, 167:21–168:7, 211:5–212:4; 159 at 54:24–55:22.) Explicitly racist incidents are still not unheard of. Wright ran for a seat on the county commission in 2006 and described several such incidents from his campaign: "on this one occasion this -- this white family sicced their German shepherd on the -- on one of my daughters during one of the times. And then there were other times when, you know, they just basically said, you know, sorry, but, you know, we don't vote for -- and they said the N word. And then there was a couple of incidents where they said don't come on my property." (Doc. 158 at 215:19–216:1.)

IV. Illustrative Remedial Plan

Wright has proposed an illustrative remedial plan which he asserts would remedy the alleged Section 2 violation. It is as follows:

Table 15. Plaintiff's Illustrative Remedial Proposal.

Dist.	Total Pop.	Voting Age Pop. (VAP)	White VAP	% White VAP	Black VAP	% Black VAP
1	4,663	3,290	1,083	32.92	2,120	64.44
2	4,686	3,636	2,446	67.27	957	26.32
3	4,772	3,605	1,975	54.79	1,490	41.33
4	4,675	3,575	1,924	53.82	1,476	41.29
5	4,703	3,279	717	21.87	2,472	75.39
6	4,677	3,797	1,999	52.65	1,457	38.37
7	4,693	3,336	1,293	38.76	1,818	54.50

(Doc. 153-87 at 6.) Sumter County challenges the districts for reasons related to Section 2, but does not allege that the proposals are unfaithful "to Georgia's traditional redistricting principles of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, recognizing communities of interest, and avoiding multi-member districts." *Larios v. Cox*, 314 F. Supp. 2d 1357, 1369 (N.D. Ga. 2004) (footnote omitted); (*see generally* Doc. 176).

To estimate how the proposed districts would vote, McBride applied the conceptual framework set forth by Bernard Grofman, Lisa Handley, and David Lublin in *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001). (Doc. 153-87 at 22.) The framework uses cohesion, crossover voting, and turnout to determine how a proposed district would vote. (Doc. 157 at 136:12–18.) The authors are well respected in the field of political science, (*Id.* at 137:3–6; Doc. 159 at 222:7–20), and their methods have been cited in *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 488 (2006) (Souter, J., concurring in part and dissenting in part).

McBride's analysis shows that the proposed District 1 and District 5 would allow African American voters to elect their preferred candidate. (Doc. 153-87 at 23.) Proposed District 7, however, is a close call. The percentage of the voting-age population needed for a minority-preferred candidate to be elected in Sumter County has ranged from 44.1% to

77.8% in the current districts. (*Id.*) At 54.5%, proposed District 7 would be sufficient in some cases but not others. Determining whether African American voters in the proposed district could elect the candidate of their choice is "guesswork," but McBride testified that based on the Grofman framework, he believed it was sufficient. (Doc. 157 at 198:8–199:8.)

The County's expert, Dr. Karen Owen, did not express any opinions on McBride's illustrative districts or his analysis of the viability of the districts. (Doc. 159 at 221:16–222:6.)

DISCUSSION

I. *Gingles* and Senate Factors

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. 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.[5] *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 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 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

[5] Wright pleaded a packing claim in his pro se complaint. (Doc. 1 at 7.) However, he has since abandoned the claim and offered no support for it at trial. The Court finds no evidence in support of it.

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 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)). 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;
>
> 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).

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. "[T]he first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). The Court already granted summary judgment as to this factor; there is no need to revisit it now. (Doc. 125 at 16.) African Americans currently hold two of the seven School Board seats. McBride has demonstrated a plan which would permit African Americans to elect three members of their choice.

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 demands more frequency than a *more often than not* standard but less frequency than an *always* standard. *Id.* at 48, 56.

The Court finds that the second *Gingles* factor is also satisfied. Of the twelve elections with reliable data before the Court, in ten of them the overwhelming majority of African Americans voted for the same candidate. In one of the two where they did not, the District 4 race on May 20, 2014, both candidates were white. While still relevant, elections without a black candidate are less probative in evaluating the *Gingles* factors. *Davis v. Chiles*, 139 F.3d 1414, 1418 n.5 (11th Cir. 1998). The Court is particularly struck by the November 2, 2004, race for Sheriff. In that race, African American candidate Nelson Brown received nearly every single black vote (96.5%) despite being a write-in candidate when running against two white candidates. Write-in candidates face obvious structural barriers that make their election in the American political system rare. To see African American voters demonstrate that level

of cohesion for a write-in campaign is extraordinary. When buttressed by the other nine cohesive elections, it is clear factor two is also satisfied.

Sumter County makes a few arguments in opposition. First, it points to McBride's original report which showed a lower level of cohesion in the same elections than does his supplemental report. For those elections analyzed in both McBride's original report and his supplemental report, the only analytical change was to use actual black and white turnout data rather than the estimated turnout data McBride had to rely on originally. Sumter County argues that "[t]here is virtually no correlation between Dr. McBride's [turnout] estimates and the actual numbers." (Doc. 170 at 15.) True enough. The estimates do vary wildly from the actual turnout data. (*See id.* at 15–16 (Defendant's comparison chart).) But even Defendant's expert testified that were she reanalyzing an election where she had originally used voting age population data for turnout, she would use actual turnout data was it to become available. (Doc. 159 at 209–210.) The shift, then, only reflects poorly on McBride's original turnout estimates and not his final analysis.

Second—and a slight variation on the first argument—Sumter County argues McBride's original analysis demonstrates a low level of cohesion amongst black voters. (Doc. 170 at 12.) The County's arguments cut against themselves. The Court agrees that McBride's original turnout estimates were unreliable and vary wildly from the actual turnout numbers. The Court does not find those results credible and therefore does not consider any of the original results—good or bad—in evaluating factor two.

Third, the County argues McBride's analysis is unreliable because he eliminated three elections from his original analysis when producing his supplemental report. (*Id.* at 11–12.) McBride explained that he did not reanalyze those three elections, the 2002 Board of Education District 3, the 2006 Board of Education District 3, and the 2008 Board of Education District 1 races, because he did not have voter turnout data in those elections available to him, and therefore he had "nothing new" to report from his original report. (Doc. 157 at 60:25–61:9.) McBride testified that he stood by the results of his original analysis. (*Id.* at 61:10–12.) The Court, however, does not find any of the original analysis credible after seeing how drastically different the voter turnout numbers were from

McBride's original predictions. But even if it did, and even assuming those three elections show a lack of cohesion, they would only bring the total to ten cohesive elections and five non-cohesive elections. The Court finds those results would still satisfy factor two.

The Court also does not accept that McBride's selection criteria introduced bias into his results. His selection criteria—recent elections for which he had reliable turnout data—is entirely reasonable. Sumter County was free to run its own analysis on additional elections to show how McBride's results were unreliable. It chose not to do so.

Fourth, the County argues McBride's analysis is not credible because in some cases his estimates of voter preferences total over 100%, a logical impossibility. (Doc. 170 at 14.) Dr. McBride explained that ecological inference establishes bounds between zero and 100 for the estimates of black or white support for an individual candidate, but it does not constrain the sum of those estimates to 100%. (Doc. 157 at 94:9-95:20, 162:13-164:12.) Gary King, the creator of ecological inference, identified this problem and proposed that researchers could either use an algebraic expression to bring the estimates within a 100% bound or leave them as is. (Doc. 160 at 128:12–129:23.) McBride chose to leave them as-is to avoid altering the results. (*Id.* at 130:13–19.)

The County's expert, Dr. Karen Owen, testified in her deposition that the EzI program—written by Gary King and used by McBride to conduct his EI analysis—could give a sum of over 100% for the estimates of white voter support or black voter support. (*Id.* at 57:6–10.) At trial, Owen testified that a sum of over 100% would call into question the data inputted because "Gary King wanted to ensure we were getting estimates between a bound of zero and 100 percent." (Doc. 160 at 55:14–20.) Owen has never used EzI (*id.* at 53:14–17), did not independently analyze the elections in Sumter County (*see generally* Doc. 154-9), did not use EI in her dissertation or research (Doc. 160 at 59:8–16), did not publish any results using EI until 2015 (*id.* at 59:17–24), and could not identify a source for her claim that a sum over 100% calls into question the accuracy of the estimates. (*id.* at 58:20–59:7.) The Court does not find her criticism credible. Rather, it accepts McBride's testimony that

EI can give sums exceeding 100% and that such a result does not call into the question the reliability of McBride's analysis.[6]

C. The Third *Gingles* Factor: Majority Bloc Voting

Finally, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (citation omitted). "[T]he degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances. Consequently, there is no simple doctrinal test for the existence of legally significant racial bloc voting." *Id.* at 57–58.

"[P]laintiffs seeking to establish the third *Gingles* factor 'must show not only that whites vote as a bloc, but also that white bloc voting *regularly causes* the candidate preferred by black voters to lose; in addition, plaintiffs must show not only that blacks and whites sometimes prefer different candidates, but that blacks and whites *consistently* prefer different candidates.'" *Johnson v. Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002) (quoting *Johnson v. Hamrick*, 196 F.3d 1216, 1221 (11th Cir. 1999)).

The elections analyzed in this case fall into three general categories. First are those seven races where a white candidate faced an African American candidate. In six of those seven races, as detailed in factor two, there was a clear candidate preferred by African Americans. An average of 88.3% of white votes cast in those races went to the white candidate. African American candidates only won two of those races: the 2014 District 5 race and the 2010 District 3 race. In District 5, over 70% of the voting-age population is black. In the previous District 3, the population was approximately half white and half black.

[6] The Court cannot refrain from commenting on one other argument advanced by the County. McBride testified that EzI runs on 32-bit operating systems and cannot be run on newer 64-bit systems. (Doc. 160 at 128:1–8.) Sumter County contorts this fact in an attempt to discredit McBride: "Dr. McBride admitted that the program he used is so outdated that he had to adjust his computer settings to run it." (Doc. 170 at 15.) EzI is merely a program which allows a researcher to perform a mathematical analysis. The program's age may cause computer compatibility issues and slow load times, but the math underlying it never changes. The results of Adrien-Marie Legendre's regression models in 1805 would be no different if run again today. Any attempts to impugn the credibility of McBride's analysis based on the age of the program he used to run it is illogical, not credible, and completely irrelevant to the matter at hand.

African Americans constituted 48.4% of the voting-age population. (Doc. 154-6.) In sum, in six of the seven races, African Americans and whites preferred different candidates. The Court excludes the seventh race—the March 2014 District 6 election—because, without a black-preferred candidate, it cannot meaningfully consider whether white voters are usually able "to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. In four of the six races in this category, the black-preferred candidate lost. African Americans had only one true success: the District 3 race. The District 5 win was in a predominantly African American district. *See Old Pers. v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000) (considering minority group success in minority-majority districts under the totality of the circumstances, but not under *Gingles* factor three because "[t]o do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-[minority] districts").

The second type of race is where there are multiple candidates facing a black-preferred candidate. The Court counts four such races: the 2014 elections in District 1, District 2, and At-Large Seat #1, and the 2004 sheriff race. The Court discounts the race for sheriff. There, 96.5% of African Americans wrote in Nelson Brown, demonstrating an incredible level of political cohesion. While only 4.4% of whites voted for Brown, a write-in candidacy is a special circumstance which does not shed light on whether there is "racial bias in the voting community." *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). The Court can only speculate as to whether white voters were aware that Brown was running as a write-in candidate and, if they did, whether they would have voted for him. In the District 1 case, between 85% and 88% of white residents voted against the black-preferred candidate. The African American candidate was still able to win the race, however, as 62.7% of the voting-age population in that district is black. In the District 2 race, between 89.1% and 94.2% of white residents voted against the black-preferred candidate. The African American candidate was defeated and the two white candidates advanced to a run-off election. In the At-Large Seat #1 race, between 92.2% and 95.9% of white residents voted against the black-preferred candidate. Although the black-preferred candidate won the plurality and was able to advance to a run-off, white voters then coalesced around a single candidate and defeated him.

Discounting the majority-black district, African Americans had no real successes in these types of elections.

Finally is the one election where two white candidates faced each other—the 2014 District 4 election. The race had no clear black-preferred candidate, nor a clear white-preferred candidate. The Court discounts that race because of the lack of a clear preference and the lack of an African American running. *See Johnson*, 196 F.3d at 1221.

Sumter County argues the results from the at-large elections should be discounted because Busman and Roland had worked in the Sumter County schools, but Coley and Pless had not. (Doc. 170 at 20.) The election of the white candidates, it implies, is thus a preference for better-qualified candidates and does not reflect "entrenched voting patterns." (*Id.* at 21.) The Court disagrees. The Ninth Circuit has rejected any attempt "to scrutinize the qualifications of minority candidates who run for public office in jurisdictions with historically white-only officeholders." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 558 (9th Cir. 1998). There does not appear to be any binding Eleventh Circuit law holding the same. However, the Court finds that even if it can examine candidate quality, doing so would not discount the importance of the at-large elections. While Coley had never worked in the school district, he had been a school board member for almost a decade. Conversely, his opponent Roland had impeccable education credentials but knew very little about the community and had never had a student in the public school system. Voters could easily decide either was more qualified. Likewise, Busman volunteered as a team physician and is an upstanding member of the community, but homeschooled three of his children rather than send them to the school district he oversees. His opponent, Pless, had experience on the School Board and a background in education. Voters could reasonably select either.

Sumter County points out that African Americans have had success in November general elections. (Doc. 170 at 18.)[7] Neither side has presented a statistical analysis of these

[7] Sumter County also wants to attribute any success by Democrats in these elections to African Americans. (*See* Doc. 172 at ¶ 7.) The Court declines to do so. First, in many races, the Democrat and Republican are both likely to be white. (*See generally* Doc. 154-10.) The Court has already explained it would be discounting such races. *See Johnson*, 196 F.3d at 1221. Second, there is no statistical evidence before the Court of how likely African Americans in Sumter County are to support Democrats. Sumter County relies solely on McBride's testimony that (1) "the candidate of choice in the black community would be the Democrat"—but

races. There is thus no evidence of whether there was a black-preferred candidate in those races. Sumter County flippantly asserts Wright "cannot seriously contend that Barack Obama and Sanford Bishop are *not* the preferred candidates of the Sumter County black community . . . ." (Doc. 170 at 18 (emphasis in original).) Yet in the March 2014 District 6 election, an African American faced a white candidate and there was no black-preferred candidate. The Court will not merely assume black voters in Sumter County support every black candidate. Moreover, these elections took place at a different time of year than the current school board elections, included voters from outside of Sumter County, and were for positions other than school board. Accordingly, they are of diminished relevance here because they do they not allow the Court to make inferences about voter patterns in the challenged districts. *See Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 760 (N.D. Ga. 1997).

Reviewing the elections analyzed by McBride, there can be no doubt black and white voters consistently prefer different candidates. Moreover, white voters are usually able to the defeat the candidate preferred by African Americans. There was only one true "success" in the elections analyzed where an African American candidate preferred by African Americans was able to defeat a white-preferred candidate when the electorate was not predominantly black. The third *Gingles* factor is satisfied.

Sumter County argues Wright cannot satisfy factor three because African Americans in Sumter County are not a "minority," but rather a majority of the population and a plurality of the voting-age population. (Doc. 170 at 5.) Other courts have found that although a majority group claiming a need for protection under Section 2 "faces an obvious, difficult burden in proving that their inability to elect results from white bloc voting, they are not precluded, as a matter of law, from seeking to prove such a claim." *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1555 (5th Cir. 1992). Like any other group, they must show "less

---

providing no basis or statistics in support of that position, and (2) "more than possibly 92 percent of African Americans support the Democrat Party" nationally—but providing no evidence of the percentages in Sumter County. (Doc. 157 at 180:25–181:4, 185:3–8.) Third, the Court is unable to determine if there was any minority cohesion or white bloc voting in these races because no EI analysis has been run on them. Any finding by the Court that wins by Democrats are wins by the black-preferred candidate over the white-preferred candidate would be pure speculation.

opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63 (citation omitted).

The County hypothesizes ways in which it believes Wright could theoretically satisfy that burden—past discrimination could result in lower voter registration rates, felon disenfranchisement could disproportionately impact African Americas, the voting rolls might be inaccurate, other minority groups may band together with whites, there may be racially gerrymandered districts, or other practical impediments to African Americans voting may exist. (Doc. 170 at 3–7.) But, the County concludes, Wright has made no such showing. (*Id.*)

While African Americans do outnumber whites on the voter rolls, the voting booth is another story. In the school board elections since the new plan was implemented, white voters have outnumbered black voters in seven of nine races. *See* Tables 1; 2.[8] The only exceptions are the elections in District 1 and District 5 where African Americans make up over 60% of the voting-age population. Sumter County cites *Missouri State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1071 (E.D. Mo. 2016), for the proposition that low voter registration rates can form the basis for a Section 2 claim by a group that is a near-majority in population or voting-age population. (Doc. 170 at 6.) The Court finds no meaningful difference between a failure to register to vote and a failure to cast a vote. It is, of course, true that were more African Americans to register (as in *Missouri State*) or turn out to vote (as here), they would likely be able to elect their preferred candidate. But our circuit has roundly rejected any effort to blame African Americans' lack of electoral success on "a failure of blacks to turn out their votes." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1568 (11th Cir. 1984) (quoting district court decision) (punctuation corrected). As outlined in the factual findings, Sumter County and the State of Georgia have a long history of discrimination. The effects of that discrimination still linger today in the form of disproportionate educational achievement,

[8] The Court finds these numbers by multiplying the percentage of the white and black voting-age population data contained in Table 1 by the respective white and black turnout data in Table 2. While the numbers will be slightly off because the demographic data has changed since the 2014 elections took place, any error is too small to impact the Court's conclusions. McBride provided black voting-age populations for each election at the time of that election (or near to), but it does not include corresponding white voting-age population numbers. (Doc. 153-87 at 11.)

employment, income levels and living conditions. Sumter County cites an out-of-circuit case requiring evidence linking past discrimination to low turnout today. (Doc. 170 at 8 (citing *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992)).) Our circuit has no such stringent requirement. "[W]hen there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination, as there [is] in this case, the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else." *Marengo*, 731 F.2d at 1569. Sumter County has produced no evidence or argument showing what the low African American voting rate is attributable to. (*See generally* Doc. 170.) The Court, therefore, must assume a causal connection to the past discrimination.

Having found that all three *Gingles* factors are satisfied, the Court moves on to the Senate factors.

D. Senate Factor One

The first Senate factor is the history of voting-related discrimination in the State or political subdivision. "[P]ast discrimination can severely impair the present-day ability of minorities to participate on an equal footing in the political process. Past discrimination may cause blacks to register or vote in lower numbers than whites. Past discrimination may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984).

The Parties have stipulated that "Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans." This factor weighs heavily in Wright's favor.

E. Senate Factor Two

The second factor is the extent to which voting in the elections of the State or political subdivision is racially polarized. "[T]his factor will ordinarily be the keystone of a dilution case." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1566 (11th Cir. 1984). The Court finds the Sumter County's voters to be highly polarized. In ten of the twelve elections analyzed, over 85% of African American voters voted for the same candidate. Less than a

quarter of white voters supported the black-preferred candidate in any of those races. The average level of white support in those races was under 10%. In one of the two races which were not polarized, there was no African American candidate. The election results, therefore, would surely "have been different depending upon whether it had been held among only the white voters or only the black voters." *Thornburg v. Gingles*, 478 U.S. 30, 54 (1986) (citation omitted). This factor also weighs heavily in Wright's favor.

F. Senate Factor Three

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. The current plan employs three parts relevant to this Senate factor.

First, Sumter County uses staggered terms for the at-large seats, with one at-large seat filled at each regular election. (MUF ¶ 6; PX 26 (House Bill 836).) Were the County to instead seat the top two vote-getters for at-large seats every four years, African Americans would have an enhanced opportunity for election in those seats. An illustrative example is the May 20, 2014, election for at-large seat number 1. There, an African American candidate received 36.7% of the vote and a white candidate received 36.4% of the vote. The white candidate won the subsequent run-off. Had the two candidates receiving the most votes instead been elected, the African American candidate—Michael Coley—would be a school board member.

Second, Sumter County uses a majority-vote requirement in elections for the at-large seats. (MUF ¶ 3.) The impact on African American candidates is apparent in the same race. Had Sumter County employed a plurality-win system, Michael Coley would have won the May 20, 2014, election. Because of the majority-win system, he was defeated. Majority-vote requirements have long been recognized as enhancing an opportunity for discrimination. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 749 (5th Cir.), *on reh'g,* 999 F.2d 831 (5th Cir. 1993); *City of Rome v. United States*, 446 U.S. 156, 183 (1980), *abrogated on other grounds by Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

Third, the addition of at-large districts enhanced the opportunity for discrimination. Several witnesses with experience in local politics testified that running at large in Sumter County is more expensive than running in a district and therefore presents a particular barrier for African-American candidates. (Doc. 158 at 52:24–54:23, 77:20–78:4, 135:23–138:2.) Although Sumter County itself is not unusually large, the larger area nonetheless requires greater costs. One white candidate, Sylvia Roland, received unsolicited money to assist with those added costs. (Doc. 159 at 54:21–23.) There is no testimony of any African American candidate receiving a similarly unsolicited donation.

The third factor weighs in Wright's favor.

G. Senate Factor Four

The fourth factor is the exclusion of members of the minority group from candidate slating processes. "The term 'slating' is generally used to refer to a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991). There is no evidence in the record of any slating process in Sumter County. Accordingly, the Court cannot find whether a slating process would or would not exclude African Americans. This factor carries no weight.

H. Senate Factor Five

The fifth factor 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. As recognized in the original Senate Report, "disproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." *Johnson v. Mortham*, 926 F. Supp. 1460, 1519 (N.D. Fla. 1996) (quoting S. Rep. No. 97-417 at 29 n.114 (1982)).

As detailed in the factual findings, only 13.6% of white residents lack a high school diploma. The rate is over double—29.9%—for African Americans. (Doc. 164 at 4.) White residents are over three times more likely to have a bachelor's degree or higher—30.9% versus 8.8% of African Americans. (*Id.*.) The educational differences are reflected in employment numbers as well. Among those in the workforce aged sixteen years or over, the unemployment rate is 7.1% for white residents and 18.2% for African Americans. (*Id.*) Only 15.3% of white residents live in poverty compared to an astonishing 46.2% of African Americans. (*Id.* at 5.) Three in four African American households receive Supplemental Nutrition Assistance Program benefits. (*Id.*) The number is reversed for white residents: only one in five households receive the same benefits. (*Id.*) The median African American household earns $22,736, less than half of the median $48,672 for white households. (*Id.*) There can be no doubt that African Americans in Sumter County face "disproportionate educational, employment, income level and living conditions arising from past discrimination . . . ."

There can also be no doubt that the level of black participation in Sumter County politics is depressed. In the elections analyzed in the case, African Americans were on average over 60% less likely than their white counterparts to cast a vote. *See* Table 2.

Having shown a disparate socio-economic status between white and black residents of Sumter County and a depressed level of political participation by African Americans, this factor weighs heavily in Wright's favor. *See* S. Rep. No. 97-417 at 29 n.114 (1982).

I. Senate Factor Six

The sixth factor is the use of overt or subtle racial appeals in political campaigns. Wright points to alleged incidents of African American candidates facing hostile and racist constituents while on the campaign trail. (Doc. 171 at 45.) The sixth factor, however, concerns racist messages being communicated to constituents, not constituents communicating racists messages to the candidates. *See*, *e.g.*, *Meek v. Metro. Dade Cty., Fla.*, 805 F. Supp. 967, 982 (S.D. Fla. 1992), *aff'd in part, rev'd in part*, 985 F.2d 1471 (11th Cir. 1993) (voters were told that "Black candidates share common goals with Jesse Jackson or Nelson Mandela"). There is no evidence, and Wright does not allege, that any political campaign

employed overt or subtle racist appeals. Accordingly, this factor weighs in favor of Sumter County. However, the Court recognizes that "overtly bigoted behavior has become more unfashionable." *Marengo*, 731 F.2d at 1571 (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977)). While this factor can weigh heavily in favor of a plaintiff when present, "its absence should not weigh heavily against a plaintiff proceeding under the results test of section 2." *Id.*

J. Senate Factor Seven

The seventh factor is the extent to which members of the minority group have been elected to public office in the jurisdiction. Here, it is undisputed that no African American has ever been elected to an at-large seat on the School Board under the challenged plan. (Doc. 125 at 20.) No African American has been elected in a School Board district except in districts where African Americans make up a majority of the voting-age population. (*Id.*) The only evidence of an African American being elected to county-wide office was in 2016 when Cortisa Barthell became Clerk of Superior Court. Barthell won the Democratic nomination where African Americans made up 81.9% of the electorate and did not face a general election opponent. There is no evidence in the record of an African American in Sumter County winning a contested race for county-wide office.

In sum, African Americans have lacked success in Sumter County elections. This factor weighs heavily in Wright's favor.

K. Additional Senate Factors and Considerations

The Senate Report and courts applying Section 2 have recognized several other factors that may be relevant in determining the totality of the circumstances. The Court reviews those relevant to this case.

First is whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. S. Rep. No. 97-417 at 29. Wright asserts the School Board's policy assertion for adding at-large districts was tenuous. (Doc. 171 at 48–51.) The Court disagrees. At nine members, the Sumter County School Board was one of the largest in the state. At the recommendation of its accreditation agency, the School Board reduced the number of members and realigned

the districts to mirror those of the County Board of Commissioners. Those decisions were entirely reasonable. But the Board of Commissioners only has five members. Wright asserts there was no reason to move to a seven-member Board with two at-large seats rather than a five-member Board with no at-large seats. The only testimony on this issue was Busman's testimony that it was "easier" to go from nine to seven members rather than down to five. (Doc. 159 at 16:10–15.) As noted in the factual findings, the Court infers that the smaller shift was "easier" because fewer incumbent seats were put at risk. There is nothing tenuous about minimizing changes to make the districts more politically palatable.

Another reasonable interpretation is that nine was the status quo, and the further one strays from the status quo, the more difficult the transition can be. Again, this justification would not be tenuous. It can be challenging to predict the problems which will arise when shifting to a new district alignment. The more the new system resembles the old, the more familiar it will be to election officials, candidates, and voters.

Wright argues the asserted rationale is belied by the timing of the changes. While it is true that the final Board vote approving the plan did not occur until a lame-duck session immediately before the newly-elected black board member would give African Americans a majority on the Board, the bill was introduced before that election, and the final resolution passed without any opposition. The timing does not undermine the asserted purpose.

Further, the General Assembly's re-enactment of a plan not precleared by the Department of Justice following the *Shelby County* decision is not evidence of an improper motive. (*See* Doc. 171 at 51.) When the Department requested additional information to decide if the plan should be given preclearance, it was the African American majority on the Board which refused to provide that information. The plan's lack of preclearance, therefore, is not evidence of discrimination toward African Americans.

The lack of a tenuous policy justification thus weighs toward Sumter County. However, a showing that the policy justification is race-neutral does not negate "a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. No. 97-417 at 29 n.117.

Second is the proportionality inquiry. "'Proportionality' as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Proportional districts help to assure that "minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" *Id.* at 1020 (quoting 42 U.S.C. § 1973(b) (1994)). Wright argues that "African Americans constitute [49.5%] of Sumter's County's voting-age population, but they constitute a majority of the voting-age population in only two (28.6%) of the board's seven seats."[9] (Doc. 171 at 52 (citations omitted).) The Court agrees that the districts are not proportional. While African Americans hold a majority *or plurality* in four of the seven districts, it is abundantly clear plurality districts do not provide an equal opportunity for African Americans to elect representatives of their choice given the history of discrimination in the county. Accordingly, because African Americans hold a majority in only two districts, this factor weighs toward Wright.

Wright asserts a third relevant factor: racial separation. (Doc. 171 at 52.) The Court finds no support for racial separation being a consideration in a Senate Factors analysis. Wright cites three cases arguing otherwise. Two, *United States v. City of Euclid*, 580 F. Supp. 2d 584, 592–93 (N.D. Ohio 2008) and *United States v. Charleston Cty.*, 316 F. Supp. 2d 268, 291 (D.S.C. 2003), *aff'd sub nom.*, 365 F.3d 341 (4th Cir. 2004), are out-of-circuit district court cases with no precedential value in this Court. The third, *McMillan v. Escambia Cty., Fla.*, 688 F.2d 960, 967–68 (5th Cir. 1982), *vacated*, 466 U.S. 48 (1984), only noted the district court's observation of racial separation in its Fourteenth Amendment—not Voting Rights Act—analysis, and in any event the judgment was vacated on appeal and never reinstated. *See Tallahassee Branch of NAACP v. Leon Cty., Fla.*, 827 F.2d 1436, 1440 (11th Cir. 1987) ("*McMillan* has no binding precedential effect."). In the absence of any authority recognizing this factor, the Court declines to consider it.

[9] Wright actually claims African Americans constitute 48.1% of the voting-age population. The Court refers only the most recent demographic data before it, which puts that number at a slightly higher 49.5%.

II. Totality of the Circumstances

The Court must "consider the 'totality of circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425–26 (2006). "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995) (citation omitted); *see Thompson v. Glades Cty. Bd. of Cty. Comm'rs*, 493 F.3d 1253, 1261 (11th Cir.), *reh'g en banc granted, opinion vacated*, 508 F.3d 975 (11th Cir. 2007), *and on reh'g en banc*, 532 F.3d 1179 (11th Cir. 2008) (noting the *Niagara Falls* standard, though the opinion was later vacated and the district court affirmed by an evenly divided en banc panel). "In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act." *Niagara Falls*, 65 F.3d at 1019 n.21 (citation omitted).

The Court finds, based on the totality of the circumstance, that African Americans in Sumter County have less opportunity to elect candidates of their choice than do white citizens. Under the totality standard, the Court finds the following facts particularly compelling: (1) the incredibly high rates of polarized voting in races that pit an African American candidate against a white candidate; (2) the glaring lack of success for African American candidates running for county-wide office, both historically and recently, despite their plurality in voting-age population; (3) the undisputed history of discrimination in Sumter County and throughout Georgia; (4) the lingering effects of that discrimination today, including the comparatively low income and education levels and high rates of poverty for African Americans in Sumter County; and (5) the low rate of African American turnout in these elections which—in the absence of evidence to the contrary—the Court attributes to the history of discrimination and the socioeconomic disparities. Because of these factors, the elections for at-large seats do not give African Americans in Sumter County a meaningful opportunity to elect the candidates of their choice.

III. Illustrative Plan

> "In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, 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, 114 S. Ct. 2581, 2585, 129 L. Ed. 2d 687 (1994) (footnote omitted).

The Court finds that, by the bare minimum, Wright has shown his illustrative plan "achieve[s] a more proportional representation of minorities than did the previous multi-member 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)). African Americans in Sumter County are currently able to elect two of seven candidates of their choice. The Court accepts, based on the evidence presented, that they are unable to elect the candidates of their choice in the at-large districts where they account for 49.5% of the voting-age population. In the illustrative plan, neither party contests that African Americans would be able to elect the candidates of their choice in District 1 and District 5. The question for the Court, then, is whether they would have an opportunity to elect the candidate of their choice in illustrative District 6, a single-member district where they represent 54.5% of the voting-age population. As McBride readily concedes, the answer is "guesswork." Based on the cohesion and crossover voting patterns, that percentage would be sufficient in some of the current single-member districts, but not others. McBride asserts that a 49.5% district is not a black-majority district, so it would behave like districts with far less black voters. Meanwhile, a 54.5% district is a black-majority district, so it would behave differently from the at-large districts. (Doc. 158 at 13:10–20:3.) The Court finds no support for the idea that a five percentage point shift would have such a drastic impact on voting behaviors.

That said, the testimony before the Court is that illustrative District 6 has a greater percentage of African American voters than has been needed in other districts to elect the candidate of their choice. (Doc. 153-87 at 24.) The five percentage point increase in African American voters over the current at-large district, combined with the corresponding eight percentage point drop in white voters from the at-large district to the illustrative District 6

could create a potentially sizable shift in the election results. The only *testimony* before the Court is that "black voters would have a meaningful opportunity to elect candidates . . . of their choice in [illustrative District 6]." (*Id.*) Sumter County makes the *argument* that this is not the case, (Doc. 170 at 24–29), but it did not ask its expert to conduct any analysis of Wright's illustrative plan in this stage of the case. (Doc. 159 at 221:16–21.)

Sumter County suggests that a minimum of 60% of the voting-age population is needed to give African Americans an opportunity to elect candidates of their choice, citing cases in which have adopted a similar number. (Doc. 170 at 25); *Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984). But in those cases, the courts recognized a higher number was necessary *based on the evidence in the case*. *See*, *e.g.*, *Ketchum*, 740 F.2d at 1415 ("During the trial, witnesses for both sides testified that 65% of total population is a widely recognized and accepted criterion in redistricting formulations.") This case has no such evidence. Again, the only testimony is that 54.5% would likely be sufficient.

Sumter County next argues that the illustrative plan would be a step backward because it trades two 49% African American districts for a 54% district and a 41% district. The Court has already found that African Americans do not have a meaningful opportunity to elect candidates of their choice in the at-large districts. They are stuck at two representatives of seven. In the illustrative plan, they would at least have an opportunity to win a third seat.

This is not to say the Court believes Wright's illustrative plan is the one which should ultimately be put into place. Africans Americans currently constitute a majority of the population in Sumter County. Their numbers, by percentage of the population, continue to grow each year. If these trends continue, African Americans will soon make up a majority of the voting age population in Sumter County, as well. At some point under the current plan—if the trends continue—one would expect black-preferred candidates to win at-large seats and constitute a majority of the School Board. Under the illustrative plan, African Americans would need to win a district where they represent roughly forty percent of the voting-age population to pick up a fourth seat. Even with a growing share of the population, the Court finds it unlikely they will be able to do so in the foreseeable future so long as

voting in the country remains racially polarized. The Parties agree that Sumter County and Georgia's elected officials must be given the first opportunity to craft a remedial plan. (Doc. 140 at 3; 141 at 3.) The Court encourages the Parties and elected officials to be creative in exploring possible remedies. Redrawn district lines are but one tool available for remedying a Section 2 violation. For example, a discriminatory anti-single-shot voting rule can be fixed by removing the rule. *See Holder v. Hall*, 512 U.S. 874, 880 (1994). The problem for African Americans in Sumter County is not the number of voters, but how often they turn out to cast votes. The Parties and the General Assembly may consider whether any tools at their disposal could meaningfully improve turnout such that African Americans have an equal opportunity to elect candidates of their choice.

Finally, Sumter County argues that the illustrative plan "inflicts a constitutional injury." (Doc. 170 at 29 (capitalization altered).) The Equal Protection Clause of the Fourteenth Amendment "prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Bethune–Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017)). To prove a violation, a plaintiff must show that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). "That entails demonstrating that the legislature subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Cooper*, 137 S. Ct. at 1463–64 (quotations and citations omitted). Here, there is no evidence that the illustrative plan subordinated any factors for race considerations. McBride testified, and Sumter County does not contest, that the illustrative plan "complie[s] with the one-person, one-vote principle, the Voting Rights Act, and traditional redistricting criteria including compactness, contiguity, respect for communities of interest, [and] respect for political boundaries." (Doc. 153-87 at 5.) The plan does not raise any constitutional concerns.

Accordingly, the Court concludes that the illustrative plan—while far from perfect—is likely to give African Americans a more proportional representation on the Board of Education than does the current plan. The Parties should not take this as an indication of

how the Court will view the proposed remedial plans in the next step of this case. The Parties have already begun a much more robust discussion of remedial plans in post-trial briefing. (*See* Docs. 174; 176; 180.) While that evidence is not before the Court at the liability stage, (*see* Doc. 189), the Court expects a much more expansive body of evidence to determine the effectiveness of proposed remedial plans following post-trial discovery.

CONCLUSION

The Court finds that Plaintiff Mathis Kearse Wright, Jr. has established all three *Gingles* factors, that the majority of the Senate Factors weigh toward him, and that he has shown an illustrative plan which is likely to give African Americans a more proportional representation on the Board of Education than does the current plan. Accordingly, the Court finds, based on the totality of the circumstances, that the at-large districts of the Sumter County Board of Education dilute African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301.

The case now moves to a remedial stage. The Court agrees with the Parties that elected officials should have the first opportunity to remedy the unlawful election plan. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); (Docs. 140; 141). The Court notes that the General Assembly will be in session through at least Thursday, March 29, 2018. S.R. 631, 154th Gen. Assemb., Reg. Sess. (Ga. 2018). The Sumter County Board of Elections and Registration is **ORDERED** to confer with Sumter County's legislative delegation and inform that Court **no later than Monday, March 26, 2018** whether the General Assembly is inclined to enact a remedial plan before adjourning *sine die* or, if not, a timeline for when it believes a remedial plan could be adopted. While the time period is short, the Parties have already put considerable effort into their proposed remedial plans, which will greatly assist the General Assembly in its efforts.

Given the Court's holding, Wright's Motion for Preliminary Injunction (Doc. 190) is

DENIED WITHOUT PREJUDICE. Following the status report from the General Assembly, the Court will consider whether the May elections must be enjoined.

SO ORDERED, this 17th day of March 2018.

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

Tab 204

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

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

ORDER

On November 20, 2017, the Court issued an order memorializing the pretrial conference in this action. The order directed the parties to "submit their views on the procedure required for an order implementing a redistricting plan in this action were Plaintiff to prevail . . . ." (Doc. 134.) Plaintiff Mathis Kearse Wright, Jr. submitted his views first. (Doc. 140.) He argued the Court should give elected officials the first opportunity to remedy an unlawful plan, but that timing or other factors may make doing so impracticable. (*Id.* at 3.) Any new plan put in place, he noted, must not violate Section 2 of the Voting Rights Act. (*Id.* at 4.) Defendant Sumter County Board of Elections and Registration agreed that the legislature should have the first opportunity to remedy an unlawful plan. (Doc. 141 at 3.) If the legislature failed to do so, it noted, the Court would have to put a plan in place which would approximate the plan the legislature would have put in place. (*Id.* at 4.)

The Court then held a bench trial in this matter on December 11–14, 2017. (Docs. 144–146; 147.) Following the trial, the Court ordered the parties to submit a series of post-trial briefs, including proposed remedial plans. (Doc. 147.)

Wright filed his proposed remedial plans on January 22, 2018. (Doc. 174.) Sumter County filed a response on February 5, 2018, (Doc. 176), and Wright then filed a reply on February 14, 2018. (Doc. 180.) In the midst of that briefing, the Court filed an order

explaining that a series of motions filed and hearings requested by the parties would prevent it from determining liability and implementing a remedial plan prior to the scheduled May 2018 elections. (Doc. 179.) It ordered the parties to files brief no later than February 23, 2018, and no longer than five pages, addressing whether the Court should allow the upcoming election to proceed as planned with the current districts or enjoin the election. (Doc. 179.)

Wright responded that, in the event the Court found the current plan to violate Section 2, the election should be enjoined. (Doc. 181 at 1.) He suggested the election be moved to the general election on Tuesday, November 6, 2018. (*Id.* at 3.) Sumter County disagreed. (Doc. 182.) It suggested that, even if the Court ruled in Wright's favor on the merits, the elections should go forward as scheduled. (*Id.* at 1.) The Court held a status conference on February 28, 2018. Wright suggested the following timeline for a general election:

- July 23, 2018: Deadline for new district boundaries to be set.
- August 6–10, 2018: Candidate qualifying period.
- August 8, 2018: Approximate time ballots begin being created.
- September 21, 2018: Deadline for ballots to be made available.
- November 6, 2018: General election.

(Doc. 189.) The Court noted that those dates were reasonable in the event the election was enjoined. (*Id.*)

On March 17, 2018, the Court found that the current school board districts violate Section 2 of the Voting Rights Act. (Doc. 198.) The Court noted that the Georgia General Assembly would be in session through at least Thursday, March 29, 2018. S.R. 631, 154th Gen. Assemb., Reg. Sess. (Ga. 2018). It ordered Sumter County "to confer with Sumter County's legislative delegation and inform th[e] Court no later than Monday, March 26, 2018 whether the General Assembly is inclined to enact a remedial plan before adjourning sine die or, if not, a timeline for when it believes a remedial plan could be adopted." (Doc. 198 at 37.) Sumter County filed a status report on March, 26, 2018. (Doc. 201.) It spoke with Senator Freddie Powell Sims, the representative for Georgia Senate

District 12, who informed counsel that the Assembly would not be able to change the school board districts before it returned to session in January 2019. (*Id.*)

Also on March 26, 2018, the parties filed supplemental briefs regarding remedy proposals. Wright argued that, if the General Assembly failed to enact a remedial plan before adjourning, the Court should enact a remedial plan as an interim remedy and move the election date to November 6, 2018. (Doc. 199 at 1.) Again, Sumter County disagreed. (Doc. 200.) It suggested the Court leave the May 2018 election in place and permit the Assembly to enact a plan in 2019. (*Id.* at 29.) Further, it requested the Court issue a partial final judgment in accordance with Federal Rule of Civil Procedure 54(b) and reserve jurisdiction over remedial issues until after the Assembly has an opportunity to act. (*Id.* at 30.)

On March 30, 2018, Wright filed an Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. (Doc. 202.) He informs the Court that, in the absence of an injunction, absentee ballots may begin being distributed on April 3, 2018. (*Id.* at 4.) The ballots for the election have already been printed and cannot be changed. (Doc. 202-1.) Wright requests that Sumter County: "(a) redact the names of school-board candidates by means of a sticker or permanent marker; (b) include a notice with the ballots that the school-board election has been cancelled; or (c) both. Alternatively, the Court could enjoin the defendant from distributing any ballots for a few days while the parties attempt to agree on a suitable procedure for cancelling the election." (Doc. 202 at 8 (citation omitted).)

Later the same day, Sumter County filed a Notice Regarding Briefing. (Doc. 203.) It notes that Wright's motion was filed the morning of Good Friday and seeks nearly-immediate Court action without response from the County. (*Id.*) It requests until Wednesday, April 4, 2018 to file a response. (*Id.*)

DISCUSSION

At the outset, the Court notes that under the totality of the circumstances, including its resolving of dispositive motions, a bench trial, post-trial hearings, and extensive and ongoing briefing by the parties, it has an adequate record before it to consider injunctive relief consistent with its duty to protect the right at issue. Further, Sumter County—as will

be further explained—will be provided an opportunity to respond to this order consistent with the local rules.

Before delving into the appropriate remedy, the Court reviews the different forms of injunctive relief available in federal court. "[T]here are basically three types of injunctions that can be issued by a federal court[:] . . . the temporary-restraining order, the preliminary injunction, and the permanent injunction." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2941 (3d ed.).

- A temporary-restraining order typically is sought and issued on an ex parte basis and operates to prevent immediate irreparable injury until a hearing can be held to determine the need for a preliminary injunction.
- A preliminary injunction is effective until a decision has been reached at a trial on the merits.
- A permanent injunction will issue only after a right thereto has been established at a trial on the merits.

Id. (formatting altered). Because the Court has already decided the merits of this action in Wright's favor, neither a temporary restraining order nor a preliminary injunction are appropriate. Rather, the Court must decide whether to issue a permanent injunction, the standards for which vary slightly from those cited by Wright. "[T]o obtain a permanent injunction, a party must show: (1) that he has prevailed in establishing the violation of the right asserted in his complaint; (2) there is no adequate remedy at law for the violation of this right; and (3) irreparable harm will result if the court does not order injunctive relief." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005).

To begin with, the Court agrees with the parties "that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). The Georgia General Assembly should have the first opportunity to craft a remedial plan when doing so is "practicable." *Id.* at 540. Here, it is clearly not practicable to defer to the Assembly for the 2018 election. Both the Georgia Senate and the Georgia House of Representatives have now adjourned sine die, and the senator representing Sumter County has informed the Court through Sumter County that the Assembly will not act on this issue until 2019.

"[O]nce a State's[—or here, school board's—]legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Unsurprisingly, then, the Court finds that all three requirements for a permanent injunction have been met. First, Wright has prevailed in his claim. (Doc. 198). Second, there is no adequate remedy at law for a violation of Section 2 of the Voting Rights Act. *See Dillard v. Crenshaw Cty.*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) ("it is simply not possible to pay someone for having been denied a right of this importance"). Likewise, and third, the loss of a meaningful right to vote creates an irreparable harm. *Id.*

Once the Court decides the standards for a permanent injunction are met, it "must undertake an 'equitable weighing process' to select a fitting remedy for the legal violations it has identified . . . ." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (citation omitted). The Court must consider "a special blend of what is necessary, what is fair, and what is workable." *New York v. Cathedral Acad.*, 434 U.S. 125, 129 (1977) (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)); *see Covington*, 137 S. Ct. at 1625 (applying *New York* to the voting rights context). Relief is not automatic. A district court may permit an election to proceed even after a finding that the districts are unlawful when "an impending election is imminent and a State's election machinery is already in progress." *Id.* There is no shortage of courts that have done so. *See*, *e.g.*, Order at 162–163, *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. August 11, 2016).

The Supreme Court recently noted, in the context of a district court setting a special election to remedy a racial gerrymander, a non-exhaustive list of factors district courts may consider in deciding a proper equitable remedy. They include "the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty." *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

Here, the infringement of black voters' right to vote in Sumter County is severe. Despite African Americans constituting 49.5% of the voting age population in Sumter County, they are only able to elect their candidates of choice to 29% of the school board seats. (Doc. 198 at 2.) Were the Court to allow the election to proceed, this vastly disproportionate representation would continue for another two years. Second, the Court finds that enjoining this election and moving it to November would cause minimal disruptions to the ordinary processes of governance. New school board members do not begin their term until the January following the election, so moving the election date from May to November will not interfere with the regular terms of board members. (Doc. 153-85); *cf. Covington*, 137 S. Ct. at 1625 (vacating injunction which would have shortened legislators' terms from two years to one). The Court acknowledges that voters may be confused by the changed election date. However, the school board held elections in November as recently as 2010. (Doc. 153-61.) A November school board election will not be an unusual sight for Sumter County voters. Moreover, Wright is not proposing to move the election to an unusual, specially set election date. *Cf Covington*, 137 S. Ct. at 1625 (setting special primary and general elections for the fall of 2017). Voters are used to elections taking place on the first Tuesday after the first Monday in November of even-numbered years. A number of races will already be on the ballot, and the addition of a school board election is unlikely to disrupt the election process.

Finally, the Court is acting with proper judicial restraint. It attempted to defer to the General Assembly to craft a remedy for the 2018 elections. (Docs. 198; 201.) It is only after learning that the Assembly would be unable to act that the Court considered an injunction. Any injunction and specially set election will be for the 2018 election only. The Court will again defer to the Assembly when it returns to session in 2019.

CONCLUSION

Accordingly, the Court finds that the balance of equities weighs toward enjoining the May 2018 election as to the Board of Education. The Court construes Wright's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. 202) as a motion for a permanent injunction. Pursuant to Middle District of Georgia Local Rule 7.7,

the Court finds that the extensive briefing on this issue, as outlined above, has allowed it to determine "the relative legal positions of the parties so as to obviate the need for the filing of opposition thereto." The Court will entertain any objections to this order filed **no later than Friday, April 6, 2018**. Wright's motion for a permanent injunction (Doc. 202) is **GRANTED**. The Sumter County Board of Education election scheduled for May 22, 2018 is **ENJOINED** and **RESET** for November 6, 2018. Defendant Sumter County Board of Elections and Registration is hereby **ORDERED** to redact the names of school-board candidates by means of a sticker or permanent marker on all ballots distributed for the May 22, 2018 election, include a notice with all ballots for the May 22, 2018 election that the school-board election has been cancelled, or petition the Court prior to distributing any ballots for the May 22, 2018 election of another method by which it intends to inform voters in the May 22, 2018 election that the races for the Sumter County Board of Education has been enjoined.[1] Defendant Sumter County Board of Elections and Registration is **ENJOINED** from tabulating the votes cast in the May 22, 2018 election for any position on the Sumter County Board of Education.

The Court will enter an order **no later than July 23, 2018** setting interim boundaries for the new Sumter County Board of Education districts. The election for all Sumter County Board of Education seats set for May 22, 2018 will instead take place on **November 6, 2018**. The candidate qualifying period for that election will begin **August 6, 2018** and end **August 10, 2018**. The parties should inform the Court as soon as practicable if any of these deadlines are unworkable or if additional deadlines need to be set by Court order.

SO ORDERED, this 30th day of March 2018.

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

[1] The Court notes that Sumter County does not believe it has sufficient time to print and prepare notices for each absentee ballot or to redact all of the Board of Education candidates' names from the ballots. (Doc. 203 at 2.) The Court intends to be flexible with this requirement. In the event so many absentee ballots are to be distributed on April 3, 2018, that the County is unable to redact them all, the Court is not expecting Defendant's counsel to "cancel[] their plans to be with their families this holiday weekend." (*Id.*) Rather, Sumter County should formulate a reasonable plan to inform voters that the election has been enjoined and present it to the Court as soon as possible.