No. 15-13628

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MATHIS KEARSE WRIGHT, JR.,

Plaintiff-Appellant,

v.

SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia, Albany Division

REPLY BRIEF ON BEHALF OF APPELLANT

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I. Wright Did Not Rely Exclusively on His Expert's Testimony

Defendant/Appellee Sumter County Board of Elections and Registration ("Board of Elections") claims that: "In support of his Section 2 vote dilution claim, Wright relied exclusively on the expert testimony of Dr. Fred McBride." Br. of Defendant/Appellee ("Appellee's Br.") at 3. To the contrary, in addition to the expert testimony of Dr. McBride, Wright relied upon the "Senate Factors," or the "totality of the circumstances," identified in the Senate Report that accompanied the 1982 amendment of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, as probative of a violation. *Thornburg v. Gingles*, 478 U.S. 30, 36-37, 106 S. Ct. 2752, 2759 (1986); S. Rep. No. 97-417, at 28-29 (1982). As the District Court held, "Wright relies heavily on the Senate Factors in arguing that he has established the existence of racial polarization and vote dilution in Sumter County over time." Doc. 62 at A487 (citing Pl.'s Resp. to Def.'s Mot. for Summ. J., Doc. 44, at 10-20).

The Senate Factors are: a history of official discrimination that touched the right of minorities to participate in the democratic process; the extent of racially polarized voting; the use of devices that enhance the opportunity for discrimination, such as large election districts and majority vote requirements; whether minorities have been denied access to a candidate slating process; the effects of discrimination in areas such as education, employment, and health; overt or subtle racial campaign appeals; and the extent to which minorities have been elected to office. *Gingles*,

478 U.S. at 36-37, 106 S. Ct. at 2759. Other factors include a lack of responsiveness on the part of elected officials to the needs of minorities and whether the policy underlying the voting practice is tenuous. *Id.* As the Court held in *Gingles*: "While the enumerated factors will often be pertinent to certain types of § 2 claims, particularly to vote dilution claims, other factors may also be relevant and may be considered." 478 U.S. at 45, 106 S. Ct. at 2763.

II. The District Court Failed to Give Appropriate Consideration to the Senate Factors

Courts have held the Senate Factors must be taken into account and considered appropriately in determining if a plaintiff has established the three preconditions for a Section 2 violation identified in *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67, *i.e.*, minority geographic compactness, minority political cohesion, and effective white bloc voting. In *Nipper v. Smith*, 39 F.3d 1494, 1526 (11th Cir. 1994), the court held "the full totality of the circumstances surrounding a section 2 claim must be considered appropriately when evaluating the *Gingles* preconditions as well as when deciding the ultimate issue of vote dilution." *Accord*, *Johnson v. De Grandy*, 512 U.S. 997, 1007, 114 S. Ct. 2647, 2655 (1994) (the *Gingles* preconditions cannot be applied "mechanically"); *Hall v. Holder*, 955 F.2d 1563, 1568 n.8 (11th Cir. 1994) ("If the totality of circumstances could not be considered in reviewing the *Gingles* factors, then courts would often be left to consider statistical and census data in an inappropriate contextual vacuum. The

interaction of social and historical conditions with the challenged system would not be considered despite the fact that such interactions are central to § 2 claims."); *S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995); *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 772 (N.D. Ga. 1997).

The Board of Elections contends the "District Court used the Senate Factors/totality of the circumstances test in precisely the way it should have: as part of a threshold inquiry into whether Wright could prove the *Gingles* preconditions." Appellee's Br. at 33. The District Court, however, held it "need not consider the 'totality of the circumstances' or the Senate Factors because a Section 2 violation cannot be established without proof of *all three Gingles* factors." Doc. 62 at A487. The District Court acknowledged Wright had produced "evidence of the history of voter suppression and systematic racism in Sumter County," but did not discuss it in any detail and essentially dismissed it in concluding that Wright "failed to establish the third *Gingles* prong." Doc. 62 at A488.[1] According to the Court, "although

[1] The history of racial discrimination in Georgia and Sumter County in all areas of life is also set out in detail in Plaintiff's First Request for Judicial Notice, Doc. 32, A29-A61. It includes discrimination in voting, discrimination and segregation in education, bans on inter-racial marriage, segregation of public transportation, segregation of prisons and jails, segregation of public accommodations, segregation of hospitals, and resolutions calling for impeachment of Justices of the U.S. Supreme Court for their racial integration decisions and declaring the Fourteenth and Fifteenth Amendments, which protect the rights of racial minorities, null and void and of no effect. This history has been repeatedly recognized and confirmed by federal courts. *See, e.g.*, *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1560 (S.D. Ga. 1994) ("Georgia has a history chocked full of racial discrimination at

Wright has established a history of voter suppression generally, Wright has not established the current scheme denies black voters an equal opportunity to elect the candidate of their choice." *Id.* Accordingly, "the Court need not consider the totality of the circumstances." *Id.* The evidence of the history of voter suppression and systematic racism in Sumter County strongly supports proof of the third *Gingles* factor. It should have been "considered appropriately," *Nipper*, 39 F.3d at 1526, rather than dismissed by the District Court because of failure to prove the third *Gingles* factor, or treated only as a "threshold inquiry" as the Board of Elections contends, Appellee's Br. at 33.

The Board of Elections also contends the "District Court clearly considered evidence of the totality of the circumstances." Appellee's Br. at 35. But it is apparent from the District Court's opinion that it did not even mention, let alone consider, many of the Senate Factors/totality of circumstances, including: (1) the use of enhancing devices in elections for the Board of Education, such as a majority vote requirement and large election districts "that tend to enhance the opportunity for

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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."); *Johnson v. Miller*, 864 F. Supp. 1354, 1379 (S.D. Ga. 1994) ("we have given formal judicial notice of the State's past discrimination in voting, and have acknowledged it in the recent cases"); *Abrams v. Johnson*, 521 U.S. 74, 107, 117 S. Ct. 1925, 1945 (1997) (noting "Georgia's long, well-documented history of past discrimination in voting") (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting).

discrimination against the minority group," *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763; (2) objections under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, by the Department of Justice (DOJ) to at-large elections in Sumter County because they would "have a racially discriminatory effect," Doc. 44-2 at A392, because "of racially polarized voting, non-responsiveness on the part of the school board members to the particularized needs of the black community," Doc. 44-3 at A396, and DOJ's inability "to conclude, in light of the continuing exclusion of effective participation by black citizens and their representatives in the redistricting process, that this discriminatory result was unintended," Doc. 44-4 at A401; (3) court decisions finding the use of at-large elections for the Sumter County Commission and the Americus City Council "dilutes minority voting strength, in violation of the Fifteenth Amendment,"[2] Doc. 44-8 at A422; (4) discrimination against voter registration campaigns initiated by the Student Nonviolent Coordinating Committee, Doc. 44-10 at A436-A437; Doc. 44-11 at A440; (5) the arrest of civil rights leaders in Sumter County and charging them with violating the state's Insurrection Statute, which carried the death penalty, Doc. 44-12 at A441-A444, and the decision of a federal court that the "prosecutions are being conducted by the defendants with the intent, and for the purpose of, depriving the plaintiffs of rights

[2] Notably, a violation of the Fifteenth Amendment requires proof of intentional discrimination. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 62, 100 S. Ct. 1490, 1497 (1980).

guaranteed to them under the Constitution of the United States," Doc. 44-12 at A443; (6) efforts by Black people to desegregate places of public accommodation in Americus, Doc. 44-11 at A440; (7) the enactment of a new literacy test for voting and a stringent character and understanding test, Doc. 32 at A38 (¶¶ 78-79); (8) the arrest of Black women for attempting to vote in Sumter County in a booth reserved for "white women," *Bell v. Southwell*, 376 F.2d 659, 661 (5th Cir. 1967); *see* Doc. 44-16 at A457-A459; (9) the racial segregation of public schools, the finding of the U.S. Commission on Civil Rights that "Intimidation, harassment and violence have prevented school desegregation in Sumter County," Doc. 44-18 at A464, and as of 2000, over one-third of the white school-age population in Sumter County attended private schools, Doc. 44-19 at A471; and (10) the depressed socio-economic status of racial minorities in Sumter County in education, employment, income, housing, and mobility/access, Doc. 38-1 at A295-A299, factors which the Supreme Court has acknowledged are "probative of a § 2 violation," *Gingles*, 478 U.S. at 36-37.

The Board of Elections contends Wright "did not connect any historical discrimination to today's election results in presenting his case to the District Court." Appellee's Br. at 35. To the contrary, in his brief in opposition to the Board of Election's motion for summary judgment, Wright discussed at length the various Senate Factors identified above, and noted that: "These factors confirm that blacks in Sumter County are politically cohesive and that whites vote as a bloc

usually to defeat the candidates of choice of minority voters, providing further proof of the second and third *Gingles* factors." Doc. 44 at 8-18. *Gingles*, moreover, held: "Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." 478 U.S. at 69, 106 S. Ct. at 2776. In *Teague v. Attala County, Mississippi*, 92 F.3d 283, 294 (5th Cir. 1996), the court held "Plaintiffs are not required to prove a causal connection between these factors and a depressed level of political participation." And in *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993), the court held:

> The courts have recognized that 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.

Id. at 866-67 (emphasis removed) (quoting S. Rep. No. 97-417 at 29 n.114). And as previously noted, the District Court acknowledged "Wright relies heavily on the Senate Factors in arguing that he has established the existence of racial polarization and vote dilution in Sumter County over time." Doc. 62 at A487 (citing Doc. 44 at 10-20).

III. Wright Showed That No Minority-Preferred Candidate Has Been Elected At-Large to the Board of Education

The Board of Elections contends that the "fact that no African-American has been elected at-large" to the Sumter County Board of Education, "even if true, does not by itself support a Section 2 claim" because "[u]nder *Gingles*, 'the race of the candidate is not determinative.'" Appellee's Br. at 24-25. The contention completely ignores the fact that in *Gingles*, the Court held one of the two "most important Senate Report factors bearing on § 2 challenges to multimember districts . . . [is] the 'extent to which minority group members have been elected to public office in the jurisdiction.'" 478 U.S. at 48 n.15, 106 S. Ct. at 2765 n.15 (quoting S. Rep. No. 97-417 at 29). It is clearly relevant and important to a Section 2 challenge that at-large elections are used for the Board of Education and no Black candidate has ever been elected to an at-large seat on the Board. The District Court's decision shows that in the two 2014 at-large elections analyzed by Dr. McBride, the candidates preferred by Black voters were Black and both were defeated. Doc. 62 at A476; *see* Doc. 38-1 at A310-A311.

IV. Whites Were a Majority of Voters in the 2014 At-Large Elections

The Board of Elections argues the District Court was correct in saying that in the 2014 at-large elections "whites likely did not make up the majority of registered voters." Appellee's Br. at 25 (quoting Doc. 62 at A486). But whites were in fact a majority of the voters, and of necessity a majority of the registered voters, who

actually participated in the elections. As of August 2014, there were 13 more Blacks registered to vote than whites in Sumter County. Doc. 38 at A126-A127. However, the turnout for whites in the 2014 four-year at-large election was 19.6% compared to 16% for Blacks, and the turnout for whites in the run-off at-large election was 14.3% compared to 12.6% for Blacks. Doc. 38-1 at A335-A336. Thus, whites were a majority of the registered voters who actually participated in both elections. Indeed, the Board of Education concludes by saying that "[i]t was not error for the District Court to note that whites were likely a majority of registered voters in the 2014 at-large elections." Appellee's Br. at 26.

V. The Demographics of the Districts Are Not Similar to Those of the County

The Board of Elections argues that the District Court was correct in holding that "minority-preferred candidates have been successful in districts with demographics similar to the countywide demographics." Appellee's Br. at 27. But in four of the districts from which Black candidates have been elected—Districts 1 and 5 in 2014; District 3 in 2010; and District 1 in 2008—Blacks were a greater percentage of the total population (TPOP) or the voting age population (VAP) than in Sumter County as a whole. Doc. 38-1 at A292, A300, A330, A337, A338; Doc. 44-1 at A390. The evidence shows that Black-preferred candidates won in five elections but, with one exception, only in districts in which they were a majority of the TPOP or the largest VAP. The

demographics in those districts are not similar to Sumter County's at-large voting population.

The Board of Elections says the evidence "showed that minority-preferred candidates can be successful under the current voting scheme in at-large elections." Appellee's Br. at 27. What the evidence in fact shows is that Black candidates have never been successful in at-large elections in Sumter County.

VI. Blacks Were Elected Under Special Circumstances

The third *Gingles* factor requires a showing that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . —usually to defeat the minority's preferred candidate." 478 U.S. at 51, 106 S. Ct. at 2766-67. Blacks have been elected to the Board of Education in five elections but in four of those elections they were elected under special circumstances, *i.e.*, where Blacks were a majority of the TPOP or the largest VAP. The Board of Elections contends, however, such elections are not "the type of 'special circumstance' the Supreme Court referred to." Appellee's Br. at 20. But nothing in *Gingles* supports that argument. The Supreme Court made it clear that the examples of special circumstances it gave were "illustrative, not exclusive." 478 U.S. at 57 n.26, 106 S. Ct. at 2770 n.26. Running in a district that is majority Black is not the same as running at-large or in a district that is majority white. That a Black candidate can get elected in a majority Black district is a special circumstance and does not show

that Blacks get elected at-large or in majority white districts.

Johnson v. Hamrick, 296 F.3d 1065 (11th Cir. 2002), upon which the Board of Elections relies, does not support its argument. The case involved a challenge to at-large elections for all five members of the City Council of Gainesville, Georgia. The consistent success of Black voters in electing candidates of their choice to the City Council was held to undercut the plaintiffs' argument that at-large elections diluted minority voting strength. Here, by contrast, no Black person has ever been elected to an at-large seat on the Board of Education. The court of appeals in *Hamrick* also held "the plaintiffs have not shown white bloc voting." 296 F.3d at 1081. But here, voting is clearly racially polarized. The District Court found the Black community in Sumter County was politically cohesive because it "usually and consistently votes for the same candidate." Doc. 62 at A482. It also found "that non-black voters in Sumter County usually prefer the same candidate." Doc. 62 at A483. The District Court further held "that the candidate preferred by non-black voters is usually different from the black-preferred candidate." Doc. 62 at A484. Thus, the Court found voting in Sumter County was racially polarized. And as noted above, Blacks have been elected to the Board of Education but under special circumstances, *i.e.*, almost exclusively from districts in which they were a majority of the TPOP or the largest VAP. The facts in this case are fundamentally different from those in *Hamrick* where Blacks were only 15.7% of the city's population but

had elected candidates of their choice in 45.5% of the at-large elections. 296 F.3d at 1070, 1076.

VII. The District Court Failed to Consider Three Elections

The District Court failed to consider three elections in which Black-preferred candidates were defeated, *i.e.*, the May 20, 2014 District 3 election, the 2006 District 3 election, and the May 20, 2014 at-large election. Doc. 62 at A481-A482, A484. The Board of Elections contends the District Court properly refused to consider these elections because the data for the District 3 elections was "unreliable," and the May 20, 2014 election had "no clear winner." Appellee's Br. at 17. Both assertions are incorrect.

First, the District Court should not have discounted the May 20, 2014 at-large election. In the first round of voting the Black-preferred candidate got nine more votes than the second place white-preferred candidate, but was not elected because he failed to win a majority of the votes, and he was subsequently defeated by the white-preferred candidate in the run-off. Doc. 38-1 at A334, A336. Contrary to the Board of Elections' assertion, there was a "clear winner" in this election: the white-preferred candidate. The district court should not have discounted the May 20, 2014 election, and rather should have included it in its racial polarization analysis as an election in which the Black-preferred candidate was defeated.

Second, the district court should not have discounted the results of the May 20, 2014 District 3 election and the 2006 District 3 election. While the percentage vote totals estimated by Dr. McBride for these two elections were greater than 100%, the District Court should have considered them as estimates and confirmed their reliability by taking into account its own findings of racially polarized voting and the totality of circumstances, including Section 5 objections and federal court findings of racially polarized voting in Sumter County. As McBride explained in his report: "Literature suggests that these unlikely occurrences may be due to aggregation bias, sample size, number of precincts involved, etc. Nevertheless, estimates must be viewed with caution and possibly additional analysis, but not merely dismissed." Doc. 38-5 at A347.

Once these three improperly-excluded elections are included in the analysis, there are a total of 11 elections in which there was a Black-preferred candidate, and Black-preferred candidates were defeated in six of those elections, *i.e.*, a majority of the time. Moreover, although Black candidates were successful on five occasions, as explained above, in four out of those five elections, the Black-preferred candidate won only under special circumstances. If the analysis is limited only to those elections without special circumstances, there were seven elections in which there was a Black-preferred candidate, and those candidates lost six out of seven times.

VIII. The District Court Failed to Consider Wright's Packing Claim

The Board of Elections claims the District Court "considered Wright's packing claims," *i.e.*, that Blacks were packed in Districts 1 and 5. Appellee's Br. at 28-29. While the District Court acknowledged that Wright challenged "the high concentration of African American voters in voting Districts 1 and 5 under Section 2," Doc. 62 at A472, nowhere in its opinion did the District Court address or discuss the packing claims. The packing claims were separate from the claim that the 5-2 system diluted minority voting strength in violation of Section 2. *See Gingles*, 478 U.S. at 46 n.11, 106 S. Ct. at 2764 n.11 ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority."). The packing claim should have been considered independently and it was clear error for the District Court not to do so.

The Board of Elections argues that *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015), relied upon by Wright and which held that a racial gerrymandering claim "applies to the boundaries of individual districts," is not relevant since "Wright did not bring a racial gerrymandering claim under the Fourteenth Amendment." Appellee's Br. at 29. However, in *Alabama Legislative Black Caucus*, the Court noted that the appellants had also raised "vote dilution

claims" and that the district court "remains free to reconsider the claims." 135 S. Ct. at 1274. There is nothing in the opinion that holds or suggests a Section 2 claim cannot be applied to the boundaries of individual districts. Indeed, as noted above, *Gingles* expressly held that it can be.

CONCLUSION

For the reasons stated in Wright's Brief On Behalf of Appellant and Wright's Reply Brief, the decision of the District Court should be reversed.

Dated: December 2, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 3,721 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010, in compliance with Fed. R. App. P. 32(a)(5)(A).

Dated: December 2, 2015

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on December 2, 2015, the foregoing Reply Brief On Behalf of Appellant was filed through the CM/ECF system and served electronically on all participants in this appeal.

On this date, seven paper copies will be sent to the Court and one paper copy will be sent to counsel for the Appellee.

Dated: December 2, 2015

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