Nos. 18-11510 and 18-13510

United States Court of Appeals

for the

Eleventh Circuit

MATHIS KEARSE WRIGHT, JR.,

Plaintiff-Appellee,

– v. –

SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,

Defendant-Appellant.

INTERLOCUTORY APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

APPELLEE'S BRIEF

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18-11510 and 18-13510

Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Eleventh Circuit Rule 26.1, 26.1-2, and 26.1-3, counsel for the plaintiff-appellee certifies that the following persons and entities have or may have an interest in the outcome of this case:

ACLU Foundation, Inc.

ACLU Foundation of Georgia, Inc.

Baker & Hostetler, LLP

Braden, E. Mark

Brady, Robert

Khondoker, Aklima

Lawson and Reid, LLC

McDonald, M. Laughlin

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Raile, Richard R.

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Certificate of Interested Persons and Corporate Disclosure Statement (continued)

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Sells, Bryan L.

Stanley, Trevor

Sumter County Board of Elections and Registration

The Law Office of Bryan L. Sells, LLC

Wright, Mathis Kearse, Jr.

There is no nongovernmental corporate party to this proceeding.

/s/ Bryan L. Sells
Bryan L. Sells
Attorney for Mathis Kearse Wright, Jr.,
Plaintiff-Appellee
Dated: February 1, 2019

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Statement Regarding Oral Argument

This is a voting-rights challenge to the method of electing members of the Board of Education in Sumter County, Georgia. At issue is plaintiff Wright's claim that the board's two at-large seats 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 district court took evidence on Wright's claim in a four-day bench trial and later issued a 38-page ruling in which it made extensive findings of fact to support its ultimate conclusion that the challenged plan violates Section 2. And, after the Georgia General Assembly declined the court's invitation to devise a remedy, the court enjoined Sumter County from holding school-board elections in 2018 using the unlawful plan.

Sumter County now appeals the district court's injunctions and the finding of liability on which they are based. Despite the County's assertion that the appeal raises numerous issues of first impression and a conflict among the circuits, Wright submits that the district court's rulings have ample support in the record and stay well within the lines of firmly established caselaw.

As a result, no oral argument is necessary for this Court to affirm the district court's rather mild injunctions. Should the Court

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choose to hear oral argument, no more than 15 minutes per side will be necessary to address the most salient issues.

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Statement of Jurisdiction

Wright agrees with Sumter County that the only basis for the Court's jurisdiction over this appeal is 28 U.S.C. § 1292(a)(1), which confers jurisdiction over interlocutory appeals from orders granting, continuing, modifying, refusing, or dissolving injunctions issued by the district courts.

Statement of the Issues

1. The district court's ultimate finding of vote dilution in violation of Section 2 of the Voting Rights Act—after a full trial on the merits and based on the totality of circumstances—is not clearly erroneous.

2. Having found that the school board's election plan violates Section 2, the district court's injunctions prohibiting Sumter County from holding school-board elections in 2018 using the unlawful plan were not an abuse of the court's discretion.

Statement of the Case

Mathis Kearse Wright, Jr., brought this action in the United States District Court for the Middle District of Georgia challenging the method of electing members of the Board of Education in Sumter County, Georgia. He alleged, among other things, that the

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board's two at-large seats dilute African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301.

The district court held a four-day bench trial on Wright's claims and later issued a 38-page order concluding that the challenged plan violates Section 2. The Georgia General Assembly subsequently declined the court's invitation to devise a remedy, and the court then enjoined Sumter County from holding school-board elections in 2018 using the unlawful plan.

The Sumter County Board of Elections and Registration ("Sumter County" or the "County"), which is responsible for conducting elections for members of the Sumter County Board of Education, now appeals the district court's injunctions and the finding of liability on which they are based.

I. Background

Sumter County is located in rural southwest Georgia. It has a long and extensive history of discrimination against African Americans that need not be recounted here at length. *See Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1560 (S.D. Ga. 1994), *appeal dismissed and remanded*, 59 F.3d 1114 (11th Cir. 1995). That history touched directly on black political participation, *see*

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Bell v. Southwell, 376 F.2d 659, 660-61, 664 (5th Cir. 1967) (setting 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), and it includes almost two decades of prior litigation over the method of electing the school board, *see Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (11th Cir. 1985) (per curiam) (a successful challenge to the use of at-large elections for members of the school board). No African American had ever served on the school board until 1986, when that litigation was finally resolved and single-member districts were implemented. (Appellee's Supp. App. 153-65 at 1; Appellee's Supp. App. 153-66 at 1.)[1]

Today, Sumter County "remains a largely segregated community, with separate neighborhoods, civic organizations, and churches." (VII:198 at 14.) Its school system is one of the very few school districts in the nation that has yet to achieve "unitary" or fully-desegregated status. (IV:158 at 176; Appellee's Supp.

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[1] Throughout this brief, citations to Sumter County's Appendix will be in the form "Volume:Tab at Page" and will refer to the appendix filed in 18-11510 unless otherwise noted. Citations to Wright's Supplemental Appendix in 18-13510 will be in the form "Appellee's Supp. App. Tab at Page."

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App. 153-78 at 5.) And the student population in its public schools is overwhelmingly black. (IV:158 at 143; V:159 at 61.)

Current census data reveals striking socioeconomic disparities between black and white residents of Sumter County. African Americans today are more than twice as likely as whites to lack a high school diploma, less than a third as likely to have a bachelor's degree or higher, more than twice as likely to be unemployed, and more than three times as likely to be living in poverty. The median African-American household in Sumter County earns only $22,736 per year—less than half of the median $48,672 per year earned by white households. (VII:198 at 2.)

Election data reveals similar disparities. Even though African Americans make up almost half of the voting-age population and registered voters in Sumter County, white voters have outnumbered black voters in school-board elections by an almost two-to-one margin since at least 1996—the earliest year for which data are available. (*Id.*) On average, the turnout in school-board elections over that period has been 61.7 percent white and 37 percent black. (Appellee's Supp. App. 153-60 at 1-2.) The average margin has decreased in the last decade, but black political

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participation in Sumter County remains depressed compared to whites.[2]

African Americans also remain underrepresented in county-wide offices in Sumter County. Before this litigation began, no African-American candidate had ever won any public office elected at large from within the county. (VII:198 at 30.) Those offices have included Superior Court Clerk, Sheriff, Tax Commissioner, Coroner, Chief Magistrate, and certain seats on the school board. (Appellee's Supp. App. 154-1 at 1475-79.) Since this litigation began, no African American has won election to the at-large seats on the school board despite three attempts. In 2016, however, an African-American candidate won the Democratic nomination for Superior Court Clerk in a primary where African Americans constituted 81.9 percent of the electorate. She faced no opposition in the general election and thus became the first and only African American elected to county-wide office in the history of Sumter County. (VII:198 at 30.)

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[2] According to the latest data available to the district court, the county's total population of 31,070 persons was 39.9 percent white and 51.9 percent black. The county's voting-age population of 23,541 persons was 46.7 percent white and 49.5 percent black. And the county's 15,683 active registered voters were 46.7 percent white and 48.5 percent black. (VII:198 at 2.)

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II. The Challenged Plan

Sumter County's Board of Education currently consists of seven members, two of whom are elected at large within the county and five of whom are elected from single-member districts. Two of the five districts have a black voting-age majority. Elections are nonpartisan and held at the nonpartisan general election in May of even-numbered years. Terms are staggered on a four-three basis,[3] with one at-large seat filled at each regular election. A majority vote is required for election. (VII:198 at 6.)

Since 2014, when the Georgia General Assembly adopted the plan, there have been three elections for the at-large seats. Despite three attempts, no African-American candidate has been elected to an at-large seat under the challenged plan. In fact, no African-American candidate has been elected to any seat under the challenged plan except in the two districts where African Americans constitute a substantial majority of the voting-age population. (Appellee's Supp. App. 125 at 14.)

The board currently has five white members and two black members. (*Id.*)

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[3] Four members are elected every four years after 2014, and three members are elected every four years after 2016.

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III. Procedural History

Wright filed his complaint and motion for a preliminary injunction in March 2014, before any elections had taken place under the challenged plan. The district court denied his motion and, a year later, granted summary judgment in the County's favor. (I:62 at 18.)

In 2016, this Court reversed. (I:71 at 6.) The Court concluded, among other things, that the district court had improperly weighed district elections held under Sumter County's prior election plan more heavily than the 2014 at-large elections held under the current plan in which the minority-preferred candidates did not win. (*Id.*) The Court also held that the district court had improperly ignored the possibility that the current plan's majority-vote requirement may add to the dilutive effect of the at-large elections. (*Id.* at 5.)

In 2017, following additional discovery on remand, the district court granted partial summary judgment in Wright's favor. (Appellee's Supp. App. 125 at 20.) Specifically, the court concluded that the African-American community in Sumter County is sufficiently large and geographically compact to constitute a majority in an additional single-member district, satisfying the first precondition to liability under Section 2 established by the

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Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). (*Id.*) The court also concluded that the following material facts are undisputed: (1) Sumter County uses a majority-vote requirement; (2) no African American has been elected to an at-large seat on the school board under the challenged plan; and (3) no African Americans have been elected in school board districts except where African Americans constitute a majority of the voting-age population. (*Id.*)

The district court then held a trial on the remaining issues over four days in December 2017. Four months later, the court issued a 38-page opinion concluding, "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." (VII:198 at 37.)

IV. The District Court's Findings

The district court's opinion includes extensive findings of fact. Applying the analytic framework set forth by the Supreme Court in *Gingles*, the court found that Wright had satisfied each of the three *Gingles* preconditions for a vote-dilution claim under Section 2. (VII:198 at 18-26.)

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The court then turned to the so-called "Senate Factors," a list of seven factors set forth in the Senate Judiciary Committee's report on the 1982 amendments to the Voting Rights Act that courts typically use when making the totality-of-circumstances determination required by Section 2. *See* S. Rep. No. 97-417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (the "Senate Report"). The court found that five of the seven Senate Factors and one additional factor—lack of proportionality—weighed in Wright's favor. (VII:198 at 26-32.)

Finally, the court also analyzed Wright's illustrative plan to determine whether it would offer African-American voters a meaningful opportunity to elect an additional representative to the school board, and the court concluded that it did. (*Id.* at 34-37.)

The district court then concluded with its ultimate finding of vote dilution based on the entire record before it. (*Id.* at 37.)

A. The *Gingles* Preconditions

As to the first *Gingles* precondition—numerosity and compactness—the district court observed that it had already granted summary judgment in Wright's favor. (VII:198 at 18.) The County had not disputed the issue (Appellee's Supp. App. 125 at 16), and the court saw no need to revisit it.

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As to the second *Gingles* precondition—political cohesiveness—the district court found that African-American voters in Sumter County are "highly cohesive." (VII:198 at 7.) The court based that finding on the results of a racial bloc analysis contained in the supplemental report of Wright's expert, Dr. Frederick G. McBride. Dr. McBride analyzed a total of twelve Sumter County elections, including all three general elections and one runoff election held under the challenged plan for the at-large seats on the school board.

The district court found that "the overwhelming majority of African Americans voted for the same candidate" in ten of the twelve elections, including all of the at-large elections held under the challenged plan. (*Id.* at 18.) Of the two elections in which African-American voters were not highly cohesive, one involved only white candidates and the other was a special election for a district seat on the school board held under the prior plan. (*Id.* at 7.) The court did not find that those two elections were enough to undermine its conclusion that African Americans "usually or consistently vote for the same candidate." (*Id.* at 18.)

The district court also considered and rejected Sumter County's arguments criticizing Dr. McBride's analysis. The court noted that Sumter County was free to run its own analysis but

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chose not to do so. The County had chosen instead to have its own expert, Dr. Karen L. Owen, review and criticize Dr. McBride's work, but the court did not find her criticism credible. (*Id.* at 20.)

And, as to the third *Gingles* precondition—white bloc voting—the district court found that "black and white voters consistently prefer different candidates" and that "white voters are usually able to defeat the candidate preferred by African Americans." (*Id.* at 24.) The court again based those findings on Dr. McBride's analysis of twelve Sumter County elections.

The court examined those twelve elections in three groupings. First, it examined seven contests where a single white candidate faced a single black candidate. (*Id.* at 21-22.) The court found that black and white voters preferred different candidates in six of those races and that the black-preferred candidate lost in four of the six, including each of the three at-large school-board elections in this category. One of the remaining two races was an election for the school board in one of the challenged plan's two majority-black districts. The last race, which the court described as a "true success" for African Americans, was a school-board election held in 2010 under the prior plan. (*Id.* at 22.)

The second grouping included four races where multiple white candidates faced a black candidate. (*Id.* at 22-23.) The court

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discounted one of those, the 2004 at-large election for Sumter County sheriff, because the black-preferred candidate was a write-in and the court was reluctant to draw conclusions about white bloc voting from that contest. The black-preferred candidate lost in two of the three remaining races, including the one at-large school-board election in this category, with the one victory for a black-preferred candidate coming in the other majority-black district in the challenged plan.

Finally, the third grouping included one school-board election where two white candidates faced each other in a majority-white district. (*Id.* at 23.) The race had no clear black-preferred candidate and no clear white-preferred candidate, and the court discounted it.

Reviewing all of the elections, the district court found that the third *Gingles* precondition was satisfied because black-preferred candidates had only one true success (and seven losses) against white-preferred candidates outside of predominantly black districts. (*Id.* at 23-24.)

The district court also considered and rejected three arguments made by the County. (*Id.* at 23-25.)

First, the County argued that the court should discount the results of the at-large school-board elections because the white-preferred candidates were of a higher quality than the black-

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preferred candidates. The court disagreed as a matter of fact, finding that all of the candidates involved were qualified and that voters could reasonably choose among them. (*Id.* at 23.)

Second, the County argued that the success of black-preferred candidates in November general elections for state and federal offices should outweigh the lack of success of black-preferred candidates in the Sumter County elections that Dr. McBride analyzed. But, as the court pointed out, neither side had presented any statistical analysis of those state and federal elections, so there was no evidence as to which candidates were preferred by black or white voters. (*Id.* at 23-24 n.7.) The Court declined the County's invitation to assume, without statistical evidence, that any success by black or Democratic candidates in those elections is attributable to black voters. (*Id.* at 24.) The court also determined that the state and federal elections on which the County relied are of diminished relevance here because they "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." (*Id.* at 24.)

Third, relying solely on a case from the Fifth Circuit, *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1555 (5th Cir. 1992), the County argued that Wright could not establish the

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third *Gingles* precondition because he had failed to meet a heightened burden of proof that applies when, as here, a minority group constitutes a plurality of the voting-age population and registered voters. The district court observed, however, that our circuit has no such heightened standard. (VII:198 at 26.) The court also pointed out that Wright had established that African Americans in Sumter County still suffer from depressed political participation and the lingering effects of historical discrimination. (*Id.* at 25-26.)

B. The Senate Factors

The first Senate Factor is the history of voting-related discrimination in the State or political subdivision. The parties stipulated that "Georgia and Sumter County have a long and extensive history of voting discrimination against African Americans," and the district court concluded that this factor "weighs heavily in Wright's favor." (VII:198 at 26.)

The second Senate Factor is the extent to which voting in the elections of the State or political subdivision is racially polarized. Relying again on Dr. McBride's analysis, the district court found that voting in Sumter County is "highly polarized." (*Id.*) In ten of the twelve elections that Dr. McBride analyzed, the average black

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support for the black-preferred candidate was over 85 percent, while the average white crossover vote was under 10 percent. The court concluded that this factor also "weighs heavily in Wright's favor." (*Id.* at 27.)

The third Senate Factor 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. The district court found that Sumter County uses three such practices—staggered terms, a majority-vote requirement, and a large election district—and concluded that this factor "weighs in Wright's favor." (*Id.* at 27-28.)

The fourth Senate Factor is whether members of the minority group have been denied access to a candidate slating process. Neither party offered any evidence on the issue, and the Court therefore found that the factor "carries no weight." (*Id.*)

The fifth Senate 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. Relying on census data and election data in the record, the district court found that Wright had shown both "a disparate socio-economic status between white and black residents of Sumter County" and "a depressed level

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of political participation by African Americans." (*Id.* at 29.) As a result, the court concluded that this factor "weighs heavily in Wright's favor." (*Id.*)

The sixth Senate Factor is the use of overt or subtle racial appeals in political campaigns. The court found no evidence of such appeals in the record and consequently concluded that this factor weighs in favor of Sumter County. (*Id.* at 29-30.)

The seventh Senate Factor is the extent to which members of the minority group have been elected to public office in the jurisdiction. Here, the district court noted the undisputed facts that (1) no African American has ever been elected to an at-large seat on the school board under the challenged plan, and (2) that no African American has ever been elected in a school-board district except in districts where African Americans make up a majority of the voting-age population. The court also found no evidence that an African-American candidate had ever won a contested race for county-wide office in Sumter County. The court therefore found that this factor "weighs heavily in Wright's favor." (*Id.* at 30.)

The district court then considered three additional factors that some courts have found to be relevant to a vote-dilution claim. First, the court considered whether the policy underlying the challenged plan is tenuous, and the court concluded that it was not.

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(*Id.* at 30-31.) Second, the court considered whether the challenged plan lacks proportionality, *i.e.,* whether the proportion of majority-minority districts in the plan is lower than the minority group's share of the relevant population. Because the challenged plan contains only two majority-minority seats out of seven, the court found that this factor "weighs toward Wright." (*Id.* at 32.) Finally, the court considered a third additional factor that Wright had suggested: the extent of racial separation in the jurisdiction. Although courts in other circuits have considered the factor, the district court declined to consider it here because there is no binding precedent recognizing the factor in the Eleventh Circuit. (*Id.*)

C. Analysis of Wright's Illustrative Plan

Before concluding its opinion, the district court made further findings about Wright's illustrative plan. Specifically, the court sought to determine whether Wright's illustrative plan would give black voters the opportunity to win a third seat on the school board. (VII:198 at 34-37.)

In making this determination, the court again relied on Dr. McBride's testimony and analysis. (*Id.* at 14-16.) Dr. McBride applied the conceptual framework set forth by Bernard Grofman,

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Lisa Handley, and David Lublin in *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001). That framework uses statistical estimates of cohesion, crossover voting, and turnout from past elections to estimate how a proposed district might perform in future elections.

According to the court, Dr. McBride's analysis shows that African-American voters would clearly have the opportunity to elect candidates of choice in two illustrative districts with substantial black voting-age majorities. But the court also found that a third illustrative district, where the voting-age population would be 54.5 percent black and 38.76 percent white, was "a close call." (VII:198 at 15.) The court observed that the black voting-age population in this district would be five percentage points higher than in the county at large and that the white voting-age population would be eight percentage points lower than in the county at large, and it concluded that those changes "could create a potentially sizeable shift in the election results." (*Id.* at 34-35.) The court also credited Dr. McBride's analysis and testimony that, in his opinion, black voters would have a meaningful opportunity to elect candidates of their choice in the third district. (*Id.* at 16, 34-35.)

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Sumter County argued that this was not the case. But the district court noted that the County's expert, Dr. Owen, "did not express any opinions on McBride's illustrative districts or his analysis of the viability of the districts." (*Id.* at 16.) Indeed, Dr. Owen expressed no such opinions because the County did not ask her to do so. (*Id.* at 35.)

Given the evidence before it, the district court concluded that Wright's illustrative plan "is likely to give African Americans a more proportional representation on the Board of Education than does the current plan." (*Id.* at 36.)

D. Ultimate Finding of Vote Dilution

The district court made its ultimate finding of vote dilution "based on the totality of circumstance[s]." (VII:198 at 33.) Reviewing the factors that it found most compelling, the court concluded that the at-large seats under the challenged plan do not give African Americans in Sumter County a meaningful opportunity to elect the candidates of their choice and that, consequently, "African Americans in Sumter County have less opportunity to elect candidates of their choice than do white citizens." (*Id.*)

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Accordingly, the court concluded, the at-large seats in the challenged plan violate Section 2. (*Id.* at 37.)

V. The Remedial Phase (So Far)

At the conclusion of the trial in this case, the district court ordered the parties to submit remedial proposals along with their post-trial briefing. (Appellee's Supp. App. 147 at 1.) Wright submitted two remedial plans: one was essentially identical to his illustrative plan, and the other was new. Both plans consist of seven single-member districts, three of which would have a black voting-age majority. The new plan, however, would pair fewer incumbents and has three districts in which the black voting-age majority would exceed 60 percent. (Appellee's Supp. App. 174 at 5-7.)

The County submitted no plans of its own but filed a brief opposing both of Wright's plans, arguing that neither plan would give African-American voters more opportunity to elect candidates of choice than they have under the challenged plan.

The district court subsequently allowed limited discovery on the issue, and briefing concluded on March 26, 2018, shortly after the court's March 17 ruling on the merits of Wright's claim.

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The district court did not adopt a remedy in its ruling on the merits, but it noted that this case "now moves to a remedial stage." (VII:198 at 37.) The court ordered the County "to confer with Sumter County's legislative delegation and inform the Court … 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." (*Id.*) The County responded that the legislature would not adopt a remedy in the current legislative session and that the General Assembly could take up the matter at its next legislative session, which is scheduled to begin in January 2019. (Appellee's Supp. App. 201 at 1-2.) Three days later, the General Assembly adjourned *sine die* without adopting a remedy.

The next morning, on March 30, Wright filed an emergency motion for a temporary restraining order and preliminary injunction asking the district court to enjoin the County from conducting the school-board elections scheduled for May 22, 2018. The district court granted the motion later that same day. (VII:204 at 7.) The court also indicated that it would enter a further order by July 23 setting forth an interim remedial plan for future school-board elections. (*Id.*)

The County appealed that injunction (VII:207), and the appeal was docketed as 18-11510.

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Then, on June 21, the district court—acting *sua sponte*—issued an order modifying the March 30 injunction from which the County had appealed. (Appellee's Supp. App. 214 at 5-6.) The new order modified the prior order by removing the self-imposed July 23 deadline for issuing an order regarding new boundaries for the school board's election districts. The court concluded that it lacked jurisdiction to do so because of the pendency of this appeal. (*Id.* at 5.) The net effect of the June 21 order was to allow the County to hold the next school board election on November 6, 2018, using the election plan that the district court had found to violate the Voting Rights Act.

Wright promptly filed a motion asking the district court to reconsider its June 21 order. On July 23, the district court denied Wright's motion for reconsideration after again concluding that it lacked jurisdiction to issue new boundaries. (Appellee's Supp. App. 217 at 7.) The court also denied without prejudice Wright's request for an order enjoining the November election but stated that it would "… entertain the request [to enjoin the November election] upon Wright's motion on a date closer to the election." (*Id.*) Wright filed a motion making that request eight days later, and the district court expedited the briefing schedule.

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On August 9, while the parties were briefing Wright's motion for an injunction in the district court, this Court issued a limited-remand order in 18-11510 returning the case to the district court with instructions to issue new boundaries for the November election if it was still feasible to do so. Otherwise, the district court was instructed to resolve any motions regarding the November election and return the case to this Court.

On Friday, August 17, the district court entered an order concluding that it was not still feasible to issue new boundaries for the November election and that the election should not be allowed to proceed under the boundaries that it had found to be discriminatory. (Appellant's App. (18-13510) 237 at 1-2.) The court then issued a longer order explaining its injunction on the following Monday. (VIII:238.)

Later that same day, the County filed an emergency motion asking this Court to stay the district court's August 17 injunction and to allow the school-board election to proceed in November under the unlawful boundaries. The County's appeal of the August 17 injunction was docketed as 18-13510, and the County moved to consolidate that appeal with 18-11510.

On August 24, this Court granted the County's motion to consolidate but denied the County's motion to stay. As a result, the

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election went forward on November 6 without any school-board races on the ballot in Sumter County.

Standards of Review

In cases arising under Section 2 of the Voting Rights Act, this Court reviews a district court's findings of fact under the clearly-erroneous standard of Rule 52(a). *Gingles*, 478 U.S. at 79; *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1226 (11th Cir. 2000) (en banc). Under this standard, a finding of fact is clearly erroneous only "if the record lacks substantial evidence to support it." *Johnson v. Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002) (cleaned up); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985) (discussing the clearly-erroneous standard).

This deferential standard extends not only to a district court's ultimate finding of vote dilution and subsidiary findings of fact, but also to its findings "regarding the probative value assigned to each piece of evidence." *Solomon*, 221 F.3d at 1227. This deference "preserves the benefit of the trial court's particular familiarity with the indigenous political reality" of the state or local government under review. *Gingles*, 478 U.S. at 79. "Deference is afforded the district court's findings due to its special vantage point and ability to conduct an intensely local appraisal of the design and impact of a

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voting system." *Johnson*, 296 F.3d at 1074 (quoting *Negron v. City of Miami Beach*, 113 F.3d 1563, 1565 (11th Cir. 1997)).

Despite the district court's latitude, review for clear error "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles,* 478 U.S. at 79 (cleaned up). The district court's legal analysis is subject to *de novo* review. *See Davis v. Chiles*, 139 F.3d 1414, 1420 (11th Cir. 1998).

A district court's decision to grant an injunction, as well as the scope of the injunction, are subject to review for an abuse of discretion. *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, [] makes findings that are clearly erroneous," or applies the law in an unreasonable or incorrect manner. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (quotation omitted). "But, as its name implies, the abuse-of-discretion standard allows a range of choices for the district court, so long as any choice made by the court does not constitute a clear error of judgment." *Wreal, LLC*

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v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016) (quotation omitted).

Summary of the Argument

This is not a close case. There have now been three elections for the at-large seats under the challenged plan. Black voters have been politically cohesive in all three. Voting has been racially polarized in all three. And a white majority has defeated the candidate preferred by black voters in all three. In other words, black voters are *zero for three* in the at-large elections held under the challenged plan. The result is that African-American voters, who make up almost half of Sumter County's voting-age population, can elect candidates of their choice to only two of the board's seven seats. But under a fairly-drawn election plan with seven single-member districts, they would likely elect three. That constitutes vote dilution under well-settled law. The district court correctly applied that well-settled law here, and its findings of fact, including its ultimate finding of vote dilution, have more than adequate support in the trial record.

The district court correctly found that Wright established each of the three *Gingles* preconditions. Sumter County does not challenge the court's findings on the first *Gingles* precondition, and

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the County fails to establish clear error on the second and third *Gingles* preconditions.

The district court also found correctly that the two most important Senate factors—the extent to which minorities have been elected to public office in the jurisdiction and the extent to which voting is racially polarized—weigh heavily in Wright's favor. Sumter County does not dispute either finding on appeal. These two factors, along with the three *Gingles* preconditions, are more than adequate to support the district court's finding of liability.

The district court also found that four other factors weigh in Wright's favor, and Sumter County does not dispute any of those findings. Although not essential, those findings provide further support for the district court's ultimate finding, based on the totality of circumstances, that the challenged plan results in unlawful vote dilution.

And, having found the challenged plan to be unlawful, the district court did not abuse its discretion when it enjoined Sumter County from holding school-board elections in 2018 using the discriminatory plan.

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Argument

Sumter County makes many contentions in its brief, but the main question for decision on appeal is whether findings of fact made by the district court after a nonjury trial are clearly erroneous. They are not. The record contains ample evidence to support the district court's findings and its ultimate conclusion, based on settled principles of law, that the two at-large seats on the Sumter County Board of Education violate Section 2 of the Voting Rights Act. The district court likewise made no reversible error in enjoining an impending school-board election. Accordingly, this Court should affirm the district court's finding of liability and uphold the court's injunctions.

I. The district court's ultimate finding of vote dilution has more than adequate support in the trial record.

The basic legal framework governing Wright's claim is well settled. Section 2 of the Voting Rights Act prohibits voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority, including what is known as "vote dilution" through the use of at-large elections. *See Gingles*, 478 U.S. at 43-51; *Solomon*, 221 F.3d at 1224-26; *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 775 F.3d 1336, 1342

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(11th Cir. 2015). The essence of a vote-dilution claim is that a particular election practice "interacts with social and historical conditions … to minimize or cancel out the voting strength of racial minorities in the voting population." *Gingles*, 478 U.S. at 47-48 (cleaned up).

In *Gingles*, the Supreme Court identified three preconditions for a vote-dilution claim under Section 2. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51. "Third, 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." *Id.* (cleaned up). If a plaintiff meets that initial threshold, Section 2 then requires the court to determine, based on a review of the "totality of circumstances," whether the challenged practice results in unequal electoral opportunity for minority voters. 52 U.S.C. § 10301(b); *see Gingles*, 478 U.S. at 79; *Johnson v. De Grandy*, 512 U.S. 997, 1010-12 (1994).

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The legislative history of Section 2 indicates that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question" can be relevant when making the totality-of-circumstances determination. Senate Report at 28-29. The Senate Report on the 1982 amendments to the Voting Rights Act identifies seven factors that are typically relevant to a vote-dilution claim. These so-called "Senate Factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

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> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. In addition, the Senate Report identified two other factors that have had "probative value" and that are often considered alongside with the other factors, namely:

> Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]
>
> 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.

Id. at 29. The Supreme Court expressly approved and applied the Senate-Factor analysis in *Gingles*, but it pointed out that there is no requirement that any particular number of the Senate factors be proved, or that a majority of them point one way or the other. 478 U.S. at 43-45; *accord Ga. State Conf. of the NAACP*, 775 F.3d at 1342.

Since the Supreme Court decided *Gingles*, courts have recognized at least two additional factors that may be probative of vote dilution. The first additional factor is "proportionality," *i.e.*, whether the number of districts in which the minority group forms

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an effective majority is roughly proportional to its share of the population in the relevant area. *De Grandy*, 512 U.S. at 1000, 1014 n.11; *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436 (2006). The second additional factor is racial separation. "[O]n-going racial separation … —socially, economically, religiously, in housing and business patterns—makes it especially difficult for [minority] candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win … at-large elections." *United States v. Charleston Cty.*, 316 F. Supp. 2d 268, 291 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004); *see also United States v. City of Euclid*, 580 F. Supp. 2d 584, 592-93 (N.D. Ohio 2008).

Although the Supreme Court has made clear that the district courts must perform this totality-of-circumstances analysis, "[e]stablishment of the *Gingles* preconditions presages Section 2 liability." *Charleston Cty.*, 316 F. Supp. 2d at 277. This is because the establishment of the *Gingles* preconditions "creates the inference the challenged practice is discriminatory." *Sanchez v. Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996). Indeed, "it 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

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establish a violation of § 2 under the totality of circumstances." *Ga. State Conf. of the NAACP*, 775 F.3d at 1342.

In this appeal, Sumter County does not dispute the district court's findings with respect to the first *Gingles* precondition or any of the Senate Factors. Rather, the County's many arguments focus on three areas. First, the County argues that the district court applied the wrong legal standards in light of the fact that African Americans are a plurality of the registered voters in Sumter County. Second, the County argues that the district court's analysis of Wright's illustrative plan applied the wrong legal standard and relied on clearly erroneous findings of fact. And, finally, the County argues that the district court erred in weighing the evidence in numerous instances, particularly with respect to the second and third *Gingles* preconditions.

None of these arguments have any merit.

A. Black residents' so-called "registration advantage" did not require a heightened burden of proof.

Sumter County's main argument is that the district court committed legal error by failing to require Wright to meet a heightened burden of proof that applies whenever a minority group holds a "registration advantage" over white voters. (Appellant's Br.

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24-39.)[4] Specifically, the County asserts that controlling law required Wright—as a further precondition to liability under Section 2—"to identify an obstacle to participation negating the black community's registration advantage." (*Id.* at 30.) Not so.

There is no heightened burden of proof in this circuit or anywhere else. Indeed, this circuit has rejected the notion that vote-dilution claims turn on the size of the white population in a jurisdiction. *See Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1546 (11th Cir. 1990) ("The district court here properly rejected the county's contention that *Gingles* could not apply at all in a setting where the Non-Latin White bloc did not constitute a majority of the total population"). The County's argument to the contrary rests on a single case from another circuit, *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1555 (5th Cir. 1992). That case is obviously not binding in this circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) ("the decisions of one circuit are not binding on other circuits"), and the County does not offer any serious argument that it is.

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[4] Unless otherwise indicated, all citations and references to the Appellant's brief refer to Sumter County's brief filed in 18-11510 on May 22, 2018.

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Salas is also easily distinguishable from this case. The district court in *Salas* did not have access to reliable voter turnout data, so it had no choice but to focus on voter registration.[5] 964 F.2d at 1546. In this case, by contrast, there is undisputed turnout data showing that white voters have outnumbered black voters in county elections by almost two to one as far back as the eye can see. (VII:198 at 2; Appellee's Supp. App. 153-60 at 1-2.) In addition, the relevant minority group in *Salas* constituted a clear majority of the registered voters in the jurisdiction at issue. 964 F.2d at 1544. In this case, however, African Americans are less than a majority (48.5%) of the registered voters in Sumter County. (VII:198 at 2.) The so-called "registration advantage" for African Americans over whites, according to the most recent data available to the district

[5] Sumter County's singular focus on voter registration rates, instead of turnout rates, is an anachronism. *Salas* and the other cases that the County cites to emphasize voter registration all came before the advent of the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501-20511, which radically changed the nature of voter registration in this country by allowing citizens to register to vote when obtaining a driver's license or when applying for social services administered by state and local governments. Thus, even if it might have been reasonable for a court in 1992 or 1977 to regard voter-registration parity as evidence that a minority group had overcome barriers to political participation, that same inference would not apply with equal force today. Barriers such as lower levels of education and socioeconomic status that previously manifested themselves in lower voter registration rates now show up elsewhere in the electoral process.

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court, was a mere 277 registered voters (1.8 percentage points), and that number is much smaller than the 456 registered voters in Sumter County whose race is unknown. (Appellee's Supp. App. 166-1 at 3.) *Salas* did not even purport to address a situation where minority plaintiffs constitute an unclear plurality of registered voters. The Fifth Circuit considered only the issue of "whether plaintiffs, as members of a registered voter *majority* class, are precluded, as a matter of law, from bringing a vote dilution claim." 964 F.2d at 1547 (emphasis added). So even if *Salas* were binding precedent in this circuit, it would not control the outcome of this very different case.

And *Salas* does not even require a heightened burden of proof as the County contends. The Fifth Circuit's opinion expressly rejects the idea of "trying to fashion some alternative … precondition for instances where the protected class is, in fact, the majority." *Id.* at 1554. Instead, the holding of *Salas* is simply that the district court's "ultimate finding [of no vote dilution] is not clearly erroneous." *Id.* at 1556; *see also id.* at 1555 ("we hold that the findings of fact by the district court satisfy the totality of circumstances test and are, therefore, sufficient to uphold its judgment ….."). In other words, the legal standard that the Fifth

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Circuit actually endorsed in *Salas* is the same totality-of-circumstances test applied by the district court in this case.

But even if *Salas* were binding precedent in this circuit and really did require Wright, as a matter of law, "to identify an obstacle negating the black community's registration advantage," the record in this case is full of those obstacles. The district court found—and the County does not dispute—that "Georgia and Sumter County have a long and extensive history of discrimination against African Americans." (VII:198 at 26.) The district court found—and the County does not dispute—that "Sumter County remains a largely segregated community, with separate neighborhoods, civic organizations, and churches." (*Id.* at 14.) The district court found—and the County does not dispute—that even today Sumter County is a place where "[e]xplicitly racist incidents are still not unheard of." (*Id.*) The district court found—and the County does not dispute—that there are "striking" socioeconomic disparities between white and black residents of Sumter County that are "lingering effects" of past discrimination. (*Id.* at 2, 29, 33.) The district court found—and the County does not dispute—that black political participation is depressed relative to whites. (*Id.* at 29.) And the district court found—and the County does not dispute—that those lingering effects of discrimination contribute to

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depressed levels of black political participation in Sumter County. (*Id.* at 2.)

These undisputed findings were not present in *Salas*, and it is clear in this circuit that they are more than adequate to permit the district court to infer a causal nexus between racial discrimination and depressed political participation:

> [D]isproportionate 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 is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1568-69 (11th Cir. 1984) (quoting Senate Report at 29 n.114); *see also Gingles*, 478 U.S. at 69; *White v. Regester*, 412 U.S. 755, 768-69 (1973); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 144-46 (5th Cir. 1977) (en banc); *Zimmer v. McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973) (en banc), *aff'd. sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam); *Major v. Treen*, 574 F. Supp. 325, 351 n.31 (E.D. La. 1983) (three-judge district court). While the Fifth Circuit only speculated in *Salas* that minority plaintiffs with a clear voter-registration majority could prevail

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under Section 2 by showing that "low turnout was the result of prior official discrimination," 964 F.2d at 1556, Wright has amply demonstrated that connection here, where African Americans clearly do *not* constitute a majority of the registered voters.

It is thus apparent that, even though no heightened burden of proof applies in this case, the district court's findings would satisfy that burden if it did. But the district court applied the correct legal standard in this case: the totality-of-circumstances test. (VII:198 at 33.) Its ultimate finding of vote dilution under that standard is not clearly erroneous and has more than adequate support in the record.

Sumter County argues in the alternative that the district court's analysis was clearly erroneous because the court gave "no weight at all" to black residents' "registration advantage." (Appellant's Br. 37.) This claim, however, is impossible to square with the district court's opinion, which addresses voter registration at some length and never indicates that the court gave it no weight. (VII:198 at 2, 25.) The court clearly did not give *dispositive* weight to the so-called registration advantage, but the County does not contend that the court was required to do so. In the "intensely local appraisal" of the facts required under Section 2, *Gingles*, 478 U.S. at 78-79, the district court had broad discretion "regarding the

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probative value assigned to each piece of evidence." *Solomon*, 221 F.3d at 1227. It cannot be said that the district court's decision to give voter registration rates some weight, but not dispositive weight, was clear error.

The County suggests, however, that the district court's failure to give voter-registration rates sufficient probative value led it to apply an incorrect formulation of the second and third *Gingles* preconditions and the totality-of-circumstances test. (Appellant's Br. 38.) Specifically, the County argues that, as to the second *Gingles* precondition, "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." (*Id.*) As to the third *Gingles* precondition, 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." (*Id.*) And, as to the totality-of-circumstances test, the court "should have inquired how the black community's registration advantage affects each of the various factors it identified as supporting liability." (*Id.* at 39.)

These arguments are not properly before this Court because the County failed to raise them in the district court. *See Access*

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Now, Inc. v. SW Airlines Co., 385 F.3d 1324, 1330-35 (11th Cir. 2004) (declining to consider an appellant's argument raised for the first time on appeal). Indeed, the County endorsed the same formulation of these legal tests in its post-trial briefing that the district court applied in this case. (*Compare* Appellee's Supp. App. 170 at 3 *and* Appellee's Supp. App. 172 at 41 *with* VII:198 at 16-17.) The County has never proposed these new requirements before now.

In addition, no court has ever adopted or endorsed the County's new formulations of the applicable standards. They were not applied in *Salas*, and the County does not claim that they were. It appears instead that the County has simply made them up. The County does not explain why this Court should adopt them or how they would lead to a different result in this case. The "traditional" formulations of the *Gingles* preconditions and totality-of-circumstances test are well settled, and this Court should not unsettle them so lightly.

B. The district court's finding that Wright's illustrative plan "is likely to give African Americans a more proportional representation on the Board of Education than does the current plan" is not clearly erroneous.

Sumter County's second argument centers on the illustrative redistricting plan that Wright submitted in order to establish the

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first *Gingles* precondition.[6] (Appellant's Br. 39-52.) The County argues that, as a matter of law, the district court should have required Wright to establish that the plan would "with certitude" increase black representation on the school board. (*Id.* at 40.) The County also contends that the district court failed to make the factual findings necessary to determine whether Wright's plan met that standard. (*Id.* at 41.)

As an initial matter, the County failed to raise these arguments in the district court and is therefore barred from raising them for the first time on appeal. *See Access Now*, 385 F.3d at 1330-35. Indeed, the County proposed an entirely different legal standard in its post-trial briefing. Whereas the County now argues that Wright had the burden of showing that his plan would increase black representation "with certitude," the County argued

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[6] Sumter County inaccurately describes Wright's illustrative plan as a "remedial proposal." (Appellant's Br. 39.) Wright's illustrative plan was not intended as a final remedy. The district court bifurcated the liability and remedy phases of this case. (Appellee's Supp. App. 147 at 1.) Wright's illustrative plan was offered only to illustrate the possibility of drawing "more than the existing number" of majority-minority districts in order to satisfy the first *Gingles* precondition. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430 (2006). After trial, but before the district court issued its ruling on liability, Wright submitted two remedial proposals. (Appellee's Supp. App. 174 at 5-7.) One proposal contains three majority-black districts in which African Americans constitute 60 percent or more of the voting-age population. (*Id.*)

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in the district court only that Wright had the burden of showing that his plan would lead to a "meaningful improvement" in minority representation. (Appellee's Supp. App. 172 at 53.) The County has thus raised the bar on appeal, and it faults the district court for not making factual findings to meet a standard that it never previously articulated.

But, in any event, no court has ever held that liability under Section 2 requires a plaintiff to show "with certitude" that an illustrative plan would increase minority representation. To the contrary, the Supreme Court has explained that the first *Gingles* precondition "relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines that comply with § 2." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion). *See also Pope v. Cty. of Albany*, 687 F.3d 565, 577 (2d Cir. 2012) ("[T]he first *Gingles* factor can be satisfied by showing that an identified minority group forms a simple majority of the relevant population of a proposed district."); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (rejecting the need for a plaintiff to show "super-majority status"); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852–

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53 (5th Cir. 1999) (utilizing a 50% bright-line rule); *Cousin v. Sundquist*, 145 F.3d 818, 828–29 (6th Cir. 1998) (same). Wright's illustrative plan, which creates one additional majority-black district with a 54.5 percent black voting-age population, obviously satisfies the first *Gingles* precondition, and the County did not dispute that conclusion on summary judgment. (Appellee's Supp. App. 125 at 16; Appellee's Supp. App. 95-1 at 2.)

Sumter County nonetheless maintains that a "with certitude" requirement for establishing liability can be found in *United States v. Dallas County Commission*, 850 F.2d 1433, 1438 (11th Cir. 1988). (Appellant's Br. 40.) But the issue in *Dallas County* was not a plaintiff's burden for establishing liability but whether a court-drawn remedial plan complied with Section 2. 850 F.2d at 1437. Nothing in *Dallas County* established a new precondition, and the case stands merely for the proposition that a plaintiff who has already established a violation of Section 2 is entitled to a remedy that "completely" and "with certitude" cures the violation. *Id.* at 1438 (quoting *Dillard v. Crenshaw Cty.*, 831 F.2d 246, 252 (11th Cir. 1987)); *accord Dillard v. City of Greensboro*, 946 F. Supp. 946, 951 (M.D. Ala. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Harris v. Siegelman*, 695 F. Supp. 517, 529 (M.D. Ala. 1988); *Dillard v. Baldwin Cty. Comm'n*, 694 F.

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Supp. 836, 838 (M.D. Ala.), *aff'd*, 862 F.2d 878 (11th Cir. 1988) (table); *Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988); *Buchanan v. City of Jackson*, 683 F. Supp. 1537, 1545 (W.D. Tenn. 1988). There simply is no "with certitude" requirement for liability, and the district court's failure to impose one—or to make factual findings about whether Wright's illustrative plan met that requirement—was not reversible error.

Sumter County argues in the alternative that the district court's finding on the likely performance of Wright's illustrative plan is clearly erroneous. (Appellant's Br. 50.) The court found that Wright's illustrative plan "is likely to give African Americans a more proportional representation on the Board of Education than does the current plan." (VII:198 at 36.) The County claims that this finding is internally inconsistent with the court's finding elsewhere in its opinion that there is no support for the testimony of Wright's expert witness that a newly created majority-minority district would likely behave differently in terms of voter turnout than the at-large district in the challenged plan.[7] (*Id.* at 34.) It is not.

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[7] It is well established in political science that majority-minority districts do tend to improve minority turnout. *See* Matt A. Barreto, Gary M. Segura and Nathan D. Woods, *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 Am. Pol. Sci. Rev. 65 (2004).

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The district court based the disputed finding on three things. First was the five percentage-point increase in black voting-age population over the at-large seat. (*Id.*) Second was the eight percentage-point decrease in white voting-age population compared to the at-large seat. (*Id.* at 34-35.) And third was the testimony of Wright's expert, based on an analysis of past election results, that "black voters would have a meaningful opportunity to elect candidates … of their choice" in the district at issue. (*Id.* at 35; *see also id.* at 15-16 (describing the expert's analysis).) The court observed that the change in demographics alone "could create a potentially sizeable shift in the election results." (*Id.* at 34-35.) The court also noted the absence of any evidence that black voters would *not* have a meaningful opportunity to elect candidates of choice in the district.[8] The court did not, however, rely on any

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[8] Sumter County accuses the district court of improperly "flipping the burden" by noting the County's failure to offer any evidence on this and several other critical aspects of the case. (Appellant's Br. 46; *see also id.* at 30-35). The County's argument confuses the concept of burden, which can refer either to the burden of production or the burden of proof. Shifting the burden of production after a plaintiff has come forward with evidence in a case, as the court did here, is entirely proper. *See, e.g., Cooper-Houston v. Southern Ry. Co.*, 37 F.3d 603, 607 (11th Cir. 1994) (dissenting opinion) ("In an ordinary lawsuit the plaintiff must produce sufficient evidence to obtain a judgment if the defendant fails to offer any evidence. If she has, she has produced the facts and *(continued)*

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predictions about voter turnout. The disputed finding is thus fully consistent with the court's earlier skepticism about changing voter turnout. The finding has substantial support in the record and is therefore not clearly erroneous.

C. The district court did not clearly err in weighing the evidence.

Sumter County's final argument is that the district court made four errors in weighing the evidence that cumulatively amount to reversible error. (Appellant's Br. 52-59.) While it is certainly clear that the County disagrees with the district court's view of the evidence, the County has failed to establish that the court abused its discretion in weighing the evidence as it did or that it committed reversible error in doing do.

1. The County first contends that the district court should not have considered certain elections for purposes of the third *Gingles* precondition and the totality-of-circumstances analysis.

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persuaded the judge that she should prevail. Instead, if the defendant produces evidence in opposition to plaintiff's, the plaintiff has to persuade by a preponderance of the evidence that her evidence is more truthful.") At no point did the district court shift the burden of persuasion, which remained at all times on Wright.

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Specifically, the County claims that two elections in districts where the black voting-age population was lower than 36 percent "are not probative" in evaluating the ability of minority-preferred candidates to win the at-large seats on the Board.[9] (*Id.* at 53.)

Those two elections are really beside the point here. As this Court has already made clear in this very case, the at-large elections under the challenged plan are the most probative. (I:71 at 6.) There have been three such elections. Black voters have been politically cohesive in all three. Voting has been racially polarized in all three. And a white majority has defeated the candidate preferred by black voters in all three. Excluding the two elections in districts with less than 36 percent black voting-age population from the district court's analysis would change nothing.

The County suggests that excluding those two elections would "arguably" cancel out the results of two other district elections that the district court properly discounted (Appellant's Br. 54), but it fails to explain how that would change the outcome of the third *Gingles* precondition or the totality-of-circumstances analysis. The results of the at-large elections held under the challenged plan would still determine the outcome here.

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[9] The County took the *opposite* position in the district court: "To be sure, all of these elections are relevant …." (Appellee's Supp. App. 172 at 52.)

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The County also identifies no support for its arbitrary 36-percent cutoff or for excluding *any* elections from the totality-of-circumstances analysis.

Accordingly, while the district court's opinion is less than clear as to the probative value assigned to those two elections in heavily-white districts, the County has not established clear error.

2. The County next contends that the district court did not have enough evidence to support its finding on the third *Gingles* precondition. (*Id.* at 54-56.) This contention has no merit.

There have been three complete elections for the at-large seats on the school board (including one that went to a runoff). The district court found that the white majority defeated the minority-preferred candidate in all three (VII:198 at 21-22), and the County does not dispute those findings on appeal.

Three at-large elections are enough in this case. Those are the elections at issue. The results of those elections are undisputed. And they all point in the same direction. The Supreme Court relied on three elections in *Gingles*, 478 U.S. at 80-82, and the County identifies no authority for its contention that more than three elections are required. Based on those three endogenous elections alone, it cannot be said that the "record lacks substantial evidence

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to support [the district court's finding]" on the third *Gingles* precondition. *Johnson v. Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002) (cleaned up). Of course, the district court also considered eight exogenous elections. Taken together, those elections further support the district court's finding on the third *Gingles* precondition, but they are less probative of minority voters' ability to elect candidates to the at-large seats on the school board than are the results of the at-large elections themselves. *See Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1560 (11th Cir. 1987); *see also Bone Shirt,* 461 F.3d 1011, 1020-21 (8th Cir. 2006); *Sanchez*, 97 F.3d at 1317; *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1397 (5th Cir. 1996). As a practical matter, moreover, requiring more than three endogenous elections would force minority voters to endure years of discrimination before they could vindicate their rights. That cannot be the law, and no court has ever so held.

Sumter County argues, however, that the district court was required to discount the 2016 at-large election because it involved a rematch between candidates who had vied for the same seat in 2014. (Appellant's Br. 56.) This argument reflects a misreading of this Court's decision in *Johnson v. Hamrick*, 296 F.3d at 1078, which held that it was not improper for the district court to decline

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to give extra weight to two elections that featured a long-time incumbent running for re-election. *Johnson* does not stand for the proposition that a court *must* discount elections featuring any incumbent, as the County's argument suggests. Indeed, this Court has observed that incumbency "should not be viewed as a talisman by courts, sufficient in and of itself to deem an election involving an incumbent irrelevant to a plaintiff's vote dilution claim." *Nipper v. Smith*, 39 F.3d 1494, 1539 (11th Cir. 1994) (en banc). Here, the first-time incumbent was a newcomer to the county and had held office for only two years. (VII:198 at 10.) The County identifies nothing in the record to suggest that incumbency played any significant role in the re-election campaign. Under these circumstances it was not clearly erroneous for the district court to afford full probative value to the 2016 at-large election, and, more importantly, the County has failed to establish that the district court's finding on the third *Gingles* precondition is clearly erroneous.

Sumter County argues finally that the results of three at-large elections are not enough to support the district court's conclusion on the third *Gingles* precondition in this case because the statistical analysis of those elections is not "dependable" due to low turnout. (Appellant's Br. 56-57.) Again, Sumter County has

waived this argument by failing to raise it in the district court. *See Access Now*, 385 F.3d at 1330-35. It appears nowhere in the County's post-trial brief or proposed findings. (Appellee's Supp. App. 170 at 9-14; Appellee's Supp. App. 172 at 47-53). The County did raise a number of other criticisms of the statistical analyses in the record, and the district court rejected them. (VII:198 at 19-21.) But, in any event, the County's assertion that turnout levels and thus sample sizes are too low to permit dependable analyses is not a matter for judicial notice. It is also flat wrong. Sample size in this kind of election analysis is not a function of turnout; it is a function of the number of precincts. *See, e.g., Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989) ("statistical significance is dependent on sample size (e.g., the number of precincts studied in each election)").

3. The County's third argument is that the district court improperly gave "no weight" to dozens of elections for state and federal offices in which Democratic candidates carried Sumter County.[10] (Appellant's Br. 57.) The County contends that the court

[10] Sumter County's brief in 18-13510 relies heavily on the results of state and federal elections held on November 6, 2018, which are not in the record of this case because the election occurred after the county noticed this appeal. (*See* Appellant's Br. (18-13510) at 7-11.) *(continued)*

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"did not need to find this evidence dispositive" but should have given it "some probative weight" in evaluating the third *Gingles* precondition. (*Id.* at 58.)

That is precisely what the district court did. The court did not exclude or ignore those elections or give them no weight; it merely found that "they are of diminished relevance here" for several reasons. (VII:198 at 24.) The first reason given by the court was that neither side had presented a statistical analysis of voting patterns in those elections, thus providing no evidence of whether there was a minority-preferred candidate in the race. (*Id.*) And because statistical analysis of a 2014 school-board election had shown that black voters in Sumter County do not always prefer a black candidate, the court declined the County's invitation to assume that all of the black candidates were preferred by black voters. (*Id.*) The absence of statistical analysis also meant that the court could not, without "pure speculation," determine levels of

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These elections, like the state and federal elections upon which the County relied at trial, are of diminished value here for the reasons stated by the district court and discussed in this section. But, as this Court has made clear many times, "We do not consider facts outside the record." *Turner v. Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008).This Court should therefore decline to consider those results at all.

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minority cohesion and white crossover necessary to analyze the *Gingles* preconditions. (*Id.* at 23-24 n.7)

The district court also noted that the County had not identified the race of most candidates, making it impossible to distinguish between interracial contests, which it considered more probative, and all-white contests. (*Id.* at 12 n.4.) One of the County's lay witnesses was able to identify the race of a handful of candidates based on personal knowledge, but there is no information in the record on the racial identification of the vast majority of them. (*Id.*)

The district court also observed that those state and federal 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." (*Id.* at 24.) Although not mentioned by the district court, it is also evident that the elections on which the County relies do not include all state and federal elections held in Sumter County over the relevant time span, and the record reveals neither who selected these particular elections nor what criteria the editor or editors used to select them. (V:159 at 107-11.) The school-board elections are also non-partisan, while the elections on which the County relies are all partisan contests. (VII:198 at 6.)

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Under these circumstances, it was not clear error for the district court to consider these elections to be "of diminished relevance here." (*Id.* at 24.) Racial voting patterns must be proven, not simply assumed. *See Gingles*, 478 U.S. at 46, 58-61, 67-70; *Growe v. Emison*, 507 U.S. 25, 42 (1993) ("A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minneapolis.").

Moreover, it is well established that some elections are more probative than other when considering the second and third *Gingles* preconditions. As this Court has already indicated in this case, elections for the office at issue ("endogenous" elections) are generally more probative of cohesion and polarization than elections for other offices ("exogenous" elections). (I:71 at 6.) *See Johnson,* 196 F.3d at 1222; *City of Carrollton*, 829 F.2d at 1560; *see also Bone Shirt,* 461 F.3d at 1020-21; *Sanchez*, 97 F.3d at 1317; *Clark*, 88 F.3d at 1397. Exogenous elections are relevant, but only "to the extent that the results from these elections allow an inference to the voting patterns" for the office at issue. *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997); *see also id.* at 773 ("the voting patterns in exogenous elections cannot defeat evidence, statistical or otherwise, about [endogenous] elections"). Exogenous elections may also differ in their probative value

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depending on their similarity to the elections at issue. *See, e.g., Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 308 (D. Mass. 2004).

The district court may have given these state and federal elections very little probative value, but the County has not established clear error given the absence of statistical analysis, the absence of racial identifications, and key differences between those elections and the at-large elections at issue in this case. And even assuming that the district court should have given those elections *more* weight, the County has not shown—nor does it even argue—that those elections should have carried dispositive weight for purposes of the third *Gingles* factor.

4. Lastly, the County contends that the district court ignored one election held in 2008 in District 1 under the prior plan when it found, for purposes of the totality-of-circumstances analysis, 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." (Appellant's Br. 58-59.) However, the County's contention reads the finding out of context. The preceding sentence in the district court's order on liability includes the important qualifying phrase, "under the challenged plan." (VII:198

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at 30.) Both sentences cite to the district court's order granting partial summary judgment, where those two sentences are conjoined as one. (Appellee's Supp. App. 125 at 14.) That order cites to the County's response to Wright's statement of undisputed material facts, which contains this:

> 12. No African-American candidate has been elected under the current school-board plan except in districts where African Americans constitute a majority of the voting-age population. (McBride Report at 15-16.)
>
> RESPONSE: Defendant does not dispute Fact No. 12 but dispute its materiality, as the inquiry is whether the minority community's candidate of choice has been elected.

(Appellee's Supp. App. 95-1 at 5.) It is thus evident that the district court's finding, in context, refers to elections *under the challenged plan,* and there is no dispute about that finding's accuracy. And even if that finding were off by one election, Sumter County has failed to show how that error would fatally undermine the district court's ultimate finding of vote dilution.

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II. The district court did not abuse its discretion when it enjoined Sumter County from holding school-board elections under an unlawful plan.

Sumter County does not now contend that the injunctions canceling the 2018 school-board elections constitute an abuse of the district court's discretion beyond the finding of liability on which the injunctions are based. Indeed, it would likely have been improper for the court to allow the elections to proceed under a plan that it found to be discriminatory. *See Clark v. Roemer,* 500 U.S. 646, 652-53 (1991) (the district court erred in failing to enjoin elections held in violation of the Voting Rights Act); *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) ("Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election."); *Reynolds v. Sims,* 377 U.S. 533, 585 (1964) ("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"). And because the district court made no reversible error in finding Sumter County's election plan to be unlawful, this Court should affirm the injunctions as lying within the range of permissible choices for the district court faced with the particular circumstances of this case.

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Conclusion

Sadly, this is not the first chapter in Sumter County's sordid history of discrimination against African Americans. *See, e.g., Edge v. Sumter Cty. Sch. Dist.*, 775 F.2d 1509 (11th Cir. 1985) (per curiam) (a challenge to the use of at-large elections for members of the school board); *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (setting aside an election because of "gross, unsophisticated, significant, and obvious racial discrimination" in Sumter County). It is just the latest.

The record in this case is full of that history and its lingering effects. Georgia's segregationist past is well known, but witness after witness at trial testified that life in Sumter County is still largely divided along racial lines. Statistical evidence reveals pervasive and extreme levels of racially polarized voting, with white voters crossing over to support black candidates only in the single digits in many cases. Census data shows that African Americans in Sumter County are twice as likely as whites to lack a high school diploma, a third as likely to have a bachelor's degree or higher, twice as likely to be unemployed, and three times as likely to be living in poverty. Turnout data shows that black political participation continues to be depressed. There is a nearly complete absence of black elected officials at the county level. And black

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voters are *zero for three* in the at-large elections held under the challenged plan.

This record more than adequately supports the district court's ultimate finding that the two at-large seats on the Sumter County Board of Education violate Section 2 of the Voting Rights Act. The court likewise made no reversible error when it enjoined the County from holding the 2018 school-board elections under a discriminatory plan.

This Court should therefore affirm those injunctions and remand jurisdiction back to the district court so that the remedial phase of this case can continue.

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Dated: February 1, 2019

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding parts of the brief exempted by Rule 32(f), it contains 12,628 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook font using version 16.21 of Microsoft Word for Mac.

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Certificate of Service

I hereby certify that on February 1, 2019, I electronically filed the foregoing **Appellee's Brief** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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