APPEAL 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

Appeal from the United States District Court
for the Middle District of Georgia

BRIEF OF DEFENDANT/APPELLEE

Anne W. Lewis
Georgia Bar No. 737490
Barclay S. Hendrix
Georgia Bar No. 917852
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
awl@sbllaw.net; barclay.hendrix@sbllaw.com
678.347.2200 (telephone) 678.347.2210 (fax)

Kimberly A. Reid
Georgia Bar No. 596699
LAWSON & REID, LLC
901 East 17th Avenue
P.O. Box 5005
Cordele, Georgia 31010
kimberly.reid@lawsonreidlaw.com
(229) 271-9323 (telephone) (229) 271-9324 (fax)

CERTIFICATE OF INTERESTED PERSONS

In accordance with Eleventh Circuit Rule 26.1-1, counsel for Defendant/Appellee Sumter County Board of Elections and Registration certifies that Plaintiff/Appellant's Certificate of Interested Persons and Corporate Disclosure Statement is complete and correct with one exception: Bryan Tyson has left private practice and is no longer an attorney with Strickland Brockington Lewis LLP or an attorney for Defendant/Appellee. Therefore, he is no longer an interested person in this case.

STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellee does not desire oral argument in this case. In granting summary judgment to Defendant/Appellee, the District Court thoroughly considered the evidence and applied well-established law. The facts and legal arguments are adequately presented in the briefs and record, and this Court's decisional process will not be significantly aided by oral argument. Therefore, under FRAP 34(a)(2)(b) and (c), oral argument is unnecessary.

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RESPONSE TO STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had jurisdiction over this action brought solely under Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301. 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction of this appeal from a final decision of a district court in a civil case. 28 U.S.C. § 1291.

RESPONSE TO STATEMENT OF THE ISSUES

The issue presented for review by Plaintiff Mathis Kearse Wright, Jr. ("Wright") is whether the District Court correctly held that he failed to establish the third necessary precondition for a Section 2 vote dilution claim: "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)

RESPONSE TO STATEMENT OF THE CASE

Plaintiff Wright filed a complaint and request for injunctive relief, challenging Sumter County's method for electing its Board of Education on the grounds that it diluted minority voting strength in violation of Section 2 of the VRA. Vol. I, Doc. 1, p.1-2, 9. The District Court denied Wright's motion for preliminary injunctive relief. Vol. I, Doc. 17. The parties proceeded to discovery, during which they exchanged expert reports and deposed those experts on the

Gingles preconditions for establishing a Section 2 claim. Vol. I, Docs. 38, 38-1, 39, 40-4.

The analyses of both Wright's own expert and the County's expert demonstrated that Wright could not prove the third *Gingles* precondition, and the District Court granted Sumter County's motion for summary judgment on that ground. Vol. II, Doc. 62. Wright appealed.

The Georgia State Conference of the NAACP and the Campaign Legal Center filed an *amici curiae* brief in support of Wright's appeal.

I. Statement of Facts

Sumter County is a diverse community with a population of 32,819 residents; as of the 2010 Census, a majority of the County's population was African-American (51.8%). Vol. I, Doc. 38-1, p. 4. Sumter County's voting age population is 48.1% African-American and 5.2% Hispanic or Latino. *Id.* As of August 2014, more African-Americans than whites were registered to vote in the County. Vol. I, Doc. 38, p. 50-51.

Sumter County's Board of Education consists of seven members: five are elected from single-member districts and two are elected at-large. Vol. I, Doc. 38-1, p. 11. Claiming that the five-two plan diluted the voting strength of African-Americans in Sumter County in violation of Section 2 of the VRA, Wright initially brought this action seeking to invalidate the plan and re-establish the Board of

Education's prior composition of nine members from single districts. Vol. I, Doc. 1, p. 9. During the litigation, Wright changed his mind and now seeks to eliminate the two at-large districts so that all seven members of the Board of Education are elected from single-member districts. Vol. I, Doc. 38, p.36.

In support of his Section 2 vote dilution claim, Wright relied exclusively on the expert testimony of Dr. Fred McBride to attempt to prove that the current method of electing the Sumter County Board of Education impairs African-Americans' ability to elect representatives of their choice. Dr. McBride analyzed twelve endogenous elections[1] that involved contests between African-American and white candidates for seats on the Board of Education. Vol. I, Doc. 38, p.47. Eight of these elections occurred in 2014. Vol. I, Doc 38-1, p. 21-22.

Dr. McBride used three statistical methods to determine whether the minority community in Sumter County was cohesive in its voting preferences, and if so, whether the minority-preferred candidate succeeded in Board of Education elections: (1) Goodman Single-Equation Ecological Regression; (2) double-equation regression analysis (referred to in Dr. McBride's report as BERA); and (3) Ecological Inference (referred to as EI or King's). Vol. I, Doc. 38-1, p. 19-20. A "minority-preferred candidate" is one who "received substantial support from

[1] "Endogenous elections" refer to elections that took place for the government body at issue, in this case, the Sumter County Board of Education. *See Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 760 (N.D. Ga. 1997) (defining terms).

black voters." *Lewis v. Alamance Cnty.*, 99 F.3d 600, 614 (4th Cir. 1996). Statistical estimates are required to help determine whether racially-polarized voting exists because ballot secrecy prevents courts from reviewing exact numbers. Vol. II, Doc. 40-4, p. 3. Racially-polarized voting is circumstantial evidence of racial bias in the electoral system and can show a lack of equal access by minority voters. *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994). The experts in this case and others agree that King numbers provide the best estimates of minority cohesion and support for candidates. Vol. I, Doc. 38, p. 83, 175; *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004) (collecting cases using King).

Dr. McBride initially found that minority-preferred candidates succeeded or were "not defeated" in six of the twelve elections analyzed. Vol. I, Doc. 38-1, p. 24-26; Vol. II, Doc. 44, p. 7. However, he modified that finding in his deposition, testifying that the minority-preferred candidate succeeded in at least five of eleven and as many as seven of twelve elections. Vol. I, Doc. 38, p. 129. Statistics for at least four races revealed no minority-preferred candidate because the minority community divided over which candidate it preferred. Vol. II, Doc. 44, p. 5-7.

The elections Dr. McBride analyzed and the relevant findings are as follows:

1. 2014 Board of Education District 6

- There is a minority-preferred candidate, Michael Mock, who received 58% support from the African-American community under the King

estimates, and he won the election, which was not racially polarized. Vol. I, Doc. 38-1, p. 41; Doc. 38, p. 110.

- The District Court found that this election did not provide reliable statistical evidence for white-bloc voting because the percentages provided by Dr. McBride totaled more than 100%. Vol. II, Doc. 62, p. 12.

2. 2014 Board of Education District 1

- There is a minority-preferred candidate, Alice Green, who received 87.9% of the African-American vote under the King estimates, and she won the election. Vol. I, Doc. 38-1, p.42; Doc. 38, p. 111.

3. 2014 Board of Education District 2

- Using the King estimates, the minority community's support for Sarah Pride in this race was only 50.5%. Vol. I, Doc. 38-1, p. 43. Dr. McBride agreed that with the standard error in his estimates, the support for Pride could have been as low as 43.6% and the standard error could lead to less reliable estimates. Vol. I, Doc. 38, p. 175, 114-15.

- The District Court found that this election did not provide reliable statistical evidence of white-bloc voting again because the percentages

provided by Dr. McBride totaled more than 100%. Vol. II, Doc. 62, p. 12.

4. 2014 Board of Education District 3

- In this race, Dr. McBride's estimates showed that, using the King numbers, *both candidates received more than 50%* of the African-American vote, which Dr. McBride categorized as an error he could not explain. Vol. I, Doc. 38-1, p. 44; Doc. 38, p. 101, 116.
- The District Court excluded this election as evidence of minority political cohesion because the King-method statistics for the African-American community were erroneous and no BERA-method statistics were provided. Vol. II, Doc 62, p. 11.

5. 2014 Board of Education District 5

- There is a minority-preferred candidate, Edith Green, who received 66.4% of the African-American vote under the King estimates, and she won the election. Vol. I, Doc. 38-1, p. 45; Doc. 38, p. 116.

6. 2014 Board of Education At-Large Two-Year

- In this countywide race, there is a minority-preferred candidate, Michael Coley, who received 68.2% of the African-American vote under the King estimates. Vol. I, Doc 38-1, p. 46. Coley was one of the top two candidates and advanced to the runoff. *Id.*

- The County's expert, Dr. Karen Owen, explained that the race was an "electoral success" for the minority-preferred candidate based on social science literature on runoffs. Supplemental Appendix, Doc. 39, p. 27-29. Dr. Owen found that this election did not show defeat of the minority-preferred candidate because Coley advanced to the next election and had the opportunity to build on his success in the first round. Owen Dep., 27:22-29:2.
- Dr. McBride originally reported the minority-preferred candidate was not defeated in this contest but later confessed confusion about that conclusion because the race was a runoff, and he did not know the impact of that fact. Vol. I, Doc. 38, p. 117, 120-21.
- In the end, there was no dispute of fact about this election because Dr. Owen was able to testify conclusively that the race should be counted as a success for the minority-preferred candidate while Dr. McBride's testimony was simply that he did not know.
- The District Court found that this election did not provide a clear majority-preferred candidate because no candidate received over 50% of the non-black vote. Vol. II, Doc. 62, p. 12.

7. 2014 Board of Education At-Large Four-Year

- In this countywide election, Kelvin Pless received 72.9% of the African-American vote using the King estimates but was defeated. Vol. I, Doc 38-1, p. 47; Doc. 38, p. 122.

8. 2014 Board of Education At-Large Two-Year Runoff

- In the runoff for the two-year seat, Coley was still the minority-preferred candidate and was defeated, although Sylvia Roland received 35% of the African-American vote under the King estimates. Vol. I, Doc 38-1, p. 48; Doc. 38, p.122.

9. 2010 Board of Education District 3

- Kelvin Pless received 99.5% of the African-American vote in this election according to the King estimates and was successful. Vol. I, Doc 38-1, p. 49; Doc. 38, p.122.

10. 2008 Board of Education District 1

- Carolyn Whitehead received 96.9% of the African-American vote in this election according to the King estimates and was successful. Vol. I, Doc 38-1, p. 50; Doc. 38, p. 122.

11. 2006 Board of Education District 3

- In this election, using the King estimates, Dr. McBride reports that Darius Harris received 93.4% of the African-American vote, while

Donna Minich received 43.6% of the African-American vote. Doc. 38-1, p. 51. Because these numbers total more than 100%, Dr. McBride conceded a high standard error. Vol. I, Doc. 38, p. 123.

- The District Court excluded this election as evidence of minority political cohesion because both the King-method statistics and the BERA-method statistics for the African-American community were erroneous. Vol. II, Doc. 62, p. 11.

12. 2002 Board of Education District 3

- In another election involving the same candidates as the 2006 race, no candidate received more than 50% support from African-American voters or white voters using the King estimates. Vol. II, Doc. 40-4, p. 6. Because of the lack of bloc voting, Dr. McBride found the race was not racially polarized. *Id.*
- After finding no racial polarization, Dr. McBride selected a minority-preferred candidate: Carolyn Seay, the candidate with the *least* amount of support from the African-American community using the King estimates; he then determined she was defeated. *Id.* Later, however, Dr. McBride agreed that it was "questionable at best" whether the minority-preferred candidate was defeated, because that question would require "more analysis." Vol. I, Doc. 38, p. 127. Dr.

McBride also admitted he had performed no such further analysis and that one could reasonably say the minority-preferred candidate *succeeded* in this race. Vol. I, Doc. 38, p. 122, 125-26.

- The District Court excluded this election as evidence of minority political cohesion because the election did not demonstrate a clear minority-preferred candidate as no candidate was preferred by at least 50% of African-American voters. Vol. II, Doc. 62, p. 11.
- The District Court found that this election did not provide a clear majority-preferred candidate because no candidate received over 50% of the non-black vote. Vol. II, Doc. 62, p. 12.

The County's expert, Dr. Owen, reviewed Dr. McBride's data analysis and found insufficient support for both the second and third *Gingles* prongs. Vol. II, Doc. 40-4, p. 2. In examining whether the minority-preferred candidates were usually defeated by a white voting bloc, Dr. Owen defined "usually" to mean "a condition that occurs more often than not." *Id.* at p. 4; *see also* Vol. I, Doc 38, p. 138 (using same definition); *Hamrick III*, 296 F.3d at 1081 (same). She found that Dr. McBride's data showed the minority-preferred candidates were *not* usually defeated by a white voting bloc, but instead the minority-preferred candidate usually wins, as was the case in seven of the twelve elections analyzed. *Id.* at p. 7. She thus concluded that Wright failed to establish the third *Gingles* prong.

II. Standard of Review

The Court reviews a district court's grant of summary judgment *de novo*, "considering all the facts and reasonable inferences in the light most favorable to the non-moving party." *Mann v. Taser Inter., Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009). Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party is not required to negate the opposing party's claims but may point out the absence of evidence to support the non-moving party's case. *Marion v. DeKalb Cnty., Ga.*, 821 F. Supp. 685, 687 (N.D. Ga. 1993).

SUMMARY OF ARGUMENT

The District Court correctly held that Wright failed to prove the third *Gingles* prong, a necessary precondition for establishing a Section 2 vote dilution claim, because the data shows that the white community in Sumter County does not "usually" vote as a bloc to defeat the minority community's preferred candidates. In so holding, the court correctly found that minority-preferred candidates prevail more than equally as often as non-minority-preferred candidates in elections for Sumter County's Board of Education.

The court also correctly held that Wright did not demonstrate that the two at-large positions on the Board of Education impeded African-Americans' ability to

elect candidates of their choice. More African-Americans are registered to vote in Sumter County than are whites, and minority-preferred candidates have won in districts with similar voter make-ups as the at-large voting population. Further, Wright's evidence is confined to 2014 and does not establish racial polarization over time as required for a vote dilution claim.

After determining that Wright's Section 2 vote dilution claim necessarily failed, the District Court was not required to analyze each Senate Factor exhaustively. The court correctly concluded that a Section 2 claim cannot be established without proof of each of the three *Gingles* prongs, but considered that some Senate Factors could have bearing on proving the third *Gingles* prong. The District Court evaluated Wright's historical "totality of the circumstances" evidence in this manner. The court then properly concluded that while Wright's evidence established a history of general voter suppression, it did not establish the crucial point: that the current Sumter County voting scheme denies African-American voters an equal opportunity to elect the candidate of their choice. The District Court was not required to delve into any further analysis after reaching that conclusion.

For these reasons, the District Court's grant of summary judgment to Sumter County should be affirmed.

ARGUMENT AND CITATIONS OF AUTHORITY

Section 2 of the VRA prohibits jurisdictions from diluting the strength of minority voters through a "standard, practice, or procedure" "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Proof of illegal vote dilution is established if the "totality of the circumstances" shows that the political processes leading to an election "are not equally open to participation" by members of a minority group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). The statute cautions that it does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

In *Gingles*, the United States Supreme Court laid out a test for determining illegal vote dilution. 478 U.S. at 50-51. It first explained three "necessary preconditions" that a Section 2 plaintiff must establish in order to establish a claim that a districting scheme impairs minority voters' ability to elect representatives of their choice. *Id.* The plaintiff must show that (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) it is politically cohesive, and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as

the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* Through the third prong, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Id.* at 51.

As the District Court correctly held, Wright's case necessarily failed because he did not establish the third *Gingles* prong – one of the three preconditions that must be met for a plaintiff's Section 2 claim to proceed. *See Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1567 (11th Cir. 1997). The District Court's grant of summary judgment to Defendant should be affirmed.

I. The District Court Correctly Held that Wright Failed to Prove the Third *Gingles* Prong Because Whites in Sumter County Do Not "Usually" Vote as a Bloc to Defeat Minority-Preferred Candidates, and Thus Wright Cannot Establish a Section 2 VRA Claim

To establish the third *Gingles* precondition, Wright must show that the white voters in Sumter County usually vote as a bloc to cause the minority-preferred candidate to lose. There is no genuine dispute that Wright's evidence fails to meet this requirement.

This Court has explained that a Section 2 plaintiff "must show not only that whites vote as a bloc, but also that white bloc voting *regularly causes* the candidate preferred by black voters to lose; in addition plaintiffs must show not only that blacks and whites sometimes prefer different candidates, but that blacks and whites *consistently* prefer different candidates." *Johnson v. Hamrick (Hamrick III)*, 296 F.3d 1065, 1074 (11th Cir. 2002) (emphasis in original). In addition, the racial bloc voting must be a pattern and more than just a single election. *Id*.

In *Hamrick III*, the Eleventh Circuit affirmed a district court's judgment in favor of defendants, which was based on the court's evaluation of eleven elections in Gainesville, Georgia. *Id*. at 1077. In that Section 2 case, the minority-preferred candidate prevailed in five of eleven elections (45.5% of the time), while the minority-preferred candidate lost in five of eleven elections (45.5% of the time), leaving one election where there was no clear preference for African-American or white voters. *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1372 (N.D. Ga. 2001). The Eleventh Circuit determined that, when the evidence showed the minority community's candidates of choice won as frequently as they lost, plaintiffs had failed to prove the third prong of *Gingles* because the minority-preferred candidate was not "usually" defeated by the white majority. *Hamrick III*, 296 F.3d at 1081.

Other Circuit Courts have reached similar conclusions in cases revolving around the third prong of *Gingles*. *See Cottier v. City of Martin*, 604 F.3d 553, 560

(8th Cir. 2010) (en banc) (finding that when Indian-preferred candidates succeed in "almost equal numbers" to non-Indian-preferred candidates, plaintiffs had not shown the white voters "usually" voted as a bloc to defeat them); *Lewis v. Alamance Cnty., N.C.*, 99 F.3d 600, 616 (4th Cir. 1996) (finding that, if minority-preferred candidates were successful 50% of the time, they were not "usually" defeated by white bloc voting); *Clay v. Bd. of Educ. of City of St. Louis*, 90 F.3d 1357, 1362 (8th Cir. 1996) (finding that 57.9% success rate of minority-preferred candidates did not meet third prong of *Gingles*); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812-13 (6th Cir. 1994) (finding when 47% of black-preferred black candidates were elected, they were not "usually" defeated by white bloc voting).

Here, Wright's evidence showed numbers nearly identical to those in *Hamrick III*. Dr. McBride analyzed twelve endogenous elections. Vol. I, Doc. 38, p. 47. He initially concluded that the minority-preferred candidate was not defeated in six of those elections. Vol. I, Doc. 38-1, p. 24-26; Vol. II, Doc. 40-4, p. 7. Dr. McBride backtracked on one of the elections in his deposition, but still conceded that in at least five of eleven (45.5%), and as many as seven of twelve (58.3%) elections, the minority-preferred candidate was successful. Vol. I, Doc. 38, p. 129. The District Court thus correctly concluded that Wright failed to establish the third *Gingles* prong.

A. In Analyzing the Third *Gingles* Prong, the District Court Correctly Excluded Three Elections: Two Elections for Which the Statistical Data Was Not Reliable and So a Minority-Preferred Candidate Could Not Be Identified and One Which Revealed No Clear Winner

When analyzing minority bloc voting under the third *Gingles* prong, the District Court correctly declined to consider Dr. McBride's analysis of four of the twelve elections. Wright argues that the analyses of three of those elections were improperly excluded and should be counted as losses for the minority-preferred candidates. Appellant Br. 12.

However, the District Court properly excluded Dr. McBride's analyses of the elections. His analyses of the May 20, 2014 District 3 election and the 2006 District 3 election were unreliable because the voting percentages considered by Dr. McBride totaled greater than 100 percent. Vol. II, Doc. 62, p. 10-11. The court correctly excluded the May 20, 2014 Two-Year At-Large General Election because there was no clear winner, and the 2002 District 3 General Election because there was no clear minority-preferred candidate. *Id.*

i. The May 20, 2014 District 3 election and 2006 District 3 election were properly excluded because the data analyzing them is unreliable

Wright contends that these elections should be considered because statistical analyses "are, by their nature, estimates that by definition contain margins of error." *Id.* He cites social science literature for the proposition that experts simply reduce "impossible" results down to 100 percent. *Id.* at 15. Wright also cites a

Northern District of Ohio case that concluded that statistical analysis of racial bloc voting "might yield an inexact result for purposes of a hypothetical mathematical challenge," but could still be probative of racial bloc voting. *United States v. City of Euclid*, 580 F. Supp. 2d 585, 602 (N.D. Ohio 2008). But that case does not discuss *election results* that are clearly "impossible." *Id.* Instead, the quotation references one expert's concern about the methodologies employed by the opposing expert. *Id.* Here, there is more than a concern about methodology: there is concern about relying on election results that cannot possibly be accurate.

The percentage total for African-American voters in the May 20, 2014 District 3 election was 108.4% using the King method. Vol. II, Doc. 62, p. 5. The percentage total for African-American voters in the 2006 District 3 election was 137.5% using the King method and 104% using the BERA method. *Id.* at p. 6. During his deposition, Dr. McBride himself expressed concern about these numbers. He said that if King numbers total over 100, he would think that there was a "specification error" and that "someone input a variable wrong or something." Vol. I, Doc. 38, p. 95. Those numbers cannot accurately reflect the African-American vote and thus cannot be used as evidence of elections in which there was a minority-preferred candidate. It was proper for the District Court to exclude them.

ii. The District Court excluded the May 20, 2014 At-Large Election because no one won that election but correctly noted that had it been counted, it would have been counted as a win for the minority-preferred candidate because he received more votes than any other candidate in the first round of voting

Wright contends that the May 20, 2014 election should be treated as a loss for the minority-preferred candidate because no one won a majority and a white candidate ultimately won the election in a runoff. Appellate Br. 13. But as Wright admits, the minority-preferred candidate received more votes than any other candidate in the first round of voting. *Id.* The District Court disregarded the election, calling it "essentially a 'draw' that went on to a run-off." Vol. II, Doc. 62, p. 13. The court further noted that if it did count the election, it "would have to find, based purely on the data reported, the minority-preferred candidate won since he received more votes than any other candidate." *Id.* at 14.

That if counted, the election would have been counted as a win for the minority-preferred candidate is both logically correct and in keeping with the undisputed evidence on the issue. Dr. Owen testified conclusively that the race should be counted as a success for the minority-preferred candidate. Owen Dep. 27:18-29:14. On the other hand, Dr. McBride testified that he did not know how it should be counted. Vol. I, Doc. 38, p. 121. Thus, there is no genuine dispute as to how the race should be counted. *See Penley v. Eslinger*, 605 F.3d 843, 848 (11th Cir. 2010) (finding a genuine dispute must exist over material fact, and situations

where "all that exists is 'some metaphysical doubt as to the material facts'" do not constitute such a dispute).

B. The District Court Correctly Found that Minority-Preferred Candidates Prevailed in Five Elections that Identified a Clear Winner and a Minority-Preferred Candidate and that Those Elections Were Not Marked By Special Circumstances

The District Court found that minority-preferred candidates won five of the eight elections Dr. McBride analyzed in which there was a clear winner and a minority-preferred candidate. Vol. II, Doc. 62, p. 14. Those elections were the May 18, 2014 District 6 General Election; May 20, 2014 District 1 General Election; May 20, 2014 District 5 General Election; 2010 District 3 General Election; and 2008 District 1 General Election. *Id.* The Court thus found that the minority-preferred candidate succeeded 62.5% of the time. *Id.*

Wright contends that four of those elections were marked by "special circumstances" because African-Americans were a majority of the total population or the largest voting age population. Appellate Br. 17-18. But this is not the type of "special circumstance" the Supreme Court referred to when it held that 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." *Gingles*, 478 U.S. at 51. Other "special circumstances" listed by the Supreme Court include

"incumbency, or the utilization of bullet voting." *Id.* at 57. It is true that this list "is illustrative, not exclusive." *Id.* at 51 n.26. But these examples make clear that the "special circumstances" the Court considered relate to who the candidates are and the method of election—not the racial makeup of the voters.

As the Ninth Circuit explained it, when special circumstances are present "voters may behave differently than they would otherwise—as such, that election is not probative of whether a Section 2 majority voting bloc usually defeats the minority's preferred candidate." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 556 (9th Cir. 1998). Being a part of the majority of the total population or the largest voting age population is not a circumstance that would make voters behave differently like "the absence of an opponent; incumbency; utilization of bullet voting; or the pendency of [an] instant lawsuit" could. *Id.* Wright has not shown and cannot show that these elections were "surrounded by unusual circumstances," and as such, the elections are probative of racial bloc voting or the absence thereof. *Id.*

C. The District Court Did Not Err in Considering the Elections Plaintiff's Own Expert Analyzed and Presented to the Court Instead of Solely Focusing on Majority-White Districts

In considering whether Sumter County's method of electing the Board of Elections improperly dilutes the African-American vote, the District Court properly considered **all** of the Board of Education elections that Wright presented

to the Court. *Amici curiae*, however, argue that the District Court's inquiry into the third *Gingles* prong should have focused specifically on whether white voting blocs defeat minority-preferred candidates in *majority-white districts* and that the Court's "treatment of all the school board elections as equally probative improperly shifted the focus away from the most relevant statistics." Br. of Amici Curiae 23-25. In support of this argument, *amici* cite *Bone Shirt*, 461 F.3d at 1016, which neither supports that proposition nor controls here.

In *Bone Shirt*, the plaintiff claimed that a redistricting plan that created thirty-five state legislative districts violated Section 2 of the VRA by packing District 27 with Native-Americans at the expense of District 26. *Id*. at 1016. Because the plaintiff pled that specific question, the district court analyzed whether the plaintiff was correct that the Native-American vote was diluted in District 26. *Id*. at 1020-21. In doing so, however, the district court looked at endogenous elections in District 26, as well as two exogenous elections that held "some probative value." *Id*. On appeal, the Eighth Circuit concluded that generally, when analyzing a vote dilution claim, a district court's inquiry into the third *Gingles* prong should entail: (1) identifying the minority-preferred candidate; (2) determining whether the white majority vote as a bloc to defeat the minority-preferred candidate; and (3) determining whether there were special circumstances such as the minority candidate running unopposed present when minority-preferred

candidates won." *Id.* at 1020. This is precisely the framework the District Court followed here.

The District Court correctly focused on the twelve endogenous elections analyzed by Wright's expert as a starting point for its analysis. In order to determine whether whites usually vote as a bloc to defeat minority-preferred candidates, the Court needed to look at all interracial contests for the Board of Election and, from there, determine which elections had a minority and/or majority-preferred candidate and which candidate usually won. *Id.* Wright did not point to which district he believed was negatively impacted by the alleged packing of Districts 1 and 5, as the *Bone Shirt* plaintiff did, so the District Court analyzed elections in all of the districts which evidenced a majority-preferred or minority-preferred candidate to determine if the minority vote was diluted by the alleged packing. This process was not error, and, in fact, is in line with Eleventh Circuit precedent. *See Hamrick III*, 296 F.3d at 1075-76 (analyzing results from all contested endogenous elections and removing from the equation elections in which no racial preferences could be determined).

II. The District Court Correctly Found that Wright Failed to Demonstrate that the Two At-Large Positions on the Board of Education Impede African-Americans' Ability to Elect Their Preferred Candidates

Wright's burden was to show "that submergence in a white multimember district impedes [the minority group's] ability to elect its chosen representative" in order to successfully challenge Sumter County's use of at-large districts. *Gingles*, 478 at 51. But the evidence shows that minority-preferred candidates are able to win in districts with populations similar to that of Sumter County overall. Minority-preferred candidates won in the 2010 District 3 General Election and in the 2008 District 1 General Election, in which the African-American voting age populations were 48.4% and 49.5%. Vol. I, Doc. 38-1, p. 25. The African-American voting age population in the 2014 at-large elections was 48.1%. *Id.* Notably, even when African-Americans were only 28% of the voting age population in the 2014 District 6 General Election, the minority-preferred candidate prevailed. *Id.* at p. 24.

A. Wright Failed to Show that No Minority-Preferred Candidate Has Been Elected At-Large to the Board of Education

The fact that no African-American has been elected at large, even if true, does not by itself support a Section 2 claim. Wright argues that the District Court erred in stating that he did not cite any evidence to support his assertion that no African-American candidate has ever been elected to an at-large position on the

Board of Education. Appellate Br. 21. He then cites evidence purporting to support that fact. *Id.*

But as the District Court noted, "Wright does not provide evidence to support a finding that no *black-preferred* candidate has ever been elected." Vol II., Doc. 62 at A487 (emphasis added). Under *Gingles*, "the race of the candidate is not determinative—it is the ability of the minority community to elect the candidate of its choosing." *Id.*, citing *Nipper*, 39 F.3d at 1539. So even if no African-American has been elected to an at-large position on Sumter County's Board of Education, that fact is not sufficient to support a Section 2 vote dilution claim.

B. The District Court Did Not Err in Concluding that Whites Likely Did Not Make Up a Majority of Registered Voters in the 2014 At-Large Elections

In rebuffing Wright's argument that when whites are a majority they elect the candidate of their choice in Sumter County, the District Court noted that in the at-large elections won by the majority-preferred candidate in 2014, "whites likely did not make up the majority of registered voters." Vol. II, Doc. 62, p. 15. Wright argues on appeal that the District Court erred in concluding that "whites were not a majority of voters" in the elections, but the court did not say that; the court said whites were likely not the majority of *registered* voters. *Id.*; Appellate Br. 23.

That conclusion is borne out by the facts. As of August 2014, Sumter County had more registered African-American voters than registered white voters. Vol I, Doc. 38, p. 50-51. The District Court recognized that even though the 2014 at-large elections were held a few months prior to when this voter registration data was acquired, "the data had to have been similar if not identical barring an unusual post-election voter registration push in the black community." Vol. II, Doc. 62, p. 15.

Importantly, the District Court's analysis did not stop there. The District Court also found that Dr. McBride's evidence indicates that in districts with similar demographics to the at-large elections, minority-preferred candidates have been successful. Vol. II, Doc. 62, p. 15. And in the 2014 District 6 General Election where the African-American voting age population was only 28%, the minority-preferred candidate prevailed. *Id.* So even if a majority of actual voters in the at-large elections were white, it does not follow that no minority-preferred candidate could be successful. It was not error for the District Court to note that whites were likely a majority of registered voters in the 2014 at-large elections.

C. The Demographics of Sumter County are Similar to the Demographics of Districts Where Minority-Preferred Candidates Have Been Successful

To successfully challenge the use of at-large elections, Wright was required to show that "submergence in a white multimember district impedes [the minority

group's] ability to elect its chosen representative." *Gingles*, 478 U.S. at 51. Wright argues on appeal that minority-preferred candidates, with one exception, have only won in districts where African-Americans "were a majority of the total population or the largest voting age population." Appellate Br. 24. But as the District Court found, minority-preferred candidates have been successful in districts with demographics similar to the countywide demographics. Vol. II, Doc. 62, p. 15.

The African-American voting-age population in the 2014 at-large elections was 48.1%. Vol. I, Doc. 38-1, p. 25. The District Court pointed to two elections in which minority-preferred candidates were successful in districts with similar demographics as evidence that "submergence in white multimember districts" does not impede the minority's ability to elect its chosen representatives. Vol. II, Doc. 62, p. 15. In the 2010 District 3 General Election, the black voting age population was 48.4%. *Id.* And in the 2008 District 1 General Election, the black voting age population was 49.5%. *Id.* Further, a minority-preferred candidate was successful in the 2014 District 6 General Election in which the African-American voting age population was 28%. *Id.* This undisputed evidence showed that minority-preferred candidates can be successful under the current voting scheme in at-large elections.

III. The District Court Considered Wright's Packing Claim and Properly Concluded That It Fails

As the District Court acknowledged, Wright's Section 2 challenge cited the high concentration of African-American voters in Districts 1 and 5. Vol. II, Doc. 62, p. 1. Section 2 prohibits "packing" of minorities into a single district so as to dilute their voting strength. *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). According to the Supreme Court, "the critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity" than majority voters to participate in the electoral process and elect representatives of their choice. *Gingles*, 478 U.S. at 63. Because the District Court found that the electoral structure and practices in Sumter County did not result in African-American voters having less opportunity than majority voters to elect representatives of their choice, Wright's packing claim necessarily fails.

Wright points to *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) ("ALBA"), for the proposition that the District Court should have considered his packing claims on a district-by-district basis. In doing so, he conflates a packing claim brought as part of a Section 2 vote dilution claim with a racial gerrymandering claim under the Equal Protection Clause. In *ALBA*, the appellants sought review of their claims that new district boundaries in Alabama

created racial gerrymanders in violation of the Fourteenth Amendment's Equal Protection Clause. 135 S.Ct. at 1262. While it is true that "[a] racial gerrymandering claim [] applies to the boundaries of individual districts," *id.* at 1265, Wright did not bring a racial gerrymandering claim under the Fourteenth Amendment, so District Court properly refrained from a racial gerrymandering analysis.

The District Court considered Wright's packing claims when it analyzed whether the electoral system in Sumter County resulted in dilution of the minority vote under Section 2 and found that it did not. Wright provides no basis for reversal of that ruling, and it should stand.

IV. Although the District Court Was Not Required to Analyze Each Senate Factor, It Did Consider the Totality of the Circumstances in Determining that Wright Failed to Prove the Third *Gingles* Prong, Thus Dooming His Section 2 Claim

Appellant and his *amici* spend most of their briefs arguing that the District Court should have considered in more detail the "totality of the circumstances." When Congress amended Section 2 in 1982, the Senate Judiciary Committee issued a Report accompanying the bill that elaborates on the circumstances that might be probative of a Section 2 violation. *Gingles*, 478 U.S. at 36-37. These "Senate Factors" are not exhaustive but include "the extent of any history of official discrimination" in the County; "the extent to which voting in the elections .

. . is racially polarized"; "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices" that enhance discrimination; denial of minority group access to candidate slating processes; "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process"; racial appeals in campaigns; and "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Id.* at 37.

A. The District Court Was Not Required to Engage in Senate Factor/Totality of the Circumstances Analysis

The Supreme Court in *Gingles* made clear that while some Senate Factors could be relevant to a vote dilution claim, "the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice" unless the three *Gingles* preconditions are met. 478 U.S. at 48. These prongs are referred to as preconditions because they are just that—a Section 2 plaintiff cannot prove his claim without them. *See Nipper*, 39 F.3d at 1524 (holding that plaintiff cannot obtain relief unless he establishes each *Gingles* prong); *Askew v. City of Rome*, 127 F.3d 1355, 1385 (11th Cir. 1997) ("Plaintiffs have failed to prove one of the essential elements of their claim. They cannot,

therefore, show that under the 'totality of the circumstances' their votes have been diluted.").

Wright argues that the District Court failed to give proper consideration to the Senate Factors. But because Wright failed to prove the third *Gingles* prong, the District Court was not required to analyze the Senate Factors. *See Nipper*, 39 F.3d at 1512 (explaining that proof of the three prongs is necessary to a Section 2 claim and that prongs are threshold prerequisites to a successful claim). An inquiry into the totality of the circumstances is only required if those three prongs have been met. *See id.* at 1513; *Askew*, 127 F.3d at 1385; *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) ("The *Gingles* requirements are preconditions, consistent with the text and purpose of § 2, to help courts determine which claims could meet the totality-of-the-circumstances standard for a § 2 violation."); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) ("Once plaintiffs establish these conditions, the court considers whether, on the totality of the circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice."); *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998) ("These three circumstances are necessary preconditions for a showing that an electoral scheme impaired minority voters' ability to elect their chosen representatives. Once plaintiffs establish the three prerequisites, they must go on to show" the totality of the circumstances.); *Clarke v. City of Cincinnati*, 40 F.3d 807, 811 (6th

Cir. 1994) ("If these three preconditions are met, a variety of other factors are then examined . . . . Since plaintiffs failed to prove the necessary precondition of white bloc voting, we need not consider the various other factors that can be probative of a § 2 violation."); *Alamance Cnty.*, 99 F.3d at 604 ("If these preconditions are met, the court must then determine under the totality of the circumstances whether there has been a violation of Section 2.").

B. Even Though It Was Not Required To Do So, the District Court Considered Wright's Totality of the Circumstances Evidence and Concluded His Section 2 Claim Failed Despite That Evidence

As the District Court noted, some Senate Factors may have a direct bearing on the three *Gingles* preconditions and thus can be considered when looking at the totality of the circumstances as to whether a plaintiff is entitled to Section 2 relief. *Nipper*, 39 F.3d at 1526-27; Vol. II, Doc. 62, p. 16. The District Court acknowledged that "non-statistical, anecdotal evidence should be considered in determining whether the third *Gingles* prong has been established" Vol. II, Doc. 62, p. 16, citing *Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995). The District Court found that "even considering McBride's opinions on the socioeconomic conditions in Sumter County together with Wright's other evidence of the history of voter suppression and systemic racism in Sumter County," i.e., the Senate Factors, "the Court finds that Wright has failed to establish the third *Gingles* prong." Vol. II, Doc. 62, p. 17.

Even though the District Court was not required to inquire into the totality of the circumstances, Wright's assertion that the District Court did not do so is incorrect. 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. Because he could not, the District Court was not required to engage in any further analysis into the Senate Factors, and its decision should be affirmed.

Amici curiae rely heavily on this "totality of the circumstances" argument in their brief as well. They argue that the District Court should have found that the two at-large seats enabled white voting blocs to defeat black-preferred candidates in at-large elections by applying a totality of the circumstances analysis. Br. of *Amici Curiae* at 8. They cite to *Salas v. Southwest Texas Junior College District*, 964 F.3d 1542 (5th Cir. 1992) to support their argument. That case states that minority groups "do not lose the protection of the Voting Rights Act when they are no longer population or registered voter minorities" and encourages a totality of the circumstances analysis in multimember or at-large districts "where the protected class is also the registered voter majority." *Id.* at 1550-51.

Here, the District Court noted that African-Americans are a majority of registered voters countywide. But as already explained, its analysis did not end there. The District Court took into account the historical data Wright submitted

but concluded that even considering that data, he had not shown that minority voters' votes are diluted under the current system. Importantly, Wright's descriptions of the most recent discrimination against African-Americans attempting to register and vote occurred over three decades ago. Pl.'s Br. in Resp. to Def.'s Mot. for Summ. J. 8-14.

As *Salas* notes, "[I]t is the plaintiffs' burden, in order to justify relief, to prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates." *Id.* at 1554. Wright did not do so. "Failure to prove each of the preconditions defeats a Section 2 claim." *Bone Shirt*, 461 F.3d at 1018. "If the three preconditions are met, the court proceeds to consider the totality of the circumstances." *Id.* The three preconditions were not met, so the District Court did not need to proceed any further in its analysis.

Equally importantly, *Salas* states that the District Court also must inquire into causation—"whether the given electoral practice is responsible for plaintiffs' inability to elect their preferred representatives." *Id.* Thus, "in analyzing legally significant white bloc voting in a case where the protected class is also a population, registered vote, or other majority, the third *Gingles* precondition requires an inquiry into the causal relationship between the challenged practice and the lack of electoral success by the protected class voters." *Id.* Even if Wright had

been able to show that the African-American community's vote is diluted today, which he could not, he did not connect any historical discrimination to today's election results in presenting his case to the District Court.

Further, in *Salas* the Fifth Circuit found that "assuming arguendo that the district court did not proceed beyond a conclusion that failure to satisfy the third *Gingles* precondition ended the dispute, we hold that the findings of fact by the district court satisfy the totality of the circumstances test and are, therefore, sufficient to uphold its judgment." *Id.* at 1555. So too here. The District Court clearly considered evidence of the totality of the circumstances, and the fact that it did so is sufficient to uphold the judgment whether a totality of the circumstances analysis was required or not.

CONCLUSION

The District Court correctly held that Wright failed to establish a Section 2 vote dilution claim because he failed to show that whites in Sumter County usually vote as a bloc to defeat the minority-preferred candidate. Minority-preferred candidates in Sumter County's Board of Elections contests analyzed here prevailed more often than not. Because Wright could not show that the minority vote was diluted, he could not prove his packing claims under Section 2.

And even though the District Court considered the totality of the circumstances in assessing whether Wright met the third *Gingles* precondition, it

was not required to because proof of all three preconditions is necessary in order to prove a Section 2 claim. So it was not error for the District Court to decline to conduct further Senate Factor analysis after determining that Wright's claim could not go forward. The District Court's grant of summary judgment to Sumter County should be affirmed in its entirety.

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in a 14-point proportionally-spaced font and complies with the type-volume limitation of the Rule, containing 8,006 words, excluding those sections of the brief that do not count toward that limitation, in accordance with Rule 32(a)(7)(B)(iii), as determined by the word processing system used to prepare the brief.

Respectfully submitted this 18th day of November, 2015.

s/Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490
Barclay S. Hendrix
Georgia Bar No. 917852
STRICKLAND BROCKINGTON LEWIS LLP
Midtown Proscenium Suite 2200
1170 Peachtree Street NE
Atlanta, GA 30309
awl@sbllaw.net

(678)347-2200 (telephone)
(678)347-2210 (fax)

Kimberly A. Reid
Georgia Bar No. 596699
LAWSON & REID, LLC
901 East 17th Avenue
P.O. Box 5005
Cordele, Georgia 31010
kimberly.reid@lawsonreidlaw.com
(229) 271-9323 (telephone) (229) 271-9324 (fax)

Counsel for Defendant/Appellee Sumter County Board of Elections and Registration

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MATHIS KEARSE WRIGHT, JR.,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	Appeal No. 15-13628
	)	
SUMTER COUNTY BOARD OF ELECTIONS AND REGISTRATION,	)	
	)	
	)	
Defendant/Appellee.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing BRIEF OF APPELLEE/DEFENDANT with the Clerk of Court using the ECF system which will automatically send email notification of this filing and that I will send seven paper copies to the Court and one paper copy to counsel for the Appellant.

This 18th day of November, 2015.

s/ Anne W. Lewis
Anne W. Lewis
Georgia Bar No. 737490