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

BRIEF ON BEHALF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1-1 and 35.5 of the Rules of this Court, Appellant certifies that the below listed persons and entities have interests in the outcome of this case:

Trial Judge:

Sands, W. Louis

Attorney for Plaintiff-Appellant:

McDonald, M. Laughlin

Attorneys for Defendant:

Lewis, Anne W.

Reid, Kimberly A.

Tyson, Bryan P.

Plaintiff:

Wright, Mathis Kearse, Jr.

Defendant:

Sumter County Board of Elections and Registration

Corporate Disclosure Statement:

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

outcome of the appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Wright desires oral argument in this case. Appellant believes oral argument should be heard because the District Court failed to apply the proper legal standards in granting summary judgment to the Appellee Board of Elections and failed to consider a substantial amount of evidence probative of a violation of Section 2 of the Voting Rights Act. Oral argument would be helpful to the Court of Appeals because the facts in the case are relatively complex and there are numerous legal issues.

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I. STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This action was authorized by 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the United States Constitution. This action was also authorized by 52 U.S.C. § 10308 to secure equitable and other relief under an act of Congress providing for the protection of civil rights. The District Court had original jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 52 U.S.C. § 10308(f), and had jurisdiction to grant both declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Venue was proper in the Middle District of Georgia, Albany Division, pursuant to 28 U.S.C. § 1391(b). The Order granting summary judgment to Defendant was issued on July 14, 2015, Doc. 62, A472-89, and a timely Notice of Appeal was filed on August 11, 2015, Doc. 64. This Court has jurisdiction over the final decision of the District Court pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Whether the District Court erred in finding that Plaintiff Wright failed to establish the third factor required by *Thornburg v. Gingles*, 478 U.S. 30, 51, 106 S. Ct. 2752, 2766-67 (1986), to establish a violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, *i.e.*, "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."

2. Whether the District Court, in concluding that Plaintiff Wright had failed to establish the third *Gingles* precondition, erred in excluding as evidence and refusing to consider the results of three elections in which Black-preferred candidates lost.

3. Whether the District Court erred in failing to take into account that Black-preferred candidates won in five elections but, with one exception, only under special circumstances, *i.e.*, in single-member districts in which Blacks were a majority of the total population and the largest voting age population.

4. Whether the District Court erred in holding there was no evidence to support the fact that no Black candidate had ever been elected to an at-large seat on the Board of Education.

5. Whether the District Court erred in holding that in the two at-large elections for the Board of Education won by white candidates in 2014, whites likely did not make up the majority of registered voters.

6. Whether the District Court erred in holding that the demographics of the single-member districts for the Board of Education in which Blacks had been elected were similar to the county's at-large population.

7. Whether the District Court erred in holding that minority-preferred candidates have won in districts where Black voters were clearly the minority.

8. Whether the District Court erred in failing to consider Appellant's

claim that Blacks were "packed" in two of the single-member districts.

9. Whether the District Court erred in failing to consider the factors identified in the Senate Report ("Senate factors") that accompanied the 1982 amendment of Section 2 as probative of a violation, *Gingles*, 478 U.S. at 36-37, 106 S. Ct. at 2759, *e.g.*, enhancing devices, such as a majority vote requirement and at-large elections; the history of discrimination in Georgia and Sumter County; Section 5 objections to at-large districts in Sumter County; court decisions finding the use of at-large elections in Sumter County as discriminatory and diluting minority voting strength; discrimination against voter registration campaigns; the enactment of a new literacy test for voting and a stringent character and understanding test; racially segregated elections; the racial segregation of public schools and its continuing effect in Sumter County; and the depressed socio-economic status of racial minorities in Sumter County.

III. STATEMENT OF THE CASE

Plaintiff Mathis Kearse Wright, Jr., filed a *pro se* complaint and request for an injunction against further use of the method of electing the County Board of Education of Sumter County, Georgia, as diluting minority voting strength in violation of Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. Doc. 1 at A7-8, A15. The District Court denied Wright's request for an injunction and noted that he "did not present any statistical evidence or data sufficient to establish

any of the *Gingles* criteria," and encouraged him "to seek assistance of counsel because of the complexity of a Section 2 claim." Doc. 17 at A26, A28. After the 2014 elections in which Black candidates were defeated in the at-large elections, the American Civil Liberties Union ("ACLU") Voting Rights Project agreed to represent Wright and made an appearance of counsel on his behalf. Doc. 22.

The District Court granted Defendant Sumter County Board of Elections and Registration's motion for summary judgment, finding that Plaintiff had failed to establish the third *Gingles* precondition for vote dilution liability under Section 2 of the VRA, Doc. 62, A472-89, and Wright filed a notice of appeal, Doc. 64.

IV. STATEMENT OF THE FACTS

The Board of Education consists of seven members, five elected from single-member districts and two elected at-large. Wright challenged the election of the two members at-large and the packing of Blacks in District 1 (65.9% Black) and District 5 (72.8% Black), which are the only majority-Black single-member districts. Doc. 1 at A7-8; Doc. 62 at A472, A477; Doc. 38-1 at A300. Section 2 prohibits vote dilution through the use of at-large or multimember district elections, *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764 (1986), as well as by packing minorities in districts in which they become an excessive majority, *Voinovich v. Quilter*, 507 U.S. 146, 153-54, 113 S. Ct. 1149, 1155 (1993). As a remedy, Wright sought a seven-member Board of Education elected from all

single-member districts and which complied with Section 2. Doc. 62 at A475; Doc. 38-1 at A301-06.

The Board of Elections did not dispute that Wright had established the first of the three factors identified in *Gingles* as preconditions for finding unlawful vote dilution under Section 2 of the VRA, *i.e.*, that the minority "is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50, 106 S. Ct. at 2766. As evident from the existing redistricting plan, it was obviously possible to draw majority-Black single-member districts for the Board of Education, and Wright prepared a remedial plan containing seven single-member districts, three of which contained majority-Black voting age populations. Doc. 38-1 at A301-06.

In its motion for summary judgment, however, the Board of Elections contended that Wright failed to prove the second and third *Gingles* factors. Doc. 40-1, A357-75. The second *Gingles* factor requires proof that the minority group "is politically cohesive," or usually votes as a bloc. 478 U.S. at 51, 106 S. Ct. at 2766. The third *Gingles* factor requires proof 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.

Wright's statistical evidence in support of the second and third *Gingles*

factors consisted of a report by expert Dr. Frederick G. McBride. He analyzed 12 elections for the Board of Education held from 2002 to 2014 in which there had been Black candidates. Doc. 38-1 at A307-14. He used three methods of statistical analysis: (1) Goodman Single-Equation Ecological Regression; (2) double-equation regression analysis (BERA); and (3) Ecological Inference or the King's Method. Doc. 38-1 at A307-08; Doc. 38 at A170. McBride relied upon "endogenous elections," which are those for the governing body at issue, *i.e.*, the Sumter County Board of Education, because courts have acknowledged that endogenous elections, rather than "exogenous elections," which are those for other offices, provide "the most probative evidence." *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 773 (N.D. Ga. 1997); *accord*, *Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999); *Askew v. City of Rome*, 127 F.3d 1355, 1381 n.13 (11th Cir. 1997). He relied upon elections which included minority candidates because courts have concluded that "a court may assign more probative value to elections that include minority candidates, than elections with only white candidates." *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000) (citing *Hamrick*, 196 F.3d at 1221-22); *accord*, *Cofield*, 969 F. Supp. at 772. McBride analyzed the more recent elections for the Board of Education, *i.e.*, those from 2002 to 2014, because courts have concluded "that recent elections are more probative than those which occurred long before the litigation began." *Solomon*, 196 F.3d at 1227 (citing *Meek v. Metro.*

Dade Cnty., Fla., 985 F.2d 1471, 1483 (11th Cir. 1993)). McBride's analysis was thus conducted in a reliable manner and using the most probative evidence. McBride's analysis is summarized in a chart in the District Court's opinion. Doc. 62 at A476-77.

The Board of Elections submitted a report by its expert, Dr. Karen Owen, but she did not perform any calculations of her own but contested some of McBride's conclusions based on his own calculations. Thus, she did not present any evidence that contradicted in any way the data and estimates presented by McBride. More importantly, Owen assumed "*arguendo*, that McBride's data and estimations are reliable and valid." Doc. 40-4 at A381.

The District Court granted the Board's motion for summary judgment. Although the court found that Wright satisfied the second *Gingles* factor (*i.e.*, that Black voters are politically cohesive), it held he had failed to establish the third *Gingles* factor (*i.e.*, that Black-preferred candidates are usually defeated). Doc. 62 at A482, A488. This appeal followed.

V. THE STANDARD OR SCOPE OF REVIEW

Federal Rule of Civil Procedure 56(a) provides: "The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, a court must construe the facts and draw all

rational inferences therefrom in the manner most favorable to the non-moving party. *See Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 1774-75 (2007); *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1343 (11th Cir. 2015). And in doing so, "the district court may not weigh the evidence or find facts." *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)). "If any fact issues exist a trial judge must not make findings but is required to deny the motion and proceed to trial." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983). Nor may a court "make credibility determinations of its own." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011); *accord*, *Ga. NAACP*, 775 F.3d at 1343. And in reviewing a grant of summary judgment, a court of appeals will "review the district court's legal conclusions de novo." *Meek*, 908 F.2d at 1544; *see Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc).

VI. SUMMARY OF THE ARGUMENT

The District Court held that Wright failed to establish the third *Gingles* precondition, namely, 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. The District Court so ruled despite the fact that, of the 11 elections analyzed by Plaintiff's expert

Dr. McBride in which there was a clearly identified Black-preferred candidate, Black-preferred candidates won in only five elections. Moreover, each time they won, with the exception of the 2014 election in District 6, they did so under special circumstances, *i.e.*, in single-member districts where Blacks were a majority of the total population (TPOP) or the largest voting age population (VAP).

The District Court's ruling was erroneous in several respects. First, the District Court erred by excluding from its analysis several elections in which Black-preferred candidates were defeated. As noted, Plaintiff's expert analyzed 12 elections and identified a Black-preferred candidate in 11 out of those 12 elections. In the 11 elections with a clear Black-preferred candidate, Plaintiffs' expert determined that Black-preferred candidates were successful in only five elections – *i.e.*, less than half. The District Court, however, excluded from its consideration three elections in which Black-preferred candidates were defeated, including two elections in which the estimated total or white vote was slightly in excess of 100%. Ultimately, the District Court only considered the results of eight elections, and concluded that, because Black-preferred candidates were successful in five out of eight elections, Wright had failed to establish that Black-preferred candidates are "usually" defeated. As explained below, the District Court's refusal to consider the results of three elections in which Black-preferred candidates lost was error.

Second, the District Court erred insofar as it did not consider the fact that four

out of the five elections in which Black-preferred candidates were successful were marked by special circumstances, which account for the election of Black candidates to the Board of Education. As the Supreme Court has explained, the success of Black-preferred candidates in the presence of such special circumstances cannot be a bar to a vote dilution claim.

The District Court also erred in claiming that Wright did not provide evidence to support the "fact that no black candidate has ever been elected to an at-large position on the Board of Education." Doc. 62 at A487. The evidence showed conclusively that no Black candidate has ever been elected to an at-large seat, but if in the District Court's judgment that fact was in dispute, it was error for the Court to resolve it and grant summary judgment to the Board of Elections. Not only must a district court in considering summary judgment construe the facts and draw all rational inferences therefrom in the manner most favorable to the non-moving party, but it may not weigh the evidence or find facts.

The District Court erred in claiming that in the two at-large elections won by white candidates in 2014, "whites likely did not make up the majority of registered voters." Doc. 62 at A486. The evidence shows, however, that whites were a majority of actual voters in both elections and the candidates of choice of Black voters were defeated.

The District Court held that "data supports a finding that in single-member

districts with demographics similar to Sumter County's at-large voting population, minority-preferred candidates can [be] and have been successful over time." Doc. 62 at A487. But in four of the districts from which Blacks have been elected, Blacks were a greater percentage of the TPOP or the VAP than in Sumter County as a whole.

The District Court further claims "the evidence indicates minority-preferred candidates have won even in districts where black voters were clearly the minority, such as in the 2014 District 6 General Election." Doc. 62 at A486. To the contrary, the evidence does not show that minority-preferred candidates have won in "districts" where Black voters were the minority but only that they have won in *one* such district in one election: District 6 in the 2014 general election.

The District Court also erred in failing to consider Appellant Wright's claim that Blacks were packed in two of the single-member districts.

In addition to statistical data, the dilution of Black voting strength can be shown by other factors (known as the "Senate factors" or the "totality of the circumstances") identified in the Senate Report that accompanied the 1982 amendment of Section 2 as probative of a violation. S. Rep. No. 97-417 (1982). The District Court, however, held that 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

Court discounted substantial evidence of the Senate factors in Sumter County, which included: enhancing devices, such as a majority vote requirement and at-large elections; the history of discrimination in Georgia and Sumter County; Section 5 objections to at-large districts in Sumter County; court decisions finding the use of at-large elections in Sumter County as discriminatory and diluting minority voting strength; discrimination against voter registration campaigns in Sumter County; the enactment of a new literacy test for voting and a stringent character and understanding test; racially segregated elections in Sumter County; the racial segregation of public schools and its continuing effect in Sumter County; and the depressed socio-economic status of racial minorities in Sumter County. It was error for the District Court to ignore these factors.

VII. ARGUMENT AND CITATIONS OF AUTHORITY

A. In Analyzing the Third *Gingles* Factor, the District Court Erroneously Excluded the Results of Three Elections in Which Black-Preferred Candidates Were Defeated

The District Court erred in holding that Wright had not established the third *Gingles* factor. Despite the fact that Plaintiff's expert, Dr. McBride, analyzed the results of 11 elections in which there was a clearly identifiable Black-preferred candidate, the District Court erroneously considered the results of only eight elections.

First, the District Court explained that, in its view, "the minority preferences

in two elections are unknown since the statistics provided were clearly erroneous." Doc. 62 at A482. According to the Court, these two elections were the May 20, 2014 District 3 election and the 2006 District 3 election. Doc. 62 at A481-82. Next, the Court also declined to consider the May 20, 2014 at-large election "since it was essentially a 'draw' that went on to a run-off," which the Black candidate ultimately lost. Doc. 62 at A484. Thus, the Court concluded, there were eight contests in which there was a minority-preferred candidate and "a minority-preferred candidate won five, or 62.5%." Doc. 62 at A485. The Court then held that Wright had therefore failed to establish the third *Gingles* precondition, *i.e.*, that Black-preferred candidates are "usually" defeated.

The District Court's analysis – which, by ignoring the results of these three elections in which Black-preferred candidates lost, artificially inflated the overall success rate of Black-preferred candidates – was erroneous in several respects. First, the District Court should not have treated the May 20, 2014 at-large election as a "draw" (let alone, as urged by Defendants, as a win for Black voters), because a white candidate ultimately won the election in a runoff. To be sure, in the first round of voting, the Black-preferred candidate received more votes than any other candidate (a total of 1,584 votes, or nine more votes than the 1,575 votes received by the second-place candidate). Doc. 38-1 at A334; Doc. 62 at A484. But the Black-preferred candidate lost the election because he failed to win a majority of the

votes and in the runoff he was defeated. For purposes of analyzing the third *Gingles* precondition, the May 20, 2014 election should be counted as a loss for minority voters. *Cf. Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 616 (4th Cir. 1996) ("*Gingles*['s] third precondition can be satisfied by proof that, in either the primary or the general election, the minority-preferred candidate is usually defeated by white bloc voting").

In any event, the election should not have been excluded by the District Court from the total number of elections to be considered. In deciding not to include the May 20, 2014 election and failing to count it as a loss, the District Court "misperceiv[ed] a process that is palpably in violation of the Voting Rights Act, as not violative of the Act at all." *Lewis*, 99 F.3d at 616.

Second, the District Court erred by refusing to consider the results of the May 20, 2014 District 3 election and the 2006 District 3 election, two elections in which Black-preferred candidates lost. The District Court held that Dr. McBride's analysis of these elections was erroneous "because the percentages [of voters] provided [by Dr. McBride's analysis] total greater than 100%." Doc. 62 at A483.

The District's Court's ruling is based on a fundamental misunderstanding of the expert analysis in this case. Statistical analyses of racial polarization are, by their nature, *estimates* that by definition contain margins of error. *See* Bernard Grofman, Lisa Handley & Richard G. Neimi, *Minority Representation and the*

Quest for Voting Equality 101 (1992) ("it is important to remember that the results of ecological regression are statistical estimates"). While, as a practical matter, levels of racial bloc voting cannot be higher than 100%, political scientists James W. Loewen and Bernard Grofman have explained that estimates of racial bloc voting greater than 100% do happen on occasion, and that "[m]ost experts, including Bullock in Atlanta and Grofman in North Carolina, simply reduce such 'impossible' results down to 100 percent. This is usually appropriate, since such 'impossible' estimates generally indicate true levels of [racial bloc voting] very close to 100 percent." James W. Loewen & Bernard Grofman, "Recent Developments in Methods Used in Vote Dilution Litigation," 21 *The Urban Lawyer* 589, 599 (1989). *See also* Grofman, *et al.*, *Minority Representation*, at 101 (estimates of minority support for minority candidates above 100% rarely happen "except when such support is truly overwhelming").

Thus, in *United States v. City of Euclid*, 580 F. Supp. 2d 584, 602 (N.D. Ohio 2008), the court held that a statistical analysis of racial bloc voting "might yield an inexact result for purposes of a hypothetical mathematical challenge, but could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting. The standard of proof here is preponderance, not mathematical certainty." As the court further held, "the Court is to employ statistical analysis in aid of its own fact-finding, not to adhere slavishly to it." *Id.*; *see also Rodriguez v.*

Harris Cnty., Tex., 964 F. Supp. 2d 686, 768 (S.D. Tex. 2013) ("even if the ecological inference data is not entirely precise, it is nevertheless probative"); Doc. 38-5 at A347 ("estimates must be viewed with caution and possibly additional analysis, but not merely dismissed").

Here, it was therefore clear error for the Court to refuse to consider these two elections in which Black-preferred candidates were defeated. Given that estimates of racial bloc voting are, by definition, *estimates* that are subject to margins of error, the district court should not have totally discounted the elections in which the estimates of racial bloc voting were higher than 100%. The percentage total for Black voters in the May 20, 2014 District 3 election according to Dr. McBride's estimate using the King method was only slightly above 100%, at 108.4%. Doc. 62 at A476. The percentage total for Black voters in the 2006 District 3 election was, according to Dr. McBride's BERA estimate, 104%. Doc. 62 at A477. The Court cited no authority for the proposition that these relatively small over-estimates render the statistical analyses of these two elections totally unreliable. Given the nature of statistical estimates and the fact that political scientists using these statistical methods sometimes arrive at voting percentages higher than 100%, it was clear error for the District Court to exclude these two elections results from its analysis.

Once the three elections discussed above (the May 2014 election and the two

elections in which the Court rejected the statistical estimates as erroneous) are included in the analysis, there are a total of 11 elections in which there were Black-preferred candidates, and Black-preferred candidates prevailed in only five of those elections (45.45%). In other words, the District Court's exclusion of the three elections described above from its analysis served to artificially inflate the percent of elections won by Blacks, *i.e.*, 5 out of 8 (62.5%) as opposed to 5 out of 11 (45.45%). In sum, a proper assessment of all 11 elections in which there was a clearly-identified Black-preferred candidate demonstrates that Black-preferred candidates were "usually" defeated by whites voting as a bloc, which establishes that Plaintiffs have satisfied the third *Gingles* precondition.

B. The District Court Erred in Failing to Recognize That Four Out of the Five Elections Won by Black-Preferred Candidates Were Marked by Special Circumstances

The third *Gingles* factor requires a showing that whites vote "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." 478 U.S. at 51, 106 S. Ct. at 2766-67 (emphasis added; citation omitted). In the elections analyzed by McBride, Black-preferred candidates won in only five elections, and each time, with the exception of the 2014 election in District 6, they won under special circumstances, *i.e.*, where Blacks were a majority of the TPOP or

the largest VAP.[1] The five elections are described below.

1. In the 2014 District 1 election, in which a Black-preferred candidate was elected, Blacks were 65.9% of the TPOP and 62.7% of the VAP. Doc. 38-1 at A300; Doc. 62 at A476; Doc. 44-1 at A390. The Black-preferred candidate received 87.9% of the Black vote, and the white-preferred candidate received 60.6% of the white vote. Doc. 38-1 at A330; Doc. 62 at A476; Doc. 44-1 at A390.[2] In this election, the Black TPOP and Black VAP in District 1 were greater than the Black TPOP (51.8%) and Black VAP (48.1%) in the county as a whole. Doc. 44-1 at A390.

2. In the 2014 District 5 election, in which a Black-preferred candidate was elected, Blacks were 72.8% of the TPOP and 70.6% of the VAP. Doc. 38-1 at

[1] *Gingles* provides that the election of a minority candidate does not necessarily prove the absence of polarized voting when the election was due to "special circumstances." 478 U.S. at 57, 106 S. Ct. at 2770. It gives several examples of special circumstances but provides that the "list of special circumstances is illustrative, not exclusive." 478 U.S. at 57 n.26, 106 S. Ct. at 2770 n.26. The election of a minority in a majority-minority district is clearly another example of a special circumstance. McBride agreed that the racial composition of a district in which a minority was elected was relevant to the third *Gingles* factor. Doc. 38 at A242 ("I indicate that specifically because the rate of success has been in the districts that were majority. Does that matter? I think in the whole scheme of things, it does.").

[2] As McBride explained in his Report, Doc. 38-1 at A300: "Population figures were derived using the Maptitude for Redistricting 6.0 Geographic Information System software (Caliper Corporation) with the U.S. Census Bureau 2010 Topologically Integrated Geographic Encoding and Referencing product (TIGER) census block shape files, and the 2010 Census Redistricting Data PL 94-171 Summary File data for Sumter County, Georgia."

A300; Doc. 62 at A476. The Black-preferred candidate received 66.4% of the Black vote and the white-preferred candidate received 81.1% of the white vote. Doc. 38-1 at A333; Doc. 62 at A476; Doc. 44-1 at A390. In this election, the Black TPOP and Black VAP in District 5 were greater than the Black TPOP (51.8%) and Black VAP (48.1%) in the county as a whole. Doc. 44-1 at A390.

3. In the 2010 District 3 election, in which a Black-preferred candidate was elected, Blacks were 52.4% of the TPOP and 48.4% of the VAP. Doc. 44-1 at A390; Doc. 62 at A476. Whites were 42.5% of the VAP. Doc. 44-1 at A390. The Black-preferred candidate received 99.5% of the Black vote and the white-preferred candidate received 60.8% of the white vote. Doc. 38-1 at A337; Doc. 62 at A476-77; Doc. 44-1 at A390. In this election the Black TPOP and Black VAP in District 3 were greater than the Black TPOP (51.8%) and Black VAP (48.1%) in the county as a whole. Doc. 38-1 at A292.

4. In the 2008 District 1 election, in which a Black-preferred candidate was elected, Blacks were 51.3% of the TPOP and 49.5% of the VAP. Doc. 44-1 at A390. Whites were 46.2% of the VAP. *Id.* The Black-preferred candidate received 96.9% of the Black vote and the white-preferred candidate received 50.7% of the white vote. Doc. 38-1 at A338; Doc. 62 at A477; Doc. 44-1 at A390. In this election, the Black VAP in District 1 was greater than the Black VAP (48.1%) in the

county as a whole.[3] Doc. 38-1 at A292.

5. In the March 18, 2014 District 6 election, in which a Black-preferred candidate was elected, Blacks were 28% of the VAP, and the white candidate (Mock) got 58% of the Black vote and 95.4% of the white vote. Doc. 38-1 at A329; Doc. 62 at A476; Doc. 44-1 at A390.

Thus, Black-preferred candidates won in five elections but, with one exception, only under special circumstances, *i.e.*, in districts in which Blacks were a majority of the total population or the largest voting age population.[4] It was error for the District Court not to consider the special circumstances accounting for the election of Black candidates to the Board of Education. But even if the special circumstances are discounted, Black candidates did not win a majority of the elections. And no Black-preferred candidates were elected to any at-large seats. The evidence shows that whites vote as a bloc usually to defeat the minority's preferred candidates.

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[3] In the 2002 District 3 election, there was no clear candidate of choice of Black voters. Blacks were 49.8% of the TPOP and 44.5% of the VAP, Doc. 44-1 at A390, but split their votes among three candidates, none of whom received a majority of Black votes using either King's Method or BERA, Doc. 62 at A477.

[4] As noted above, a Black-preferred candidate, Coley, received the most votes in the May 20, 2014 at-large primary election. Doc. 38-1 at A334; Doc. 62 at A476. But the election should not be counted as a win for Black voters because the Black-preferred candidate did not win the primary and was ultimately defeated in the runoff election by white bloc voting. Doc. 38-1 at A336; Doc. 62 at A476.

C. The District Court Erred in Ignoring the Fact That No Black Candidate Has Ever Won an At-Large Seat

The District Court claims Wright did not cite any evidence to support the "fact that no black candidate has ever been elected to an at-large position on the Board of Education." Doc. 62 at A487. First, based on the uncontradicted evidence in McBride's report, no Black candidate has ever been elected to an at-large position on the Board of Education in the elections from 2002 to 2014. Doc. 62 at A476-77. Second, Wright, a longtime resident of Sumter County, alleged in his Complaint that: "Local history shows that no Black African American has ever won a county-wide election in Sumter County." Doc. 1 at A10. Third, Edith Green, a member of the Board of Education elected from District 5, during the hearing on Wright's motion for a preliminary injunction provided three examples of Black candidates who were defeated in at-large elections by white candidates. Doc. 17 at A27. Fourth, Wright's allegation and Green's testimony were confirmed by Wright's answers to the Board of Elections' interrogatories, stating that in June 1980, William Hoston, Sr. ran for Sheriff and became the first Black candidate to run for a countywide office in Sumter County and was defeated. Doc. 37-6 at A66. In June 2000, Nelson Brown, a Black man, ran for Sheriff of Sumter County and was also defeated. *Id.* In June 2004, Nelson Brown again ran for Sheriff of Sumter County and was again defeated. *Id.* In 1980, Arthur C. Pless became the first Black candidate elected to the Sumter County Board of Commissioners, and was

elected from a majority-Black single-member district. *Id.* Fifth, Defendant did not submit any evidence that Black candidates had ever been elected to an at-large position on the Board of Education or any other countywide office. Sixth, there was no evidence before the Court that Black candidates had ever been elected to an at-large position on the Board of Education or any other countywide office. Seventh, the evidence Wright cited, discussed below, showed exclusion over time of Blacks from the Board of Education.

As of 1964, Georgia law provided that the Sumter County grand jury appoint school board members. *Edge v. Sumter Cnty. Sch. Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985) ("*Edge II*"). In *Allen v. State*, 137 S.E.2d 711, 712 (Ga. Ct. App. 1964), the court found that the jury commissioners of Sumter County "have for over 40 years failed to select any Negroes from the tax digest for the grand jury list or for the traverse jury list, and no member of the Negro race has been called for either grand jury duty or traverse jury service in the county." And in *Edge II*, the court found that although Blacks were 44% of the population of Sumter County, "[n]o black person has ever served on the county school board." 775 F.2d at 1510. And that would necessarily include not being elected to an at-large position.

But as important, if the fact that a Black candidate had never been elected to an at-large seat was in the District Court's judgment in dispute, it was error for the Court to resolve the dispute and grant summary judgment to the Board of Elections.

Not only must a district court in considering summary judgment construe the facts and draw all rational inferences therefrom in the manner most favorable to the non-moving party, but it "may not weigh the evidence or find facts." *Morrison*, 323 F.3d at 924; *see Shook*, 713 F.2d at 665; *Scott*, 550 U.S. at 378, 127 S. Ct. at 1774. The District Court's decision to resolve this issue in favor of the moving party was clear error and grounds for reversal.

D. The District Court Erred in Concluding That Whites Were Not a Majority of Voters in the At-Large Elections

The District Court further sought to justify its decision by claiming that in the two at-large elections won by white candidates in 2014, "whites likely did not make up the majority of registered voters." Doc. 62 at A486. As of August 2014, there were 13 more Blacks registered to vote than whites in Sumter County, 7,279 to 7,266. Doc. 38 at A126-27. 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 runoff at-large election was 14.3% compared to 12.6% for Blacks. Doc. 38-1 at A335-36. Thus, whites were a majority of actual voters in both elections and the candidates of choice of Black voters were defeated. And as noted above, with one exception, Black-preferred candidates have been elected only in districts in which they were a majority of the TPOP or the largest VAP. It was error for the District Court to hold that in the two at-large elections won by white candidates in 2014, whites likely did not make up the majority of registered voters. Of the registered

voters who turned out, a majority were in fact white.

E. The District Court Erred in Concluding that the Demographics of the Districts Are Similar to Those of the County

The District Court held that "data supports a finding that in single-member districts with demographics similar to Sumter County's at-large voting population, minority-preferred candidates can and have been successful over time." Doc. 62 at A487. Based on the 2010 Census, Blacks are 51.8% of the TPOP and 48.1% of the VAP of Sumter County. Doc. 38-1 at A292. But in four of the districts discussed above from which Blacks have been elected, Blacks are a greater percentage of the TPOP or the VAP than in Sumter County as a whole. In 2014, District 1 had a Black TPOP of 65.9% and a Black VAP of 62.7%. Doc. 38-1 at A300, A330; Doc. 44-1 at A390. In 2014, District 5 had a Black TPOP of 72.8% and a Black VAP of 70.6%. Doc. 38-1 at A300, A333; Doc. 44-1 at A390. In 2010, District 3 had a Black TPOP of 52.4% and a Black VAP of 48.4%. Doc. 44-1 at A390; Doc. 38-1 at A337. In 2008, District 1 had a Black TPOP of 51.3% and a Black VAP of 49.5%. Doc. 38-1 at 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 Blacks were a majority of the total population or the largest voting age population. The District Court erred in holding that the demographics in these districts are similar to Sumter County's at-large voting population.

F. The District Court Erred in Ignoring That Black Candidates Have Not Won in Multiple Districts in Which They Were the Minority

The District Court further claims "the evidence indicates minority-preferred candidates have won even in districts where black voters were clearly the minority, such as in the 2014 District 6 General Election." Doc. 62 at A486. To the contrary, the evidence does not show that minority-preferred candidates have won in "districts" where Black voters were the minority but only that they have won in *one* such district, District 6 in the 2014 general election. And in that district election, the white candidate received 95.4% of the white vote according to the King estimate. Doc. 62 at A476. The District Court erred in concluding that minority-preferred candidates have won in multiple districts where Black voters were the minority.

G. The District Court Failed to Consider Appellant's Packing Claims

The District Court acknowledged that Wright had challenged the packing of Blacks in Districts 1 and 5, Doc. 62 at A472, A477, and that Section 2 prohibits "packing," Doc. 62 at A478. However, nowhere in its opinion did it discuss or address the packing claims. In *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262-63 (2015), the plaintiffs claimed that the state's redistricting plan was a racial gerrymander because it packed more minorities in districts than was needed for minorities to elect representatives of their choice. The district court rejected the plaintiffs' claims based upon "the drawing of boundary lines of the State *considered as a whole*." *Id.* at 1265. In vacating the decision, the majority of the

Supreme Court held: "A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'" *Id.* Accordingly, the case was remanded "for consideration of racial gerrymandering with respect to the individual districts subject to appellants' racial gerrymandering challenges." *Id.* at 1266. In light of *Alabama Legislative Black Caucus*, it was clear error for the District Court not to address the claims of packing in Districts 1 and 5 raised in this case.

H. The District Court Failed to Give Proper Consideration to the Senate Factors

In addition to statistical data, the dilution of Black voting strength can be shown by other factors (known as the "Senate factors" or the "totality of the circumstances") identified in the Senate Report that accompanied the 1982 amendment of Section 2 as probative of a violation. *Gingles*, 478 U.S. at 36-37, 106 S. Ct. at 2759; S. Rep. No. 97-417, at 28-29 (1982). 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 violations, 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.

Courts have held that the Senate factors must be taken into account in determining if a plaintiff has established the *Gingles* factors. *See Nipper v. Smith*, 39 F.3d 1494, 1526 (11th Cir. 1994) ("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"); *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."), *rev'd on other grounds sub nom. Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2581 (1994); *S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995) (in determining whether the third *Gingles* factor

had been established, the district "court appropriately considered all of the circumstantial evidence—both statistical and anecdotal—that was offered"); *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 772 (N.D. Ga. 1997) ("Applying the third *Gingles* factor does not depend exclusively on elections for which statistical evidence is available. To the contrary, an analysis of the *Gingles* test requires a searching examination of the totality of the circumstances."). For his part, McBride made it clear that he "rel[ies] on statistics and the 'totality of circumstances' approach" in addressing the claims raised by Plaintiff. Doc. 38-5 at A342.

The District Court, however, held that 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 Court ignored the fact that proof of the *Gingles* factors may be shown by evidence of the Senate factors. The presence of the Senate factors in Sumter County and the failure of the District Court to take them into account are discussed below.

(1) The Use of Enhancing Devices

The District Court failed to take into account the use of voting practices identified in the Senate Report "that tend to enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763. One of those enhancing factors is a majority vote requirement, which is used in elections for the Board of Education. Its discriminatory effect was apparent in

the 2014 at-large election. A Black-preferred candidate received a plurality of the vote but because of the majority vote requirement was forced into a runoff which he lost to his white opponent. Doc. 38-1 at A334, A336; Doc. 62 at A476.

Another enhancing factor is the use of "unusually large election districts." *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763. The at-large seats for the Board of Education use the largest possible district for elections, and given the depressed socio-economic status of Blacks, it makes it more difficult for Black candidates to conduct countywide campaigns. Indeed, no Black candidate has ever been elected to an at-large seat on the Board of Education. The majority vote requirement and at-large seats enhance the opportunity for discrimination against minority voters and it was clear error for the District Court to ignore them.

(2) The History of Official Discrimination in Georgia and Sumter County

Georgia and Sumter County have a long and extensive history of racial discrimination in all areas of life, which is set out in detail in Plaintiff's First Request for Judicial Notice. Doc. 32, A29-61. It includes discrimination in voting, Doc. 32 at A46-50 (Facts Nos. 48-78), discrimination and segregation in education, bans on interracial 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, Doc. 32 at A50-57 (Facts Nos. 79-133). 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 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) (Breyer, Stevens, Souter, and Ginsburg, JJ., dissenting) (noting "Georgia's long, well-documented history of past discrimination in voting").

The District Court acknowledged that Wright had produced "evidence of the history of voter suppression and systemic racism in Sumter County," but essentially dismissed it in concluding that Wright "failed to establish the third prong of *Gingles*." Doc. 62 at A488. According to the court, "although 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 past and continuing racism and racial polarization in Sumter County strongly supports proof of the third *Gingles* factor and should have been "considered appropriately" rather than dismissed by the District Court. *Nipper*, 39 F.3d at 1526.

(3) Section 5 Objections to At-Large Voting in Sumter County

In 1968, the legislature enacted a law providing that the Sumter County Board of Education consist of seven members elected from four single-member districts, one two-member district, and one member elected at-large. Ga. Laws 1968, p. 2065; *see Edge v. Sumter Cnty. Sch. Dist.*, 541 F. Supp. 55, 56 (M.D. Ga. 1981) ("*Edge I*"), *aff'd sub nom. Sumter Cnty. Sch. Dist. v. Edge*, 456 U.S. 1002, 102 S. Ct. 2287 (1982) (mem.). On July 12, 1972, the election districts were declared unconstitutionally apportioned in *Carter v. Crenshaw*, C.A. No. 768 (M.D. Ga. July 12, 1972). *See Edge I*, 541 F. Supp. at 56. The legislature enacted a new plan, Georgia Laws 1973, p. 2127, which provided for at-large elections for the entire Board. *See Edge I*, 541 F. Supp. at 56. The plan was submitted to the U.S. Department of Justice (DOJ) for preclearance under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, but was objected to because it would "have a racially discriminatory effect," Doc. 44-2 at A392. According to the objection letter, "the requirement that all candidates must be voted on county-wide would result in the dilution and minimization of the voting strength of black citizens." *Id.*

The Board of Education, however, ignored the objection and continued to hold at-large elections until they were enjoined by a three-judge court as violating Section 5. *Edge I*, 541 F. Supp. at 57. A new plan was enacted in 1982 consisting of six single-member districts and one at-large seat, but it was objected to by DOJ under Section 5 because it "fragments the black voting strength for apparently no compelling governmental reason and such fragmentation need not exist in a fairly drawn plan." Doc. 44-3 at A396. DOJ found that:

> Our analysis also has revealed evidence of racially polarized voting, non-responsiveness on the part of the school board members to the particularized needs of the black community, and other factors which, in the context of a history of racial discrimination in the county, increase the likelihood that the proposed redistricting plan will deny black voters an equal opportunity to elect representatives of their choice.

Id. DOJ further concluded that the evidence "suggests that the submitted plan was designed with the purpose of minimizing minority voting strength in the school district," and "it appears that the board consciously did not consider the alternative plan proposed by the ACLU because of racial considerations and similarly did not obtain or seek input from the minority community." Doc. 44-3 at A397. The Board submitted a second plan but it was also objected to by DOJ, which concluded that "the present proposal fails to offer black voters a realistic opportunity to elect candidates of their choice" and that it was unable 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.

Following the Section 5 objections in 1982 and 1983, the District Court adopted a plan of its own. It was challenged by local residents as failing to comply with Sections 5 and 2 of the Voting Rights Act, but the challenge was dismissed. *Edge II*, 775 F.2d at 1510. The Court of Appeals vacated and remanded, holding that the District Court had erred in designing the new apportionment plan without determining whether the plan complied with Section 2's prohibition on racially discriminatory voting qualifications. *Id.* at 1510, 1514.

On remand, the parties agreed on a new plan using six single-member districts and one at-large seat. Three of the six districts were majority-Black, with 66.57%, 64.49%, and 57.26% Black populations. Doc. 44-5 at A405. The plan was precleared by DOJ and adopted by the court. Docs. 44-5 & 44-6, A404-12.

In 2002, a plan was adopted providing for nine single-member districts. Based upon the 2010 Census, the plan was malapportioned. *Bird v. Sumter Cnty. Bd. of Educ.*, No. 1:12-CV-76 (WLS), 2013 WL 5797653, at *1 (M.D. Ga. Oct. 28, 2013). In 2011, the legislature enacted Senate Bill 154 and Senate Bill 4EX in 2011 ("the 2011 plan") for the Sumter County Board of Education. *Id.* at *2. The plan provided for five single-member districts and two at-large seats. The 2011 plan was submitted for Section 5 preclearance and DOJ asked for additional information.

Doc. 44-7, A414-20. In its response to DOJ's request, the Board of Education conceded that "the redistricting might end up reducing the total number of black members serving on the school district." Doc. 44-7 at A419. The Board also conceded that voting was racially polarized. It noted that the new redistricting plan created "'safe' black majority districts," and "'safe' white majority districts," and that the two at-large seats would serve only as "influence districts." *Id.* On January 31, 2012, however, the 2011 plan was withdrawn, leaving the malapportioned plan in effect. *Bird*, 2013 WL 5797653, at *1. A suit was filed by a local resident challenging the plan as malapportioned, but on October 28, 2013, the court issued an order that, based upon the decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), which had invalidated the coverage formula of Section 5, the case was moot. *Bird*, 2013 WL 5797653, at *4. The effect of *Shelby County* was to render the 2011 plan no longer subject to preclearance.

In response, the legislature enacted House Bill 836 in 2014. It reduced the number of members of the Board of Education from nine to seven members for the year 2015 and future years, with five members elected from single-member districts and two at-large. The districts were the same as those under the 2011 plan. The 5-2 plan diluted Black voting strength by reducing the number of districts in which Blacks were a majority, by packing Blacks in Districts 1 and 5, and by creating two at-large seats. The plan was also a return to the use of at-large elections which had

been previously objected to under Section 5.

The Section 5 objections are clear evidence of racially polarized voting in Sumter County and the discriminatory purpose and effect of at-large elections, which the District Court clearly erred in failing to consider.

(4) Court Decisions Invalidating At-Large Elections in Sumter County

Aside from Section 5 objections to at-large elections for the Board of Education, successful challenges to at-large elections for the Sumter County Commission and the Americus City Council as diluting minority voting strength were brought in 1977. The district court entered an Amended Final Judgment as to the City Council on June 17, 1980, "that Plaintiffs have established a prima facie case that the present method of electing the Mayor and members of the City Council unconstitutionally dilutes minority voting strength in violation of the Fifteenth Amendment of the Constitution of the United States." Doc. 44-8 at A422. The district court also entered a similar final judgment concerning the County Commission on April 7, 1980, and an amended judgment and order on June 16, 1980, correcting the lines in two of the districts. Doc. 44-9 at A430. A finding of 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). The orders of the district court are clear evidence of racially polarized voting in Sumter County and the discriminatory purpose and effect of at-large elections, which the

District Court in this case improperly ignored and failed to take into account.

(5) Discrimination Against Voter Registration Campaigns

Racial tensions in Sumter County erupted out of a voter registration campaign started in 1963 by members of the Student Nonviolent Coordinating Committee. There were also large-scale demonstrations against segregation in Americus in the summer of 1963, as well as large scale arrests of civil rights demonstrators. Some 250 people were taken into custody and held in various jails in Americus and neighboring counties. Doc. 44-10 at A436. They were arrested on charges such as parading without a permit or failing to obey an officer. *Id.* Eleven Blacks were arrested on July 11, 1963, when they tried to buy tickets at the white entrance to the Martin Theater in Americus. Doc. 44-11 at A440. Efforts to negotiate an agreement for desegregation of the theater, the public library, and other facilities failed. *Id.* Tommy Hooks III, who is white and the former Sumter County Superior Court Clerk and former president of the Americus Chamber of Commerce, was quoted as saying that as a result of the demonstrations: "The people are bitter. The people that were sitting on the fence six months ago have swung over on our side. I say our side, I mean the segregation side." Doc. 44-10 at A437.

On August 8, 1963, more than 200 Blacks headed toward the business section of Americus for a demonstration. Law enforcement officials halted the group and ordered them to disperse. Confrontations erupted and Sumter County Sheriff Fred

Chappell arrested four civil rights workers, John Perdew, Don Harris, Ralph Allen, and Zev Aelony, who had been leaders in the voter registration movement. Docs. 44-10 & 44-11, A436-40. While most of the earlier arrests had been for relatively minor offenses, these four were being held without bond on charges that they had violated the Georgia "Insurrection Statute," which carried the death penalty, despite the fact that the insurrection law had been declared unconstitutional by the Supreme Court twenty-five years earlier in *Herndon v. Lowry*, 301 U.S. 242, 264, 57 S. Ct. 732, 742 (1937). The defendants were also charged with violating the state's "unlawful assembly statute," *Harris v. Chappell*, 8 Race Rel. L. Rep. 1355, 1356 (M.D. Ga. Nov. 1, 1967) (three-judge court) (Doc. 44-12, A442-44), which had also been held unconstitutional by the Supreme Court in *Wright v. Georgia*, 373 U.S. 284, 293, 83 S. Ct. 1240, 1246 (1963). Following the denial of bail to the four defendants by the Georgia Supreme Court, a federal court ruled once again that the insurrection and unlawful assembly statutes were "unconstitutional and void," ordered the four defendants admitted to bail, and enjoined their prosecution. *Harris*, 8 Race Rel. L. Rep. at 1356-57 (Doc. 44-12 at A443-44). The court also noted that the plaintiffs had adduced proof that the "prosecutions are being conducted by the defendants with the intent, and for the purpose of, depriving the plaintiffs of rights guaranteed to them under the Constitution of the United States." *Harris*, 8 Race Rel. L. Rep. at 1356 (Doc. 44-12 at A443). The voter registration

and desegregation efforts of Blacks and the white response is strong evidence of white bloc voting and political cohesion of Blacks and should not have been discounted by the District Court.[5]

(6) Georgia Election Law Study Committee Proposals

In 1963, the Georgia Election Law Study Committee proposed to repeal the state's literacy and understanding tests for registration and replace them with a provision "to provide severe penalties for a person assisting any voter in any manner in the casting of his ballot," except for those with physical disabilities. Doc. 44-13 at A448. But Ely Horne, the Clerk of Superior Court of Sumter County, complained to Ben W. Fortson, Secretary of State, that "if we have people in the state who are willing to open the polls to everyone then we are in perfect accord with the scalawag element of this nation which is led by Kennedy and his Harvard advisers." Doc. 44-14 at A452. Henry L. Crisp, a native of Sumter County and a law student at the University of Georgia, wrote a similar letter to Fortson in which he complained the proposal "would allow any uninformed and illiterate citizen to be a voter," and "it would seem wise to strengthen voting requirements rather than weaken them." Doc. 44-15 at A455. In 1964, the legislature reenacted a literacy

[5] Whites and the Ku Klux Klan also attempted to close down Koinonia Farm, a small integrated religious commune in Sumter County founded by Clarence Jordan. Koinonia survived months of attacks by night riders armed with weapons ranging from pistols to machine guns. Merchants in the areas for a period of four years also refused to do business with the operators of the farm. Doc. 44-11 at A440.

requirement for voter registration and a stringent character and understanding test. Ga. Laws 1964, Ex. Sess. pp. 57, 58-60; Doc. 32 at A38 (Facts Nos. 78, 79). State and local efforts to burden and prevent minority voter registration are strong evidence in support of the third *Gingles* factor and should not have been ignored and discounted by the District Court.

(7) The Racially Segregated 1965 Election

A special election was held in Americus on July 20, 1965, to fill a vacant position for Justice of the Peace. Four Black women, one of whom, Mary Kate Bell, was a candidate for the office being filled, were arrested for attempting to vote in a booth reserved for "white women." *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967). The arrests triggered a series of massive demonstrations in Americus. Doc. 44-16, A457-59. In the days that followed, hundreds of Blacks marched to the Sumter County Courthouse and conducted prayer vigils, where they were met with taunts and threats from several hundred whites. *Id.* William Rau from Illinois, who had also been encouraging Blacks to register to vote, was attacked in Plains by three carloads of whites. One of the whites hit him on the head with a brick. Doc. 44-17, A461-62.

Bell was defeated and subsequently she and other women who were arrested filed suit seeking to set aside the election and enjoin the winner from taking office, and requesting that a new election be called. *Bell*, 376 F.2d at 660. The plaintiffs

alleged that: voting lists for the election were segregated on the basis of race; voting booths were segregated with one booth for "white males," another for "white women," and a third for "Negroes"; officials barred representatives of candidate Bell from viewing the voting; another representative was physically struck by an election official; and police allowed a large crowd of white males to gather near the polls intimidating Black people from voting. *Id.* at 660-61. The court of appeals noted that two parallel companion cases were before the district court, one by the United States against various officials of Sumter County, the other by the *Bell* plaintiffs against the same Georgia officials. The district judge in those two cases "entered an injunction enjoining the defendants from maintaining racial segregation at the polls, from maintaining segregated voting lists, from arresting or interfering with Negro voters, and from prosecuting the plaintiffs for their conduct leading to their arrest on July 20, 1965." *Id.* at 661. The district court declined to set aside the July 20, 1965 election, but the court of appeals, "[c]onsidering the gross, spectacular, completely indefensible nature of this state-imposed, state-enforced 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 the absence of an effective judicial remedy prior to the holding of the election," reversed and remanded for the entry of an order setting aside the election and requiring the calling of a special election. *Id.* at

664-65. The overt discrimination against Black women attempting to vote in Sumter County and the maintenance of racially segregated voting is further evidence of racial bloc voting by whites and Black political cohesion and should not have been ignored and discounted by the District Court.

(8) Segregated Schools in Sumter County

Schools in Sumter County, and the rest of Georgia, were historically segregated on the basis of race. In the aftermath of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954), Sumter County adopted a "freedom of choice" desegregation plan in the late 1960s, but according to a 1966 report of the U.S. Commission on Civil Rights: "Intimidation, harassment and violence have prevented school desegregation in Sumter County." Doc. 44-18 at A464. Some Black parents said they, or their children, received threats of physical violence. One Black father was told he would lose his job and home if his child went to the white school. The mother of another Black child was fired from her job as a maid after the school application was filed. The home of one of the applicants was repeatedly attacked. Bottles, stones, toilet paper, and paint were thrown at the house, and there were threatening and obscene telephone calls. Black students were tripped, spat on, attacked, called derogatory names by whites, and nearly run down by cars in the school parking lot. As of November 1965, only 26 Blacks remained in the white schools. *Id.*

Schools in Sumter County remained racially segregated until the district, along with 80 other districts in Georgia, was sued by the United States in 1969 for failure to desegregate. *United States v. Georgia, Troup Cnty.*, 171 F.3d 1344, 1345 (11th Cir. 1999); Doc. 44-19 at A468-69. The Sumter County School District remained under court order as late as 2007. Doc. 44-19 at A470. And as of 2000, over one-third of the white school-age population in Sumter County attended private schools. Doc. 44-19 at A471. The history of school segregation and its continuing effects are evidence of racial polarization in Sumter County and should not have been discounted by the District Court.

(9) Depressed Socio-Economic Status of Blacks

Based on current Census data analyzed by Dr. McBride, rates for the Black population in Sumter County remain significantly lower than rates for whites in: education, employment, income, housing, and mobility/access. Doc. 38-1 at A295-99. These lower rates are particularly evident in income and employment. *Id.* These depressed rates, which are acknowledged in the Senate Report as "probative of a § 2 violation," *Gingles*, 478 U.S. at 36-37, were not even mentioned by the District Court in its opinion, and it was error for the Court to ignore them.

CONCLUSION

For the reasons set out above, the District Court committed numerous errors in granting summary judgment to the Board of Elections as to the third *Gingles*

factor: (1) In analyzing the election data, it failed to construe the facts and draw all rational inferences therefrom in the manner most favorable to the Plaintiff, but weighed the evidence and made credibility determinations of its own; (2) It failed to consider that, with a single exception, Black-preferred candidates had only been elected from districts in which they were a majority of the total population (TPOP) or the largest voting age population (VAP); (3) It erred in finding that Plaintiff failed to prove that no Black candidate had ever been elected to an at-large seat on the Board of Education; (4) It erred in finding that whites were likely a minority of registered voters in the 2014 at-large elections; (5) It erred in finding as a matter of fact that the demographics in the single-member districts were similar to Sumter County's at-large population; (6) It erred in concluding that Blacks had been elected in multiple districts in which they were a minority; (7) It erred in excluding as evidence and refusing to consider elections in which the estimated total Black or white vote was slightly in excess of 100%; (8) It failed to consider three of the elections in which minority-preferred candidates were defeated; (9) It failed to consider Plaintiff's packing claim; and (10) It failed to consider the Senate factors probative of a violation of the third *Gingles* prong, *i.e.*, enhancing devices, such as a majority vote requirement and at-large elections; the history of discrimination in Georgia and Sumter County; Section 5 objections to at-large districts in Sumter County; court decisions finding the use of at-large elections in Sumter County as

discriminatory and diluting minority voting strength; discrimination against voter registration campaigns in Sumter County; the enactment of a new literacy test for voting and a stringent character and understanding test; racially segregated elections in Sumter County; the racial segregation of public schools and its continuing effect in Sumter County; and the depressed socio-economic status of racial minorities in Sumter County.

The District Court failed to apply the proper legal standards in granting summary judgment for the Board of Elections, and ignored or failed to consider relevant evidence. Accordingly, the decision of the District Court should be reversed.

Dated: October 19, 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 11,069 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: October 19, 2015

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Fed. R. App. P. 25(d) that on October 19,2015, the foregoing 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: October 19, 2015

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