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 OF AMICI CURIAE THE GEORGIA NAACP AND THE CAMPAIGN LEGAL CENTER

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# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1-1, undersigned counsel for *amici curiae* the Georgia State Conference of the National Association for the Advancement of Colored People (Georgia NAACP) and the Campaign Legal Center (CLC) certifies that he believes that the certificate of interested persons and corporate disclosure statement accompanying the brief of Plaintiff-Appellant Mathis Wright filed on October 19, 2015, is complete with the following exceptions:

## A. Interested Parties

Campaign Legal Center (*amicus curiae*)

Georgia NAACP (*amicus curiae*)

Institute for Public Representation (counsel for *amici curiae*)

Kirkpatrick, Michael T. (counsel for *amici curiae*)

Llewellyn, Patrick (counsel for *amici curiae*)

## B. Corporate Disclosure Statement

The Georgia NAACP is a state conference of the National Association for the Advancement of Colored People (NAACP). The NAACP is a nonprofit, nonpartisan corporation. The NAACP has no parent corporation and no publicly held corporation has any form of ownership interest in the NAACP.

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC.

*/s/ Patrick Llewellyn*
Patrick Llewellyn

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## INTEREST OF *AMICI*

This brief is filed by the Georgia NAACP and the CLC with the parties' consent.

The Georgia NAACP is part of a national network of more than 2,000 NAACP affiliates covering all 50 states and the District of Columbia. Total national membership currently exceeds 500,000. The NAACP's principle objective is to ensure the political, educational, social, and economic equality of minority citizens of the United States. The Georgia NAACP has had a continuous presence in Georgia since 1917 and maintains a network of branches throughout Georgia, from cities to small rural communities. As part of its commitment to political equality, the Georgia NAACP engages in significant voter mobilization and education. The Georgia NAACP believes the decision below will undermine its work on behalf of minority voters.

The CLC is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in prior voting rights and redistricting cases, including *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1

(2009); and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

## STATEMENT OF ISSUES

Whether the District Court erred in finding that the Plaintiff failed to satisfy the third precondition required by *Thornburg v. Gingles*, 478 U.S. 30 (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."

## SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act of 1965 (VRA) was designed to protect democracy by ensuring that every person has the same right to participate in elections. Congress believed so firmly in this participatory ideal that it explicitly overruled the Supreme Court's holding that Section 2 extended no further than the 15th Amendment when it renewed the VRA in 1982. S. Rep. No. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205–07; *see Mobile v. Bolden*, 446 U.S. 55 (1980). Instead, Congress linked Section 2 to the broad right of minority voters to "equal opportunity to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44.

The District Court erred in applying these broad protections by taking a flawed and excessively formalistic approach to analyzing whether the Plaintiff's evidence, including statistical evidence, satisfied—or raised a dispute of material fact as to whether it satisfied—the three *Gingles* preconditions. Both the Supreme Court and the Eleventh Circuit have counseled that the three *Gingles* preconditions cannot be applied "mechanically" and that statistical evidence of vote dilution cannot be analyzed with a "rigid, formalistic approach." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); *Nipper v. Smith*, 39 F.3d 1494, 1537 (11th Cir. 1994).

Despite these warnings, the District Court did exactly what *De Grandy* and *Nipper* prohibit when it simply tallied the number of racially polarized elections the Plaintiff examined, and calculated the portion of these elections that the Black-preferred candidate won. The District Court's approach ignored the electoral realities facing Black voters in Sumter County, relying instead on bare statistics and hypothetical and potential victories. Furthermore, even the District Court's tally of elections was misguided inasmuch as the most probative elections showed Black-preferred candidates winning only two of the seven new school board positions (despite the fact that Blacks comprise forty-eight percent of the County's voting age population). *See De Grandy*, 512 U.S. at 1013–14 (explaining the importance of proportionality in analyzing the totality of the circumstances); *see*

*also id.* at 1025 (O'Connor, J., concurring) ("Lack of proportionality is probative evidence of vote dilution.")

The Plaintiff alleged that two specific election practices created by the new Sumter County Board of Education electoral system violate Section 2 because they dilute Black voting power. First, the conversion of two single-member districts to at-large seats favor the election of white-preferred candidates over Black-preferred candidates by diluting the Black vote. Second, the boundaries of the five new single-member districts impermissibly dilute Black voting power by packing the Black community into only two districts. This combination of limiting minority single-member districts and using county-wide at-large seats allows white voters to leverage their voting power to defeat Black-preferred candidates. As noted above, the most probative elections indicate that Black-preferred candidates will win only two of the seven new school board positions, despite the fact that Blacks are forty-eight percent of the voting age population in Sumter County.

The District Court erred in its analysis of the Plaintiff's challenge by uncritically looking to the results of all twelve prior school board elections, including those that occurred under the prior electoral system. Instead, the District Court should have looked separately at the effect of both the addition of two at-large seats and the consolidation of single-member districts from seven to five. *Cf. De Grandy*, 512 U.S. at 1007; *Nipper*, 39 F.3d at 1537. Following this approach

would have significantly altered the District Court's conclusions. In analyzing the effect of the at-large seats, the court should have proceeded to a totality of the circumstances analysis to resolve any doubts about whether the Plaintiff had proven that a white voting bloc can usually defeat Black-preferred candidates in at-large elections. *See Salas v. Sw. Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1550–51 (5th Cir. 1992); *see also Pope v. Albany Cnty.*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) (noting plaintiffs may challenge "bare majority" districts because depressed voter turnout combined with historical discrimination may be a violation of Section 2); *cf. Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (totality of circumstances established vote dilution despite minority group having a majority of total population in at-large district); *Graves v. Barnes*, 343 F. Supp. 704, 733 (W.D. Tex. 1972) (three-judge court), *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973).

In analyzing the effects of the single-member districts, the District Court should have looked at the specific elections in which whites were the majority of voters in a single-member district. *De Grandy*, 512 U.S. at 1007; *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006). This approach would have led the court to the inescapable conclusion that Black-preferred candidates would only be twenty-nine percent of the new Board of Education, despite the fact that Blacks

make up forty-eight percent of Sumter County's voting age population, and further that the new plan dilutes their voting strength in violation of Section 2 of the VRA.

## ARGUMENT

### I. The District Court should have found that the creation of two at-large seats enabled a white voting bloc to defeat Black-preferred candidates in at-large elections.

In analyzing the Plaintiff's challenge to the at-large seats under the new electoral scheme, the District Court placed significant weight on the fact that "whites likely did not make up the majority of registered voters." Appellant's App., Vol. 2, Doc. 62 at A486; *see also id.* at A488 ("Wright's own expert agrees that black voters now make up a majority of registered voters in Sumter County . . . ."). Instead of heavily weighing the relevance of a slim Black registered voter majority in Sumter County, the court should have applied a totality of circumstances analysis to resolve any doubts it had about whether, because Black voters represented a bare majority of registered voters in the at-large district, the Plaintiff had satisfied the third *Gingles* precondition. *Salas*, 964 F.2d at 1550–51; *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1428 (8th Cir. 1989), *vacated on reh'g and judgment of district court aff'd by an equally divided en banc court*, 902 F.2d 15 (8th Cir. 1990); *see also Pope*, 687 F.3d at 575 n.8.[1]

[1] Whether racially polarized voting exists involves a distinctly different inquiry than the racial composition of those registered to vote. A racially polarized voting analysis looks at those registered voters who actually went to the polls and

This is necessary because, as illustrated below, at-large voting may still operate to dilute the voting strength of racial and language minorities where, as is the case in Sumter County, socioeconomic and historical factors combine to limit minority participation. In other words, by applying a totality of circumstances analysis, the District Court would not have overlooked how past discrimination and socioeconomic disparities depress Black turnout in Sumter County, which allows the white voting bloc to defeat Black-preferred candidates in at-large elections. *See, e.g.*, *Gingles*, 478 U.S. at 69; *Salas*, 964 F.2d at 1555–56.

By not using the totality of circumstances analysis to resolve these doubts, the court erroneously concluded that the white voting bloc could not usually defeat Black-preferred candidates because Blacks represent a slim majority of registered voters. *Cf. Meek v. Metro. Dade Cnty.*, 908 F.2d 1540, 1546 (11th Cir. 1990) (rejecting district court's reliance on the fact that Hispanic voters could be the largest voting population if they properly registered and voted). The court committed this error despite acknowledging, under its own formalistic analysis, that Black-preferred candidates had never been elected to office in any of the at-large elections examined, which, along with polarized racial voting, should have been sufficient to prove the third *Gingles* precondition. *See, e.g.*, *Gomez v. City of*

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determines whether "there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently." *Gingles,* 478 U.S. at 53 n.21 (internal quotation marks, brackets, and citations omitted).

*Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988). Thus, even under the District Court's own flawed and limited analysis, the court should have concluded that, viewing the evidence in the light most favorable to the Plaintiff, the third *Gingles* precondition was established.

### A. The District Court should have proceeded to the totality of the circumstances to resolve any doubts it had about whether a white voting bloc could usually defeat Black-preferred candidates in at-large elections.

After concluding that there is racially polarized voting in Sumter County, Appellant's App., Vol. 2, Doc. 62 at A483–A484, the District Court should have proceeded to the totality of circumstances analysis to resolve any doubts it had about whether, because Blacks represent a slim majority of registered voters or because there are few recent at-large elections, a white voting bloc can usually defeat Black-preferred candidates in at-large elections, *Salas*, 964 F.2d at 1554–55; *Whitfield*, 890 F.2d at 1428; *see also Pope*, 687 F.3d at 575 n.8. Ultimately, the inquiry under *Gingles* is whether, given the totality of circumstances, Black voters are denied the opportunity to participate effectively in the electoral process. *E.g.*, *Nipper*, 39 F.3d at 1526–27. Courts must therefore consider all evidence of vote dilution, with the *Gingles* preconditions and the Senate Factors as guides. *E.g.*, *id.* As other circuits have noted, analyzing whether the white voting bloc usually votes to defeat Black-preferred candidates under the third *Gingles* precondition cannot rest solely on whether Blacks constitute a registered voter majority, especially in

districts with few recent elections. *See Whitfield*, 890 F.2d at 1428. Thus, when analyzing a vote dilution claim in this context, courts should proceed to the totality of circumstances to resolve doubts about whether the white voting bloc can prevent the election of minority-preferred candidates. *Salas*, 964 F.2d at 1554–55.

In this case, proceeding to the totality of circumstances portion of *Gingles* is especially important. As the District Court noted in it its analysis of the third *Gingles* precondition, Black registered voters represent only a thirteen-voter majority, and the Black voting age population represents a minority in the at-large district. Appellant's App., Vol. 2, Doc. 62 at A485–A486.[2] Because of these slim margins, social and historic circumstances that only slightly reduce Black turnout can give the white voting bloc a majority of actual voters. *See Ketchum v. Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984) (noting that given low turnout and other factors, in some cases a district must be at least sixty-five percent minority to be considered majority-minority); *Smith v. Clinton*, 687 F. Supp. 1361, 1362 (E.D. Ark.) (three-judge court) (same), *aff'd*, 488 U.S. 988 (1988). Additionally, the challenged at-large voting scheme has only been in place for two elections. There

[2] The record below does not contain any evidence about the reliability or accuracy of the registered voter data, something the District Court might have reviewed if a proper totality of circumstances review had been undertaken. It's entirely possible that the voter registration data includes the names of persons who have moved away or people who have died. For this reason, the District Court's decision to place so much weight on the slim 13 person majority of Black registered voters in that database was also improper.

are, therefore, few election results with which the Plaintiff may prove that the white voting bloc usually defeats Black-preferred candidates in at-large elections. *See* Section II.A, *infra*. Without looking to the full totality of circumstances, the court could easily reach the wrong conclusion, as it did here.

### B. A totality of circumstances analysis reveals that depressed minority turnout allows for a white voting bloc to defeat Black-preferred candidates.

A long history of racial discrimination in Georgia and Sumter County, combined with severe socioeconomic disparities between blacks and whites in the county, hinders Black voters from effectively participating in elections. *See*, *e.g.*, *Gingles*, 478 U.S. at 69. These undisputed factors have the effect of reducing Black turnout sufficiently to undercut the Black voters' slim registered-voter majority in countywide elections. *See Salas*, 964 F.2d at 1555–56; *cf. Meek*, 908 F.2d at 1546. At-large elections take advantage of this depressed turnout, enabling white voters to vote as a bloc to defeat Black-preferred candidates. *See Ketchum*, 740 F.2d at 1415. These principles, drawn from case law and, as far as we can tell, undisputed by the County, are further reinforced by social science.

#### i) Prior discrimination limits minority turnout in Sumter County

Past discrimination, especially in voting, continues to discourage Black participation in Sumter County elections. Courts have found that past discrimination broadly, and especially in voting, depresses voter turnout among

groups that face discrimination. *See, e.g.*, *Gingles*, 478 U.S. at 69 (noting that past discrimination can reduce participation in elections); *Graves*, 343 F. Supp. at 733 ("[T]he *reason* that the voter participation among the Mexican-Americans is so low is that their voting patterns were established under . . . discriminatory State action[]."); *Uno v. City of Holyoke*, 72 F.3d 973, 986–87 (1st Cir. 1995) (noting that voter apathy can be the result of past discrimination that prevented minorities from voting); *cf. Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1212 (5th Cir. 1989) ("Congress was concerned not only with present discrimination, but with the vestiges of discrimination.").

Social science also shows that a legacy of discrimination discourages Black voting. Numerous studies have documented that Black Americans feel cynical about participating in electoral politics because of a history of oppression and a dearth of Black candidates. *See* Erica C. Taylor, *Political Cynicism and the Black Vote*, 17 Harv. J. Afr. Am. Pub. Pol'y 3, 8–9 (2011); *see* Frederick Solt, *Does Economic Inequality Depress Electoral Participation? Testing the Schattschneider Hypothesis*, 32 Pol. Behav. 285, 285 (2010) (showing Blacks vote at lower rates than whites). Additionally, increases in racial diversity among the electorate have been shown to correlate with decreases in voter turnout, because white-controlled governments often pass voter suppression laws in response to increased diversity.

Kim Quaile Hill & Jan E. Leighley, *Racial Diversity, Voter Turnout, and Mobilizing Institutions in the United States*, 27 Am. Pol. Q. 275, 275 (1999).

Sumter County has a history of legally mandated racial segregation and discrimination in all aspects of public life. Pl.'s Br. 29–31. For example, the school system in Sumter County remained under court order to desegregate until 2005. Pl.'s Br. 41–42. Additionally, Sumter County has a history of discrimination in voting in particular, including: violent police repression of Black voter drivers, Pl.'s Br. 36–38; white mobs attacking Black voters, Pl.'s Br. 39–41; arresting Blacks for attempting to vote, Pl.'s Br. 39–41; and attempts to implement voting plans found discriminatory by the Department of Justice, Pl.'s Br. 31–35.

**ii) Socioeconomic disparities that limit minority turnout in Sumter County**

Socioeconomic disparities discourage Black participation in elections in Sumter County. The Senate Report that accompanied the 1982 amendments to Section 2 of the VRA makes clear that where income, educational, and employment disparities exist between Black and white residents, and there are depressed levels of political participation, a causal nexus between the two can be assumed. *See* S. Rep No. 417, at 29 n.114. Likewise, courts have noted that income, educational, and employment disparities between white and minority voters depress minority turnout. *See, e.g.*, *Gingles*, 478 U.S. at 69 (noting that depressed socioeconomic conditions can reduce participation in elections); *Uno*, 72

F.3d at 986–87 (noting that, *inter alia*, "downtrodden socioeconomic conditions account for low turnout among Hispanic voters"); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 866 (5th Cir.1993) (noting that part of a Section 2 analysis involves examining "the extent to which discrimination in areas such as education, employment, and health . . . hinder [minority group's] ability to participate in the political process); *Teague v. Attala Cnty.*, 92 F.3d 283, 294 (5th Cir. 1996) (noting that Blacks participated in elections at lower rates than whites because of socioeconomic gaps between Blacks and whites).

Social science also demonstrates that there is a direct relationship between low voter participation and disparities in income, employment, and education. *See, e.g.*, Richard B. Freeman, *What, Me Vote?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 9896, 2003), *available at* http://www.nber.org/papers/w9896.pdf ("Better educated, higher paid, and older citizens invariably have higher turnout rates than others."). For example, in the 2014 federal midterm elections, forty-six percent of non-voters, compared with only nineteen percent of voters, had annual incomes less than $30,000. Pew Research Center, *The Party of Non-Voters* (Oct. 31, 2014), http://www.people-press.org/ 2014/10/31/the-party-of-nonvoters-2/. Similarly, a study of the 1978, 1980, 1988, 1990, 1998, and 2000 gubernatorial elections in nine states showed both that low-income status is negatively correlated with turnout and that economic

inequality is negatively correlated with turnout. Solt, *supra*, at 285. Finally, data from the November 1974 Current Population Survey show that unemployment, poverty, and a decline in financial wellbeing decrease participation in elections. *See* Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 Am. J. Pol. Sci. 25, 25 (1982).

As the case law and empirical research would predict, socioeconomic, educational, and employment disparities between Black and white residents in Sumter County have contributed to depressed levels of Black turnout. By all socioeconomic indicators, Black residents of Sumter County are worse off than white residents. Appellant's App., Vol. 1, Doc. 38-1 at A294–A299. Only about nine percent of Blacks over the age of twenty-five have bachelor's degrees, compared with thirty percent of whites of the same age. Appellant's App., Vol. 1, Doc. 38-1 at A296. The unemployment rate for Blacks is twice that of whites in Sumter County. *Id*. The median income for Black families is $29,464, and twenty-four percent of Blacks earn less than $10,000 a year. Appellant's App., Vol. 1, Doc. 38-1 at A297–A298. White families' median income, $56,606, is almost double Black families', and only eight percent of whites make less than $10,000 annually. Appellant's App., Vol. 1, Doc. 38-1 at A297–A298.

Given these impediments to meaningful participation in elections, Black turnout is extremely low in Sumter County (ten to fifteen percent) and is

consistently lower than white turnout in at-large elections. Appellant's App., Vol. 1, Doc. 38-1 at A313–314, A329–339. Additionally, in both at-large elections under the new system, Blacks were a minority of actual voters. *Id.* Black voters' ability to participate in elections, even when they are registered, is restricted by socioeconomic disadvantages. Likewise, given the ferocity of attempts to suppress Black voters, and the ongoing attempts to dilute the Black vote, it is no surprise that Black voters in Sumter County have low turnout. *See* Appellant's App., Vol. 1, Doc. 38-1 at A313–14, A329–339. In short, Black voters in Sumter County are less capable of participating in elections than white voters because they face significant socioeconomic disadvantages and are discouraged from voting by a history of systemic discrimination. In at-large elections, this depressed turnout undercuts black voters' registered voter majority sufficiently to allow the white voting bloc to defeat Black-preferred candidates. The District Court did not consider any of this by failing to engage in the proper totality of circumstances analysis required by Supreme Court precedent, which would have, at minimum, highlighted the lower turnout among Blacks in at-large elections—and its causes.

### C. By failing to proceed to the totality of the circumstances, the District Court incorrectly concluded that a white voting bloc could not usually defeat Black-preferred candidates.

The District Court plainly erred in concluding that a white voting bloc cannot usually vote to defeat Black-preferred candidates in at-large elections

simply because Black registered voters may slimly outnumber white registered voters. Appellant's App., Vol. 2, Doc. 62 at A485–A486.[3] Section 2 is violated if the electoral system interacts with social and historic realities to allow white voters to defeat Black-preferred candidates, even where minorities represent the majority of registered voters. *Salas*, 964 F.2d at 1550–51; *Pope*, 687 F.3d at 575 n.8 (noting plaintiffs may challenge "bare majority" districts because depressed voter turnout combined with historical discrimination may be a violation of Section 2); *cf. Zimmer*, 485 F.2d at 1303 (holding that the totality of circumstances established vote dilution despite minority group representing a majority of total population in at-large district); *Graves*, 343 F. Supp. at 733 (same). Thus, Section 2 claims require a results-based analysis of how electoral schemes interact with social and historic realities to affect minority voters' ability to meaningfully participate in the electoral process. *See City of Carrollton Branch of the N.A.A.C.P. v. Stallings*, 829 F.2d 1547, 1554–55 (11th Cir. 1987). Courts therefore commit an error if they stop their *Gingles* analysis with "bare statistics" showing that Blacks represent a population majority or a majority of registered voters in a district. *Whitfield*, 890

[3] Even if Blacks in Sumter County are a slim majority of registered voters, a numerical majority may fail to be an "effective" majority if voter turnout is skewed. Assume, for example, that whites and Blacks are equally cohesive, but that a higher percentage of Blacks do not turnout on Election Day. Under these circumstances, Blacks may account for more than half of the registered voters, yet the actual electorate may be majority-white and capable of regularly defeating Black-preferred candidates, as is the case here.

F.2d at 1428 (holding that the fact that minorities have a bare majority of the population does not foreclose a claim); *see Meek*, 908 F.2d at 1546 (rejecting district court's conclusion that Hispanic voters could not bring a Section 2 claim because they represented the largest share of registered voters); *Salas*, 964 F.2d at 1550–51 (rejecting the proposed rule that Section 2 claims are foreclosed where minorities are the majority of registered voters); *Monroe v. City of Woodsville*, 881 F.2d 1327 (5th Cir. 1989) (same). Likewise, courts err if they rely on hypothetical scenarios in which minority-preferred candidates could win elections, but fail to consider whether such scenarios are likely, or even possible, under the challenged electoral system. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1122 (3d Cir. 1993) ("[T]he Court's error occurred in analyzing whether . . . [part of the challenged voting scheme] created *any* set of circumstances whereby Black candidates might theoretically prevail."); *Gomez*, 863 F.2d at 1416 ("[T]he court should have looked only to *actual voting patterns* rather than speculating . . . .").

Here, the District Court incorrectly analyzed whether a white voting bloc could usually defeat Black-preferred candidates in at-large elections by not inquiring into how the electoral system interacts with conditions in Sumter County to affect the ability of Black voters to actually participate in the electoral process. *See City of Carrollton Branch of the N.A.A.C.P.*, 829 F.2d at 1554–55; *cf. De*

*Grandy*, 512 U.S. at 1011 (emphasizing the importance of in-depth review of the totality of the circumstances in evaluating Section 2 claims). The court thus impermissibly relied on the mere possibility that, given their slim majority of registered voters, Black voters could elect their preferred candidate. The court failed to consider whether such a victory is likely given voter turnout differentials, *Jenkins*, 4 F.3d at 1122; *see* Appellant's App., Vol. 1, Doc. 38-1 at A329–A339, and ignored the actual outcome of Sumter County's at-large elections—Black-preferred candidates received overwhelming support from Black voters but were defeated in polarized contests by white-preferred candidates. *See* Appellant's App., Vol. 2, Doc. 62 at A485. Thus, the District Court is out of sync with the analysis mandated by Supreme Court precedent and other circuits, most notably, the Fifth Circuit in *Salas*, 964 F.2d at 1552.

Although the *Salas* court ultimately concluded that no vote dilution had occurred in that case, after conducting a full totality of the circumstances analysis, this case presents different facts under a different procedural posture. In *Salas*, the district court determined *at trial* that no vote dilution occurred and, thus, the Fifth Circuit reviewed this factual finding under a clearly erroneous standard. 964 F.2d at 1552. Under this highly deferential standard, the Fifth Circuit concluded that the plaintiffs' evidence "consisted mostly of anecdotal testimony" concerning "only . . . a small number of inaccuracies in voter lists . . . ." *Id.* at 1555. Since the

plaintiffs failed to illustrate practical impediments or prior official discrimination that resulted in low voter turnout or an "illusory" voter majority, the Fifth Circuit upheld the district court's findings as not clearly erroneous. *Id.* at 1555–56.

Here, there has been no trial as the case was decided on summary judgment. Additionally, the Plaintiff and *amici* have demonstrated that at-large seats combine with socioeconomic disparities and historical discrimination to depress voter turnout sufficiently to cancel any slim Black registered voter majority. Therefore, at-large seats favor white-preferred candidates and impermissibly dilute Black voting power in Sumter County. Additionally, if there was a factual dispute regarding the cause of low voter turnout, how it impacted at-large elections, or whether at-large seats dilute Black voting power, the District Court should have denied summary judgment and proceeded to trial.

### D. Even under a rigid and formalistic analysis of the Plaintiff's statistical evidence, the District Court should have found the third *Gingles* precondition satisfied.

While the District Court should have proceeded to the totality of circumstances to resolve doubts about whether the Plaintiff satisfied the third *Gingles* precondition, even under its rigid and overly formalistic application of *Gingles*, the District Court should have concluded that the third *Gingles* precondition had been met. Pl.'s Br. 21–23. In applying *Gingles*, the District Court should have focused on the actual results in Sumter County's at-large elections.

*See Gomez*, 863 F.2d at 1416 ("[T]he court should have looked only to *actual voting patterns* rather than speculating . . . ."). Instead, the court improperly analogized the at-large elections to elections in single-member districts in the prior electoral system, District 3 and District 1. By concluding that minority-preferred candidates can win at-large elections based on past victories in single-member districts, the court ignored the most probative elections, *see* Section I.C, *supra*, and Section II.A, *infra*, instead relying again on bare statistics and the mere possibility of Black-preferred candidates getting elected.

While the 2010 election for District 3 (48.4% black VAP) and the 2008 election for District 1 (49.5% black VAP) resulted in Black candidates being elected, these elections are less probative of whether a white voting bloc can defeat Black candidates because, as noted in the Plaintiff's brief, the demographics of these elections, on closer inspection, do not actually mirror at-large voting demographics. *See* Pl.'s Br. 24; *cf. Nipper*, 39 F.3d at 1537. Additionally, both elections are less recent, took place over a smaller geographic area, and involved a subset of the at-large electorate. There is no reason to believe that this subset of the electorate can be substituted for the whole.

Conversely, in the two Sumter County at-large elections analyzed, Black-preferred candidates lost despite overwhelming support from Black voters, and in

no at-large election did a Black-preferred candidate get elected.[4] *See* Appellant's App., Vol. 2, Doc. 62 at A485. Thus, the most probative evidence—the at-large elections analyzed—suggests that, despite a slim Black majority in registered voters, whites do vote as a bloc in racially polarized elections to defeat Black-preferred candidates in countywide school board elections. Therefore, even under the District Court's formalistic application of *Gingles*, it should have found the third *Gingles* precondition satisfied and proceeded to the totality of circumstances.

Past discrimination and profound socioeconomic inequality depress Black turnout in Sumter County. At-large elections permit turnout disparities, caused by social and historic conditions, to inhibit Black voters from meaningfully participating in the electoral process. In this context, at-large elections dilute Black votes such that a narrow Black registered voter majority becomes an actual voter minority on Election Day, allowing the white voting bloc to defeat Black-preferred candidates. Thus, the trial court cannot rely on Black voters' bare registered-voter majority in deciding whether a Section 2 violation exists. The District Court ignored the impact of these realities on at-large voting. In doing so, it relied on bare statistics and conjecture, ignored the most probative evidence, and reached a

[4] Although one of the two at-large elections resulted in a runoff, the first round of balloting and the second round of balloting were essentially one electoral contest in which a majority of white voters voted as a bloc to defeat a Black-preferred candidate. As a result, this Court should consider the May 20, 2014, initial at-large election and the July, 22 2014, runoff as a single contest. *See* Pl.'s Br. 26–27.

conclusion grounded in a misapplication of law, rather than Black voters' social and historic realities in Sumter County. Yet, even under a formalistic approach, the court should have found that the Plaintiff satisfied the third *Gingles* precondition because no Black-preferred candidate has ever been elected to an at-large seat under the current at-large scheme.

## II. The District Court should have found that the creation of five single-member districts enabled a white voting bloc to defeat Black-preferred candidates.

The District Court correctly acknowledged that a viable voting rights claim could be based on the allegation that minorities had "less opportunity than other members of the electorate to participate in the electoral process and elect the representatives of their choice" because they were "packed" into one or more single-member districts that diluted their overall voting power. Appellant's App., Vol. 2, Doc. 62 at A477–A478. The District Court failed to consider, however, that in the context of a challenge to a single-member voting system, the Supreme Court has warned that the three *Gingles* factors cannot be applied "mechanically." *De Grandy*, 512 U.S. at 1007. In improperly "mechanically" applying the *Gingles* factors here, the District Court again ignored the realities facing Black voters in the other non-packed single-member districts in Sumter County.

In this case, part of the Plaintiff's allegation is that the district boundaries for the Sumter County Board of Education were drawn to dilute Black voting power.

Districts 2, 3, and 4 have white voting age populations of 62.2, 57.8, and 49.1 percent, respectively. This is compared to Black voting age populations of 30.3, 36.2 and 43.9 in those same districts. Appellant's App., Vol.1, Doc. 38-1 at A302–A303. In Districts 1 and 5, however, Blacks constitute 62.7 and 70.6 percent of the voting age population, respectively. *Id*. Part of the Plaintiff's claim is that, but for these boundaries, which arbitrarily "pack" Blacks into two districts, they could be effective in a third single-member district. Appellant's App., Vol. 2, Doc. 62 at A477–A478.

The District Court's inquiry into the third *Gingles* precondition, when analyzing the Plaintiff's challenge to the single-member district boundaries, should have focused specifically on whether white voting blocs defeat Black-preferred candidates in majority-white districts. *See Bone Shirt*, 461 F.3d at 1016.

### A. In a single-member district system, the most probative elections for determining if a white voting bloc defeats minority-preferred candidates, are interracial contests in majority-white districts.

The most probative elections for determining if the third *Gingles* precondition is satisfied are those that are representative of the challenged voting practice. *See Bone Shirt*, 461 F.3d at 1016. In *Bone Shirt*, the plaintiffs brought suit for a violation of Section 2 of the Voting Rights Act because a 2001 redistricting plan in South Dakota packed Native-American voters into two electoral districts. *Id*. at 1016. The plaintiffs' complaint alleged that these boundaries could have been

redrawn to create three majority Native-American districts. *Id*. In particular, District 27 was ninety percent Native-American and regularly elected Native-American preferred candidates. *Id*. However, a neighboring district, District 26, had only a thirty percent Native-American population. *Id*. In analyzing the third *Gingles* precondition, the court properly focused on the results of the elections in District 26, since that specific district was the most probative of whether a white voting bloc was preventing an additional minority candidate from joining the legislature. *See id*.

A number of district courts have also adopted the position that the most probative elections are those most closely related to the challenged voting practice. *See, e.g.*, *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1205 (D. Wyo. 2010) (limiting consideration of pre-1985 elections because only the post-1985 elections reflected current electoral practices); *Jamison v. Tupelo*, 471 F. Supp. 2d 706, 710 (N.D. Miss. 2007) (defining endogenous elections as "elections in a single district which are held to elect that district's representatives"); *Gonzales v. City of Aurora*, No. 02 C 8346, 2006 WL 3227893, at *3 (N.D. Ill. Nov. 3, 2006) ("Though the results of exogenous elections, *i.e., those involving voting districts other than the one that is challenged*, should not be the focus of the electoral success analysis, the data from such elections may still be considered.") (emphasis added).

The District Court's treatment of all the school board elections as equally probative improperly shifted the focus away from the most relevant statistics. The approach in *Bone Shirt* aligns more closely with the Supreme Court's admonition that courts should not apply the *Gingles* factors "mechanically" because it shifts the focus away from general electoral results and towards the results that are most probative of whether single-member district boundaries impermissibly dilute Black voting power. *Cf. De Grandy*, 512 U.S. at 1007. Additionally, the Eleventh Circuit has previously held that evidence in a vote dilution case should be "examined and weighed, not merely compiled and totaled," and more relevant elections should be considered probative of the three *Gingles* preconditions. *Nipper*, 39 F.3d at 1537. As a result, the District Court should have given the most weight to election data in the majority-white districts when analyzing the effect of single-member districts. *Cf. id.*

### B. Whites in Sumter County have historically voted as a bloc to defeat Black-preferred candidates in majority-white districts.

As noted above, the District Court should have focused on the majority-white single-member districts, which the Plaintiff alleges artificially inflate white voting power and dilute Black voting strength. *Cf. Bone Shirt*, 461 F.3d at 1016. A focus on single-member district elections where whites constitute a majority reveals that there is racially polarized voting in those districts and that whites vote as a bloc to defeat Black-preferred candidates. The single-member district elections

where whites constituted the majority of voters were: the 2014 election for District 2; the 2014 election for District 3; the 2006 election for District 3; and the 2014 election for district 6. Appellant's App., Vol. 2, Doc. 62 at A476–A477. These four endogenous elections demonstrate that there is a pattern of whites voting as a bloc to defeat Black, and Black-preferred, candidates in majority-white districts. In three of these elections, District 2 in 2014, District 3 in 2014, and District 3 in 2006, the contest was racially polarized, with the majority of Blacks favoring one candidate and the majority of whites favoring another. Appellant's App., Vol. 1, Doc. 38-1 at A329–A339. And in all three of these elections the white-preferred candidate defeated the Black-preferred candidate. *Id*.

In the fourth election, District 6 in 2014, there was not polarized voting since the majority of Blacks and whites preferred the same candidate. *Id*. at A329. However, a white candidate who had essentially unanimous white support defeated a Black candidate who had the support of over forty percent of Black voters. *Id*. The Eleventh Circuit has, in the past, cautioned against assigning too much probative weight to elections where, although the statistics show voting is polarized, the results are close. *Johnson v. Hamrick*, 296 F.3d 1065, 1080 (11th Cir. 2002) (concluding that an election where the white vote was split 50.5% to 49.5% was less probative of racially polarized voting than other elections). As a result, the 2014 District 6 election should be considered less probative than the

other three. *See id*. However, there was still racial polarization in three out of the four elections analyzed. Appellant's App., Vol. 1, Doc. 38-1 at A329–A339. Most importantly, in those three racially polarized elections, the white-preferred candidate defeated the Black-preferred candidate every time. *Id*.

The foregoing analysis demonstrates that the challenge to the new single-member districts satisfies the second and third *Gingles* preconditions. The second *Gingles* precondition is satisfied because three out of the four elections in which whites were a majority in a single-member district had racially polarized voting, and the fourth had an almost even split in Black candidate preference. *See Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1370 (N.D. Ga. 2001) (holding that finding minority support for candidates that exceeded fifty percent in ten out of eleven elections supported a finding of polarized voting), *aff'd*, 296 F.3d 1065 (11th Cir. 2002). The third *Gingles* precondition is also satisfied because, in the three elections with racially polarized voting in a majority-white district, the Black-preferred candidate was defeated every time. This perfect victory rate for white-preferred candidates and perfect defeat rate for Black-preferred candidates unequivocally shows that a white voting bloc in Sumter County can "usually . . . defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. The result is that whites will be able to vote as a bloc to defeat Black-preferred candidates in three of the five new electoral districts. That would allow whites to control sixty

percent of the single-member seats (three of five), and seventy-one percent of all the school board seats (five of seven), even though they are less than half of the county's total population. When polarized voting in single-member districts combines with boundary lines to give whites disproportionate representation, the third *Gingles* precondition is satisfied. *See Bone Shirt*, 461 F.3d at 1016.

## CONCLUSION

The District Court erred in its application of the third prong of *Gingles*, by ignoring the electoral realities facing Black voters in Sumter County and relying on bare statistics and hypotheticals rather than focusing on probative data and the totality of the circumstances. In analyzing whether Sumter County's at-large positions dilute Black voting strength, it failed to consider Sumter County's legacy of racial discrimination and the attendant socioeconomic disparities between Black and white voters. In analyzing the challenged single-member districts, it failed to focus on whether white voting blocs usually defeat Black-preferred candidates in majority-white districts, artificially inflating white voting power and undervaluing Black voting strength under the new electoral system. Finally, when analyzing both at-large and single-member districts, the court failed to properly consider the most probative elections and evidence.

If the District Court had applied the legally correct and more nuanced analysis required by the totality of the circumstances approach, it would have

found that racially polarized voting exists in the majority-white single-member districts and in the at-large seats as well, and white voters have been able to defeat minority-preferred candidates in both. As a result, the new seven-member school board has only two Black-preferred representatives (twenty-nine percent of the seats), despite the fact that forty-eight percent of the voting age population is Black. The District Court, however, used a blind (and incorrect) application of statistics—including data from an earlier voting system—to reject the Plaintiff's challenge to the current electoral system. Instead, the District Court should have concluded that the electoral structure resulting in this egregious disproportionality, designed to leverage white voting power to dilute Black voting strength, satisfied all three *Gingles* preconditions.

In any event, the District Court's failure to view the substantial evidence of vote dilution in the light most favorable to the Plaintiff at summary judgment was error. Accordingly, for the foregoing reasons and those set forth in the Plaintiff's Brief, this Court should reverse the judgment of the District Court and remand for further proceedings.

Dated: October 26, 2015

Respectfully Submitted,

*/s/ Patrick Llewellyn*

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The type face is fourteen-point Times New Roman font, and there are 6,919 words.

*/s/ Patrick Llewellyn*
Patrick Llewellyn

## CERTIFICATE OF SERVICE

I certify that on October 26, 2015, I filed the foregoing brief of Amici Curiae the Georgia NAACP and the Campaign Legal Center using the Court's CM/ECF system, which will serve a copy of the document on all counsel of record.

*/s/ Patrick Llewellyn*
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