97-2540

No. 97-2540

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GREGORY SOLOMON, et al.,
Plaintiffs-Appellants,

vs.

LIBERTY COUNTY, FLORIDA, et al.,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF FOR DEFENDANT-APPELLEE
LIBERTY COUNTY SCHOOL BOARD

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Joe Burke, Defendant-Appellee

Joseph C. Combs, Defendant-Appellee

Tommy Duggar, Defendant-Appellee

Geene Free, Defendant-Appellee

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J.S. Johnson, Defendant-Appellee

James E. Johnson, Defendant-Appellee

W.L. Potter, Defendant-Appellee

John T. Sanders, Defendant-Appellee

Liberty County, Florida, Defendant-Appellee

Liberty County School Board, Florida, Defendant-Appellee

Maurice Paul, United States District Judge

David LaCroix, Counsel for Defendants-Appellees

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David M. Lipman, Counsel for Plaintiffs-Appellants

Robert B. McDuff, Counsel for Plaintiffs-Appellants

STATEMENT REGARDING ORAL ARGUMENT

This Court showed great interest in the novel and complex issues presented in this case when it was last before the Court in 1990. Since that time, the Supreme Court has resolved at least one of the major issues. The Appellant does not raise any other noteworthy legal issues but instead raises meritless challenges of factual findings. Appellee is at the Court's disposal to aid it in the resolution of this case in any manner the Court deems appropriate, including oral argument.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to F.R.A.P. 26(i) and 11th CIR.R. 28-2.(e), Appellee Liberty County School Board adopts in part the statement of the case in Appellant's brief with the exception of the statement of the facts and the summary of the District Court's opinion.

STATEMENT OF JURISDICTION

This case comes on appeal of a final order of the United States District Court for the Northern District of Florida and involves the interpretation of 42 U.S.C. Section 1973 as well as Constitutional claims under the Fourteenth and Fifteenth Amendments.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief uses 14 point Roman type. It is proportionally spaced.

STATEMENT OF THE ISSUES

1. Are the District Court's findings of fact clearly erroneous where the findings are supported by evidence in the record and are made after review of evidence presented by both sides?

2. Is satisfying all three Gingles factors sufficient to establish a section 2 claim under the Voting Rights Act, or must a plaintiff also establish that vote dilution occurred under a totality of the circumstance? Further, did the District Court err in failing to take into account new evidence introduced in the record after the Court of Appeals remanded the case for further proceedings?

3. Were the District Court's findings of fact under the totality-of-the-circumstances test clearly erroneous?

3A. Are blacks currently able to participate freely in Liberty County politics despite past acts of official racial discrimination?

3B. Is the electorate racially polarized in Liberty County?

3C. Have vote fraud and vote buying been reduced to levels such that they no longer have a significant discriminatory impact upon minority voters in Liberty County? Do other factors such as the geographic size of the county

and the majority vote requirement in primary elections have less impact on minority voters than vote fraud?

3D. Is the informal candidate slating process open to black candidates as is evidenced by the support received therefrom by two of the four black candidates that have run for office in Liberty County?

3E. Have minority voters in Liberty county succeeded in achieving a high level of voter registration and turnout despite the socio-economic effects of past discrimination?

3F. Has there been a complete lack of racial appeals in county political campaigns for more than 20 years?

3G. Has a black candidate succeeded in three elections in recent years, making black electoral success more than an isolated incident?

3H. Are Liberty County officials on the whole responsive to minorities?

3I. Was the at-large election system enacted for the purpose of reducing ward-type politics and maximizing inclusion of all Liberty County voters and not the product of any tenuous state policy?

3J1. Is racial bias the exception rather than the norm in the subject community?

3J2. Have blacks been proportionately represented on the County Commission during this decade despite lack of similar representation on the School Board?

3K. Does a searching, comprehensive examination of many factors reveal a community in which the at-large voting structure does not result in reduced opportunity for black votes to participate in the political process and elect their preferred candidates?

4. In evaluating the totality of the circumstances surrounding a vote dilution claim under section 2 of the Voting Rights Act, should the court consider racial bias in the community, or lack thereof? Should the existence or lack of racial bias in the community be dispositive of the vote dilution claim?

5. Since the court can resolve the instant case on statutory grounds under the Voting Rights Act, should the court refrain from resolving it on Constitutional grounds? Further, should the Plaintiff-Appellant's Fourteenth Amendment claim, which requires proof of both discriminatory intent and results, fail where they can prove neither discriminatory results (as shown by

their failure to establish a section 2 claim under the Voting Rights Act) nor discriminatory intent (as shown by the results of a county-wide referendum in 1990 in which black voters by a 3-2 margin voiced their preference to keep the at-large election structure)?

STATEMENT OF THE CASE

Pursuant to F.R.A.P. 26(i) and 11th CIR.R. 28-2.(e), Appellee Liberty County School Board (hereinafter "Apellee") adopts in part Appellant's statement of the case with the exception of its summary of the District Court's 1997 opinion. This brief is filed on behalf of Liberty County School Board only.

The District Court's lengthy opinion includes a thorough review of the case law, legislative history, and statutory amendments relevant to this case. It sets forth the following model framework for section 2 vote dilution claims:

> First, the plaintiff must demonstrate the three Gingles factors of geographical compactness, political cohesiveness, and racial bloc voting. If one or more of the Gingles factors is not shown, then the defendant prevails. If all three factors are proven, then the court must review all relevant evidence under the totality of the circumstances. The defendant may present evidence of the lack of racial bias in the community, proportionate representation, past and present electoral success, as well as proof of other factors which are indicative of the existence of non-existence of vote dilution. The plaintiff may respond in kind. Without treating any single factor as dispositive, the reviewing court will finally determine through a searching inquiry whether the members of the minority group are denied equal political opportunity with respect to their race or color. If they are, then a claim under section 2 has been established.

R5-154-73. This Court having held as a matter of law that all three preconditions set forth in U.S. v. Gingles, 478 U.S. 30 (1986) were met, the District court declined to consider them in light of new evidence presented

and proceeded to examine each factor under the totality of the circumstances in great detail. The court ultimately concluded that while some discrimination and segregation exists along with racially polarized voting, "Plaintiffs have failed to show that the continued use of the existing at-large voting structure has actually resulted in blacks having 'less opportunity than other members of the electorate to participate int he political process and to elect representative of their choice.'" R5-154-118-119 quoting 42 U.S.C. Section 1973(b). The court relied on numerous facts in evidence in reaching this conclusion, including the 1990 referendum in which blacks voted by a 3-2 margin to keep the at-large election system, and the continued electoral success of a black county commissioner, Earl Jennings. It also relied on the access of black candidates to the informal slating process and the high levels of black voter registration and turnout. It notes that there are no official blocks to the political process, that there have been no racial appeals in county campaigns for more than 20 years, and that black and white candidates appreciate the importance of securing the black vote. In addition, racial animus is not the norm in the community and elected officials are responsive to the needs of the black community.

Finally, the District Court denied the constitutional claims because the plaintiffs were unable to establish either the required discriminatory intent - as proven in particular by the 1990 referendum showing black approval of the at-large system - or the required discriminatory result as shown under the totality-of-the-circumstances test.

STATEMENT OF THE FACTS

Liberty County is a rural county in Northwest Florida. 17.63% of its residents are black. The Liberty County Commission and Liberty County School Board each have five members elected on an at-large basis. Both are defendants and Appellees in the instant action. In a 1990 referendum, black voters in Liberty County voted by a 3-2 margin to keep the at-large election system rather than adopt single-member districts. Blacks are very involved in county politics; the percentage of voting age blacks who are registered is higher than the percentage of white voters registered. Black voter turnout is also routinely high.

County commissioners and school board members run for numbered seats and must reside in the district assigned to the seat they seek. Candidates are elected through an at-large primary and general election system. To participate in the general election, a candidate must first win the initial primary election by a majority of votes or succeed in a subsequent runoff election in the primary. There is no majority vote requirement in the general election. R5-154-81.

Campaigning in the county is done by door-to-door visits and political rallies, both of which are open to black candidates. There is an informal

slating process in the county in which the heads of several large white families pledge their respective families' votes to particular candidates. Only four blacks have ever run for office in Liberty County. Two of them have received the support of various white families. One black candidate, Earl Jennings, has been elected to the County Commission three times. Jennings' election caused him to change from one of the original named plaintiffs in this suit to a defendant county commissioner. His election also resulted in proportional representation on the County Commission throughout this decade.

In Jennings' first victory in 1990, he defeated a white opponent in the primary election and subsequently defeated a white incumbent in the general election. R5-154-82. His second victory involved a race against three white opponents in the primary in which he received the greatest number of votes. In the runoff election that followed, he again defeated the white candidate who had received the second highest number of votes in the initial primary election. There was no Republican opponent in the general election. Id. (Voters in Liberty County of both races are predominantly Democrats, R5-154-80, and the lack of a general election is thus not a special circumstance.) Mr. Jennings' most recent victory in 1996 was over two black opponents and

one white opponent. He received the highest number of votes in both the primary and runoff elections. Again, there was no Republican opponent in the general election. R5-154-82.

SUMMARY OF ARGUMENT

The Voting Rights Act was designed to protect groups of minority citizens from voting schemes enacted under circumstances that result in a reduction in the potential effectiveness of their collective votes. This is no such case. The black voters of Liberty County in 1990 voted by a 3-2 margin to retain the present at-large election system. In addition, the challenged voting system has produced a black winner in three recent elections. Further, as explained below, if single-member districts are imposed in the particular factual scenario of the instant case, the result will cause precisely the harm that the Voting Rights act sought to avoid, namely, exclusion of the black community from the political process and reduced opportunity to elect their preferred candidates.

Integral to Liberty County politics is an informal slating process in which leaders of at least seven large white families pledge their respective families' support to various candidates. The at-large election system currently in place prevents individual families from exercising complete control over individual districts within the county through ward-type tactics. The at-large system was implemented in 1953 to counter the exclusion of voters, black and white alike, caused by the interaction of the family factions with the single-

member elections then in place. Its effect was to dilute the influence of any one family. As Appellant vigorously asserts, the influential families are still a powerful force in Liberty County politics today. If Plaintiff-Appellant's claim is successful, those families will regain the greater power afforded them under the single-member scheme.

The record also indicates that the informal slating process has not been closed to black candidates. Only four black candidates have ever run for office in Liberty County, and various white family leaders have pledged support to two of them. One of those candidates, formerly a named plaintiff in this suit, has been successful in 60% of the elections he has entered.

The record reveals that numerous black citizens as well as some named plaintiffs are opposed to single-member districts and furtherance of the instant suit. When a majority of the minority refuses the protection available under section 2 of the Voting Rights Act, the case appears to be an attempt by certain individuals to use the statute as a sword (rather than a shield as it was intended) for their singular benefit.

The District Court has embarked on a painstakingly thorough examination of the circumstances in which the challenged voting scheme functions. The court's findings are explicitly analyzed and well supported by

the evidence in the record. Appellant on appeal raised no legal issue but instead disagrees with the District Court's findings of fact. It is well established that factual findings by the trier of fact are entitled to great deference and must not be overturned unless the reviewing court finds them clearly erroneous. A factual finding is clearly erroneous only when the reviewing court, upon examination of all the evidence, is left with the "firm and definite conviction" that the lower court's finding is wrong. Appellant makes no claim that gives rise to such a conviction.

Because this Court held in its 1990 opinion that plaintiffs had satisfied the three Gingles preconditions as a matter of law, the District Court declined to analyze them, despite relevant new evidence introduced subsequent to this Court's first edict on this case. Based on a recent Supreme Court case holding that section 2 claims require an examination of the totality of the circumstances after plaintiffs satisfy the three preconditions, Johnson v. DeGrandy, 512 U.S. 997 (1994), the District Court engaged in a comprehensive examination of various aspects of present-day Liberty County relevant to the issues presented herein.

Although the trial court found that voting in Liberty county is racially polarized, the court also speculated that the degree to which this occurs has

likely experienced a significant reduction in recent elections because Earl Jennings' success at the polls undoubtedly required a substantial amount of white votes.

The court found that the discriminatory impact on black voters caused by vote fraud was significantly reduced by purging the voting roles and changing rules regarding non-resident voting in the early 1980's. The court noted that to whatever extent any vote fraud remained, a change to single-member districts would not prevent its impact on black voters. The court found that the correction of this problem outweighed other miscellaneous factors that weighed against defendants such as the physical size of the county and the majority vote requirement in initial primary elections.

The court's finding that the informal slating process is open to black voters is based on plaintiff Solomon's testimony that he had been promised support of various family factions and on the support that Jennings received from white family factions. Thus, of the four black candidates that have ever run for office in Liberty County, two have been included in the informal slating process. The finding is therefore sound.

The court's finding that the black community has not allowed socio-economic effects of past discrimination to interfere with their access to and

participation in the political process is well founded. Black voters are registered at a higher percentage than their white counterparts. Black voter turnout is routinely high.

The record is unrefuted that racial appeals have been absent from county political campaigns for more than 20 years. The court's finding is thus beyond attack. Evidence from both sides also indicates that black and white candidates believe that an election cannot be won without black support.

The court found sustained success at the polls by black voters' candidate of choice. Because Jennings was not elected until after the onset of this litigation, the court scrutinized his elections carefully. The court found that Jennings was not elected until five years after the complaint was filed and over four years after the first trial. Furthermore, the elections were extremely competitive, with as many as four opponents, both black and white. Plaintiff-Appellant has offered no evidence to support its implication that Jennings' election was the result of a conspiracy among large numbers of voters lasting several years in an attempt to undercut this litigation.

The court cites numerous examples of elected officials' responsiveness to black community members. Among them are that blacks have filled

county positions in numbers that equal or exceed their percentage of the population. Blacks have also received the bulk of grant money spent on a water project and housing upgrades.

The court found that the policy underlying the at-large election system was sound. The evidence is unrefuted that the at-large election scheme was enacted in 1953 as part of a reform aimed at reducing ward-type tactics carried on by family factions. Although the state legislature enacted a provision allowing single-member districts in 1947 and **that** provision was motivated by racially discriminatory purposes, Liberty county did not change its voting structure at that time. Nor was the county's later change motivated by the same improper purposes that motivated the state legislature.

The 1990 referendum in which black voters chose by a 3-2 margin to keep the at-large system provides overwhelming support for the court's finding.

The trial court's finding that racial bias is the exception rather than the rule is based in large part on the lack of evidence presented on the subject combined with plaintiff Solomon's testimony regarding his experiences while campaigning in Liberty County. He was invited into many white homes and turned away from only 10 or 12. He did not know how those homes treated

white candidates. It is thus unclear whether those homes displayed racial animosity or a lack of interest in politics. Solomon received warm receptions at rallies and testified that voters did not hold race against a candidate to a great degree.

While blacks have not been proportionately represented on the school board, this is only one factor, and Gingles mandates that no one factor may be dispositive of the ultimate inquiry. As to the County Commission, blacks have been proportionately represented throughout the 1990's.

The District Court's ultimate finding on the totality of the circumstances explicitly took into consideration a long list of factors without giving any one factor undue weight. It gives consideration to all the evidence, including that which was unfavorable to Defendants-Appellees. The District Court's finding that no vote dilution occurred makes sense, especially in light of the 1990 referendum and the repeated elections of Earl Jennings.

Appellee concurs with Judge Paul's treatment of racial bias as relevant to but not dispositive of the ultimate finding. The cornerstone of the vote dilution issue is the interaction of an electoral law with "social and historical conditions" that results in an inequality between black and white voters' opportunity to elect their preferred representatives. The reference to social

and historical conditions would be rendered meaningless if evidence of racial bias in this community could not be considered. Further, the list of various factors to be examined under the totality of the circumstance was not exhaustive and it clearly contemplated the possibility that other factors could be relevant. The discussion below sets forth more fully why a factor that could be relevant should not be dispositive.

Finally, the District Court correctly denied the Constitutional claims. First, a court should not decide a case on Constitutional grounds where, as here, an alternate statutory ground is available. Additionally, the Constitutional claim requires a showing of both discriminatory result and intent. The discriminatory result inquiry is identical to the totality of the circumstances inquiry, which plaintiff failed to satisfy. Plaintiff also should fail the discriminatory intent prong, particularly in light of the 1990 referendum.

ARGUMENT

Introduction

Appellee recognizes that cases arising under section 2 of the Voting Rights Act frequently present complex, unresolved legal issues, and Appellee further recognizes this Court's interest and investment in resolving those issues. The instant appeal, however, raises very limited legal issues for which there is well developed case law. The Appellant raises none of the difficult issues that divided this Court in 1990. The case can and should be finally brought to a close. Appellee would point out that the Voting Rights Act was enacted to protect **groups** of minority citizens; it was intended to shield them from barriers to the political process. In this case, however, the group does not seek protection. The minority citizens of Liberty County, Florida, as a group, voted by a 3-2 margin in a 1990 referendum to maintain the current at-large voting system and thus do not believe that they are denied the opportunity to participate in their county's politics. R5-154-112. Many minority citizens of Liberty County, and indeed some of the named plaintiffs, are opposed to single-member districts and to furtherance of this suit. R5-154-6 n. 7. The District Court wrote:

> The Court granted Defendants' motion [to decertify the plaintiff class], noting that 'many members of the plaintiff class, and some of the

> named plaintiffs, have become equivocal or are downright opposed to the maintenance of this lawsuit.' Doc. 141 at 3 (citing to Findings). the court also cited to the testimony of some of the Plaintiffs, who indicated that they opposed single-member districts. Finally, the Court relied upon the results of two September, 1990, county-wide referenda, separately conducted by the County Commission and School Board, which demonstrated that blacks in [Liberty] County rejected the adoption of single-member districts by a 3 to 2 margin. See Doc., 141 at 2-6.

Id. Moreover, not only does this group not seek a remedy under section 2, the imposition of single-member districts in Liberty County's particular environment will actually harm black voters because it will afford the influential white families greater power within each smaller electoral unit.

The at-large system challenged herein has elected a black candidate three times in recent history, and thus has produced more than an isolated single electoral success. R5-154-82. In the process it changed one of the named plaintiffs into a defendant county commissioner. When the majority of the minority is satisfied with the current situation, the instant case can only be seen as an attempt by **individuals** to turn the Voting Rights Act into a sword for their singular benefit. The District Court's ruling should be upheld.

I. APPELLANT'S OBJECTIONS ARE MERE CHALLENGES OF FACTUAL FINDINGS AND FAIL TO ESTABLISH THAT THE DISTRICT COURT'S FINDINGS ARE CLEARLY ERRONEOUS.

Although Appellant labels the District Court's errors the result of "a misunderstanding of the proper rule of law and the proper mode of legal analysis" (Applt.'s Brf. at 8), this is but a thinly veiled disguise for mere factual challenges. Appellant's specific objections are to the relative weight that the trial court placed on certain facts. (Applt.'s Brf. at 11, 18, 24, 27, 28, 29, 31, 32, 33, 34, 38, 40, 41). These objections must fail for several reasons. First, it is a cornerstone of our legal system that the trial court's findings of fact must be given great deference. Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844 (1982). It is also well established that it is within the trier of fact's purview to determine weight and credibility of evidence because of his advantage over the appellate court. This advantage arises both from the trier's opportunity to view the witnesses as well as his perspective gained from sifting through the entire case in a manner which may provide greater insight than that afforded an appellate court reviewing specific issues. Id. In addition, certain factual findings in section 2 claims under the Voting Rights Act are made pursuant to the totality-of-the-circumstances inquiry

required by Gingles and DeGrandy. This inquiry was designed to be a flexible, holistic approach examining numerous factors as a means of revealing the broad picture. E.g., Johnson v. DeGrandy, 512 U.S. 997; Gingles, 478 U.S. 30. It neither requires equal weight be given to all factors, nor does it set forth any specific weight to be given to the various factors. R5-154-18-19 citing legislative history. The law on this point limits the trier's analysis of the factors only in its prohibition of treating any single factor as dispositive. E.g., Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990). The District Court's opinion does not indicate how much weight it places on different factors. The District Court analyzed many factors very thoroughly and in detailed fashion, then drew a conclusion that clearly took many different factors into account. The lower court's conclusion in no way allows any one factor to outweigh all others and thus makes no such error.

While it is true that findings of fact may be overturned if they are based on a misconception of the law by the trial court, Rollins v. Fort Bend Independent School District, 89 F.3d 1205, 1210 (5th Cir. 1996); Meek v. Metropolitan Dade County, 985 F.2d 1471 (11th Cir. 1993), it is also true that Appellant cites no rule of law misconstrued by this finding of fact. To the extent that the relative weight assigned to various factors is the product of

legal construction under the totality-of-the-circumstances precedent, the only possible legal error, as explained above, would lie in allowing one factor alone to determine the ultimate finding regarding vote dilution. It is indisputable that Judge Paul's opinion took many different factors into consideration and thus did not commit such an error.

> Notwithstanding all of this otherwise compelling evidence, Plaintiffs have failed to show that the continued use of the existing at-large voting structure has actually resulted in blacks having 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. Section 1973 (b). The evidence is unrefuted that there are no official blocks to the political process. Similarly, even in the face of significant economic disparities with whites, black voter registration and turnout is consistently higher than it is for whites, blacks are not precluded from effective campaigning, and blacks have full and equal access to the ballot box. Black voters' candidates of choice have been allowed to participate in the unofficial candidate slating process, with varying degrees of success. There have been no racial appeals in recent county campaigns because white and black candidates alike appreciate the importance of securing the electoral support of the black community. Racial animus within the community is the unusual exception, and not the rule. Elected officials are responsive to the needs of the black community. No tenuous policy underlies the at-large district, which was approved by a majority of voters (including a majority of blacks) in a county-wide referendum in 1990. Finally, a black county commissioner, Earl Jennings, has enjoyed sustained electoral success since 1990 - giving blacks in Liberty County roughly proportional representation on the county commission.

R5-154-118-119.

Findings of fact in vote dilution claims under the Voting Rights Act

may also be overturned if they are clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); Meek, 985 F.2d at 1481 (citing City of Maddox v. Clayton, 764 F.2d 1539, 1545 (11th Cir. 1985)); Rollins, 89 F.3d at 1210 (citing Gingles, 478 U.S. at 78-79). The issue for the appellate court is not whether it finds plaintiff's evidence more persuasive than defendant's. It is inappropriate to overturn a factual finding merely if the appellate court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." Inwood, 456 U.S. 844 (citing U.S. v. Real Estate Boards, 339 U.S. 485). Nevertheless, Appellant's challenges ask the Court to overturn Judge Paul's findings for precisely those impermissible reasons. Appellant's brief does nothing more than reargue its trial case and review competing evidence. Neither tactic provides grounds to overturn factual findings which result from the trial court's independent review of the record and which are supported by evidence in the record. See Meek, 985 F.2d at 1482 (citing Anderson v. City of Bessemer City, N.C., 470 U.S. 563, 575 ("recognizing that a trial court's

finding based on a decision to credit the testimony of one of two or more witnesses, which extrinsic evidence does not contradict, can virtually never be clear error").

The District Court opinion is replete with references to the various pieces of evidence that it considered prior to making its findings of fact. Each finding is well documented, referring to the evidence relied upon in making it. To succeed on a claim that factual findings are clearly erroneous, the Appellant must show that, upon review of all the evidence, the court is left with a "firm and definite conviction" that the trial court erred. In a community where the majority of the minority votes to keep the challenged at-large voting system, and a black candidate is repeatedly re-elected, such a "firm and definite conviction" would be very difficult, if not impossible, to attain.

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Because the only issues raised by Appellant are meritless challenges to the trial court's factual findings, the Court should end its inquiry at this point and uphold the District Court's well documented and well reasoned opinion. To the extent that this Court proceeds to address the issues that divided it in 1990, Appellee submits the following.

II. SATISFYING THE THREE GINGLES FACTORS IS INSUFFICIENT TO PREVAIL ON THE SECTION 2 VOTE DILUTION CLAIM.

One issue that divided this Court in its 1990 Solomon opinion was the legal effect of satisfying the three Gingles preconditions. The U.S. Supreme court has since then addressed this issue and answered it clearly in Johnson v. DeGrandy, 512 U.S. 997 (1994). It is now clear that the three factors are necessary but not sufficient. Id. If the plaintiff satisfies the three factors, the trier of fact must proceed to make its determination based on a totality of the circumstances. Id. at 1011, 1012.

The need to proceed beyond the three Gingles factors is based on sound logic. The factors help determine whether there is a gap between a group's voting potential (factors one and two) and their lack of success at the polls (factor three). They ask whether there is a vote that can be meaningfully diluted, i.e., whether the plaintiff's claim is not moot. The gap between the potential and the lack of success can be due to various causes. The totality of the circumstances inquiry is thus necessary to determine whether the cause is vote dilution arising from the interaction between social and historical conditions and the challenged voting system. Gingles, 478 U.S. 30. The inquiry does **not** concern itself with the motivation for the challenged voting

structure, i.e., there is no resurrection of the "intent test." Rather, it examines the objective effect, or "result," of the voting scheme at issue to determine whether it results in minorities having an unequal opportunity to participate in the election of their preferred candidate. The effect cannot be determined without considering the factual context (i.e., the "totality of the circumstances") in which the challenged voting law operates.

The determination being highly fact intensive, Nipper v. Smith, 39 F. d 1494 (11th Cir. 1994), the additional facts sought by remanding this case to the trial level should have been better incorporated into the District Court's opinion. The District Court points out that the trial court may reconsider matters already decided if new and substantially different evidence is presented in a subsequent trial. Heathcoat v. Potts, 905 F.2d 367 (11th Cir. 1990). Even if the 1990 remand is viewed as limiting the scope of subsequent trial activity (which is arguable), the new evidence rule is an exception which applies here. The new facts introduced into the record since the 1990 remand are relevant not only to the totality-of-the-circumstances inquiry, but also to the three Gingles factors. Earl Jennings, a black candidate, has to date been elected three times, R5-154-82, and in 1990, the black community voted by a margin of 3-2 to keep the at-large selection

process in place. R5-154-6 n. 7. Both facts call into question whether the third Gingles factor is still satisfied. In addition, the 1990 Census data indicates that blacks no longer comprise a majority in any of the five districts of Liberty County, R5-154-77 n. 75, calling into question whether the first Gingles factor is still satisfied. Members of the community and indeed certain named plaintiffs have indicated that they are opposed to single-member districts and are equivocal or downright opposed to this suit. R5-154-6. The community's satisfaction with its current political opportunities should necessarily be included in the comprehensive, holistic examination of allegations that it has been discriminated against.

III. THE DISTRICT COURT'S ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCE CONSIDERED ALL EVIDENCE AND SUPPORTED ITS FINDINGS; IT IS THEREFORE NOT CLEARLY ERRONEOUS

The District Court analyzed the various factors that make up the totality of the circumstances in a manner clearly designed to withstand appellate scrutiny. Judge Paul's findings set forth all the evidence he considered and state the solid evidential basis for his findings. With regard to certain factors, evidence was presented by both sides and the finding could have gone either way. This, of course, is precisely why triers of fact exist. The selection of one piece of evidence over another competing piece of evidence is the quintessential function of the trier of fact. Without more, such selection does not permit a clearly erroneous finding upon appellate review. Substituting the judgment of the appellate court for the trier's judgment without compelling reason would render the trial process meaningless and superfluous.

A. History of Official Discrimination

Judge Paul found that Liberty County has a past of official racial discrimination and he describes it at length in his opinion. R5-154-83-87. However, he also found that "there is no evidence that the ability of blacks to

participate in the political process has been hindered by that discrimination." R5-154-87-88. This finding is well supported by evidence showing the current situation in Liberty County, including testimony of Plaintiffs themselves: Black candidates have been invited to speak at all of the Democratic party political rallies. Two blacks, Emmanuel Solomon and Queen Ester Solomon, are members of the Executive Committee of the Liberty County Democratic Party. But perhaps most telling of all is that every witness who spoke on this point concluded that there are no blocks to the political process arising from past or present acts of official discrimination. R5-154-88 (citations omitted).

B. Degree of Racially Polarized Voting

Based on this Court's earlier opinion and a lack of additional evidence, the trial court held that "there is a high degree of racially polarized voting in Liberty County." However, the trial court also speculated that there was likely a "significantly reduced degree of racially polarized voting," R5-154-89, as Jennings "undoubtedly needed a substantial amount of white crossover vote to win." Id.. This is in stark contrast to Appellant's attempt to prove that Jennings was not the candidate of choice by conjuring a hypothetical mathematical formula that is completely without support in the record and

therefore should be struck. (Applt.'s Brf. at 15 ("as little as two percent of his first primary votes **may have** come from black voters") and at 16 ("as little as 19% of the votes **may have** come from black voters")(emphasis added).) Appellant's conclusion that Jennings was not the candidate of choice are based on the assumption that 100% of the white voters in the district voted for him. It is difficult to imagine the community in which the same 100% of the white voters who cast their ballots for a black candidate will simultaneously manage to display enough racial bias to prevent minorities from participating the political and electoral process. The fact remains that Jennings received the overwhelming majority of votes from a black majority district. R5-154-96 n97.

C. Enhancing Factors

The record contains evidence that flagrant cases of vote fraud were reduced to a great extent in the early 1980s when nearly 600 non-residents were purged from the voting roles and those moving from the county were no longer allowed to vote in Liberty County. R5-154-93. Although vote fraud generally operates to the detriment of black candidates, the record also indicates that "adoption of single member districts would not prevent such voting fraud." Id. Appellant contends that the District Court erred by holding

that the detrimental effect that the physical size of the county had on black political participation was less than vote buying. While the geographic size of the county may play some role in running a campaign, it hardly seems clearly erroneous to hold that vote buying and vote fraud have a greater, more direct, impact. The Court thus found that, with the exception of the majority vote requirement, "and to a much lesser extent the geographic size of Liberty County," "no other voting practices or procedures were sufficiently proven to exist or to otherwise have a discriminatory impact upon blacks in the county." R5-154-93. The represents an even-handed appraisal followed by a holding amply supported by the record.

D. Candidate Slating Process

Case law has recognized that the "ability of minority candidates to participate in [the local] slating organization and to receive its endorsement may be of paramount importance." U.S. v. Marengo County Commission, 731 F.2d 1546, 1569 (11th Cir.). Jennings, a minority candidate, has on more than one occasion benefitted from the informal slating organization in Liberty County. R5-154-95. Judge Paul noted that it would have been insufficient to hold that the slating process was not closed to blacks had Jennings only benefitted one time. R5-154-96 n. 96. Solomon also testified that he was

promised support through the slating process. R5-154-95 n. 95. His lack of success due to apparent "double crossing," which frequently occurs as a result of the slating process, R5-154-94 n. 94, (and not as a result of race) does not establish that the slating process was closed to him. The relevant inquiry should be the willingness of the families to promise their support rather than the election results, which they cannot ultimately control. Judge Paul's finding that Plaintiffs failed to establish that blacks are excluded from the slating process is thus sound.

Appellant's brief creates the impression that there are a select few individuals whose favor must be gained in order to achieve any political success in Liberty County. The record indicates otherwise. There are at least seven families involved in the informal slating process. It is a matter of simple arithmetic that the power of any one family is necessarily dilute. In fact, on average, a family encompasses at most 10.71% of the voting age population.[1] The black community, which Appellant contends, and this Court

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[1] The record indicates that black voting age citizens comprise 25.03% of Liberty County. R5-154-80. White voting age citizens thus comprise 74.49% which, divided by 7 families, indicates an average of 10.71% per family. The record indicates that there are **at least** seven families. As the number of

has held, is politically cohesive, consists of 25.05% of the voting age population of Liberty County. Thus the cohesive black community has at its disposal the equivalent of approximately two and a half families worth of votes with which it may engage in the "horse trading" the characterizes the slating process in Liberty County. R5-154-94. Given this factual scenario, it is the politically powerful white families of such great concern to Appellant that stand to benefit if single-member districts are imposed. No longer would they be required to engage in "horse trading" with other blocks of voters. Instead they would be able to control their respective districts completely. This opportunity for ward-type tactics led to the institution of at-large elections in 1953. The same need exists today, as is evidence by Appellant's vigorous emphasis on the power and influence that the white families yield currently. It is ironic that the remedy sought under a provision designed to increase minority inclusion in the political process would actually have the opposite effect of excluding them by reducing the potential effectiveness of their collective votes.

E. Present Socio-Economic Effects of Past Discrimination

As the District Court points out, the relevant inquiry is not only

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families increases, the percentage of total votes commanded by each goes down.

whether blacks in Liberty County suffer present socio-economic effects of past discrimination, but also "whether those effects actually 'hinder their ability to participate effectively in the political process.'" R5-154-97 quoting S. Rep. at 29, 1982 U.S.C.C.A.N. at 206. The record is clear that blacks in Liberty County suffer from present socio-economic effects of past discrimination. R5-154-97-99. However, the black community clearly has not allowed their present socio-economic status to interfere with their voice at the polls. Black registration percentage has exceeded white registration since 1981, with seventy-three percent of blacks and somewhat less than sixty-seven percent of whites being registered at the time of the 1986 trial. R5-154-99 citing Billings Test., 1986 Tr., Doc. 77 at 34-35; St. Angelo Test., 1986 Tr., Doc. 81 at 212-215; Schofner Test., 1986 Tr., Doc. 82 at 87-88. The record also indicates that black voter turnout is "uniformly high." R5-154-100 citing Billings Test., 1986 Tr., Doc. 77 at 69.

As to the effect socio-economic disparities have on the ability of blacks to run effective campaigns, the District Court makes a fair and balanced appraisal which speaks for itself.

> Income disparities between blacks and whites could make it more difficult for black candidates to run effective campaigns. However, the nature of Liberty County politics does not seem to demand great financial expenditures. As the Court has already discussed, the

> predominant campaign approach in the county is door-to-door solicitation of support. The far-flung nature of the county's population in unincorporated areas may work against less affluent black candidates. But this disadvantage is largely offset by the fact that the local democratic Executive Committee has sponsored well-attended rallies to which all candidates were invited and which the black candidates attended. Moreover, blacks who have actually fun for office have been 'at least as affluent as most of the white candidates.' Billings test., 1986 tr., doc. 77 at 44. In light of this evidence, and the testimony of Plaintiffs' own expert that blacks do not face any obstacles in their campaigning [St. Angelo Test., 1985 Tr., Doc. 81 at 221], the Court finds that the lingering effects of past discrimination do not hinder political campaigning by blacks.

R5-154-101.

Appellant's contention that the District Court erred by "assuming" that lack of knowledge of how to run an effective political campaign caused the black candidates' defeats (Applt.'s Brf. at 18) must fail for several reasons. The "assumption" results from an independent review of competing evidence and is well supported by evidence in the record. Both parties presented evidence attempting to explain the defeat of black candidates and the trial court founds defendant's evidence more persuasive. There is no error when a trier of fact chooses between competing pieces of evidence.

The finding is well supported:

> blacks have frequently not known nor asked about alternatives to paying qualifying fees. ... Plaintiff Solomon [who had run for office] did not know a voter registration list was available to assist in targeting people who are more likely to vote. ... Plaintiff Solomon stated that

> 'interrelat[ing] with the public ... get[ting] to know the public' is also a big part of being elected to public office in the county. ... [the defense expert] testified that Earl Jennings' electoral success in 1990 resulted in large part from becoming more knowledgeable about the political process ... and running 'a very personal kind of campaign.'"

R5-154-102 n. 101. The trial court thus had a substantial basis for its finding. Appellant's objections to the court's finding (Applt.'s Brf. at 20-21) are no more than simple disagreement with the judge's conclusion. For example, Appellant would overturn the court's finding of fact because "the defeats are not explained by the fact that candidate Solomon did not know that the voter registration list would help target those who vote more." (Applt.'s Brf. at 20.) While it may be true that Solomon's lack of knowledge was not the sole, direct, and proximate cause of his defeat, it is certainly reasonable to find that it could have contributed to the loss, especially when combined with the other facts cited. The four different reasons cited above by Judge Paul are more than sufficient to sustain his findings under a clearly erroneous standard.

Appellant's contention that the lack of knowledge should not be considered in the analysis of black defeat is without merit because Appellant's on Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) and United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984) is misplaced. There is a crucial distinction between the reversible

error cited in those cases (taking judicial notice of apathy) and the finding of a lack of knowledge in the instant case. Taking judicial notice of apathy was reversible because apathy does not fall within the limited categories of items subject to judicial notice. The language cited by Appellant stands for the proposition that a party must offer some type of evidence before a judge can make a finding that apathy existed; that it is improper to equate apathy with those matters that are of such common knowledge that no evidence needs to be offered to prove them and thus judicial notice may be taken to prove them. Appellant's cases do not stand for the proposition that apathy can never be considered as a possible cause of an election outcome. In the instant case, substantial, credible evidence of a lack of knowledge was entered into the record and thus, unlike the judges in Kirksey and Dallas County, it was proper for Judge Paul to consider it in his evaluation of black defeat at the polls.

F. Racial Appeals

The Plaintiff-Appellants failed to present any evidence that racial appeals, either overt or subtle, have been used in county campaigns within the last twenty-plus years. Further, there is evidence from both sides to indicate that the "citizens and candidates of Liberty County believe that an election

cannot be won without black support." R5-154-103.

G. Extent of Electoral Success

The District Court was aware of the need to "closely scrutinize the election of a minority following the onset of section 2 litigation." R5-154-105 citing Gingles, 48 U.S. at 76, n. 387. In holding "that elections in Liberty County show consistent success by the black candidate of choice for public office," R5-154-105, the Court considered far more than the mere election outcomes: "Mr. Jennings was not elected until 1990, some five years after Plaintiffs filed this case and over four years after the first trial. The election results show that all of his elections were extremely competitive, with as many as four opponents (including both black and white candidates)." R5-154-105.

Appellant's contention that the District Court erred by placing substantial weight on the successful candidacy of Earl Jennings is without merit. Although legislative history and case law recognize that success can be suspect, they do not bar its consideration in context of the bigger picture. Appellant implies that there has been a conspiracy among a significant number of voters which has lasted for years in an attempt to undercut the current litigation. However, Plaintiff has offered no evidence in the record to

support this. While it is true that Jennings is the only black ever elected, it is also true that only three others have ever tried. Appellant ignores that Jennings has won three times. Further he has won in three of the five elections he has run in, or 60% of the elections he has entered. This is not an isolated single success.

H. Unresponsiveness of Elected Officials

The Court cites evidence from defense expert Billings and Plaintiff Solomon indicating that the School Board does an adequate job employing black teachers in a community where the number of blacks with college degrees is very low and that other positions also appear to be open to blacks. R5-154-107. The District Court explicitly addressed a successful claim against the school board thirteen years ago which weighed against Appellee, as well as a incident where an administrator refused to allow a black history class for racially motivated reasons. R5-154-106-107. However, the Court also noted that the Plaintiffs failed to establish that the School Board has been similarly insensitive in recent years. In light of this mixed evidence, the Court's finding that school board officials have become more responsive in recent history was reasonable.

As to the responsiveness of the County Commission, the record paints a

clear picture of a body that, on the whole, is quite responsive to the community. Both Plaintiffs and Defendants offered testimony to support this conclusion:

> There was some testimony that many of the streets in black communities in Liberty County are unnamed and unpaved. See Solomon Test., 1986 Tr., Doc. 78 at 55. On the other hand, blacks have access to the same municipal and county services that are available to whites. Id. at 71-72. Blacks have filled county positions in percentages greater than or equal to their percentage of the population. Blacks have received other benefits, including the bulk of grant money which was spent on a water project and housing upgrades. Billings Test., 1986 Tr., Doc. 77 at 31-32, 42-43; Solon Test., 1986 Tr., Doc. 78 at 85-87. Blacks have no problem approaching county commissioners, and even those commissioners elected from other residential districts (outside of residential district 1, where most lacks are concentrated) listen to their complaints and are responsive to their needs. Solomon Test., 1986 Tr., Doc. 78 at 71; Beckwith Test., 1986 Tr., Doc. 80 at 13-14; Burke Test., 1986 Tr., Doc. 80 at 32.

R5-154-107-108.

I. Tenuous State Policy

Plaintiffs have conceded that there is no tenuous state policy underlying the at-large election of county commissioners in so far as there was no racial motivation behind the 1900 amendment to the Florida Constitution instituting such elections.

As to the at-large elections of school board members, the District Court properly found that there was no tenuous policy underlying those elections

either. Although the situation at first blush it may appear otherwise, the District Court's analysis is sound. The 1947 statewide legislation that allowed counties to elect their school boards in at-large elections was found to have been racially motivated. R5-154-110. However, Liberty County did not adopt the at-large system when the State gave it the chance in 1947. Two different experts testified that "the adoption of the at-large school board elections resulted from a citizen's reform movement in the county to abolish the existing ward-type political system." R5-154-110. Although the plaintiff's expert testified that the 1947 statute was racially motivated, he was also unaware that the familial politics in single-member districts allowed them to control each district. He was also unaware that the change to at-large elections did not occur until 1953 and that it was intended to combat the ward-type political system. R5-154-110 n. 107 citing Schofner Test., 1986 Tr., Doc. 82 at 97. The District Court thus considered evidence from both parties and made a reasonable decision.

It is possible that the 1990 referendum, in which black voters elected by a two to one margin to keep the at-large system, is also motivated by the desire to keep family influence at a minimum, given that family politics are still the way of Liberty County political life. R5-154-112. As discussed

earlier, there are at least seven influential white families that participate in Liberty County politics. In an at-large system in which a successful candidate must receive a greater number of votes to win, the influence of any one family is necessarily diluted because it does not have enough votes by itself to elect its preferred candidate, which is the case in single-member elections. In single-member district elections, families can exert almost complete control over their respective small districts. In any event, the results of the 1990 referendums seriously undercut Plaintiff-Appellant's claim that the adoption or maintenance of the at-large system is motivated by improper racial animus.

In addition, the Court correctly points out that even if the policy were tenuous, the State Legislature, not Liberty County, enacted it.

J. Other Factors

1. Racial Bias in the Voting Community

The District Court's finding that the voting community in Liberty County is not motivated by racial animus is not clearly erroneous. The record contains evidence from both sides which the Court explicitly weighed and examined in its opinion. The only evidence of racial animus was presented by Plaintiff Solomon, who opined that racial prejudice must have caused his loss at the polls because he was better qualified than his opponents. R5-154-

114-115. The District Court's response is sad but all too true: "Unfortunately, far too often the person elected to political office is not the most qualified candidate. Usually, it is merely the person who is a better politician. See Billings Test., 1986 Tr., Doc. 77 at 47-48." R5-154-115 n. 112. Despite Solomon's conclusion, the facts to which he testified reveal a different picture. For example, Solomon was invited into many white homes while campaigning. Only ten to twelve homes turned him away, and he did not know how those households responded to white candidates; it is not possible to say whether their actions arose out of racial animosity, political apathy, a fear of strangers, a busy schedule at the time he called, or any of the many other possible explanations. He received "warm receptions" at the rallies (R5-154-115). He also testified that voters in District One and several of the largest communities in Liberty County did not hold race against a black candidate "to a great degree." R5-154-115. The District Court's finding was thus sound. In addition, the District Court gave proper weight to this finding: "The absence of racial bias does not defeat Plaintiffs' section 2 claim, but merely indicates that no circumstantial evidence of discriminatory results exists under this factor." R5-154-116 citing Johnson v. DeSoto County Bd. of Commissioners, 72 F.3d 1556, 1564-65 (11th Cir. 1996).

2. Proportional Representation

Blacks are not and have not been proportionately represented on the school board. It is important to bear in mind that none of the totality-of-the-circumstances factors is essential or dispositive, Gingles, 478 U.S. at 45, and as a result it is entirely possible for the ultimate finding to be in favor of defendants even where certain individual factors weigh against them.

Jennings, as one of five county commissioners, i.e., 20% of the board, clearly creates proportional representation in a community in which 17.63% of the total population is black and 25.03% of the voting age population is black.

The District Court explicitly noted that although proportional representation on the County Commission weighs in Defendant-Appellees' favor, it is not dispositive, but merely additional evidence to consider in making the overall determination. R5-154-117.

K. Totality of the Circumstances

The Court very explicitly sets forth the various aspects, both pro and con, of the local community and voting system it considered in reaching its conclusion.

> Liberty County still has a long way to go in eliminating the vestiges of past discrimination. Racism is still present among many residents. The

county remains geographically divided between whites and blacks, with each racial group attending separate churches and participating in different civic organizations. Blacks suffer from significant socio-economic disparities in housing, income, and education. Finally, there is evidence of a high degree of racially polarized voting by both blacks and whites in the county, although it appears there is less polarization now than there was when this case was originally tried in 1986.

Notwithstanding all of this otherwise compelling evidence, Plaintiffs have failed to show that the continued use of the existing at-large voting structure has actually resulted in blacks having 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. Section 1973 (b). The evidence is unrefuted that there ar no official blocks to the political process. Similarly, even in the face of significant economic disparities with whites, black voter registration and turnout is consistently higher than it is for whites, blacks are not precluded from effective campaigning, and blacks have full and equal access to the ballot box. Black voters' candidates of choice have been allowed to participate in the unofficial candidate slating process, with varying degrees of success. There have been no racial appeals in recent county campaigns because white and black candidates alike appreciate the importance of securing the electoral support of the black community. Racial animus within the community is the unusual exception, and not the rule. Elected officials are responsive to the needs of the black community. No tenuous policy underlies the at-large district, which was approved by a majority of voters (including a majority of blacks) in a county-wide referendum in 1990. Finally, a black county commissioner, Earl Jennings, has enjoyed sustained electoral success since 1990 - giving blacks in Liberty County roughly proportional representation on the county commission.

R5-154-118, 119. This finding obviously does not give any one factor undue weight. It does not ignore evidence presented. It recognizes that the issue is not clear cut and weighs many issues. Such a finding leaves no room for a

"firm and definite conviction" that it is clearly erroneous. Appellee can see no way that such a finding is clearly erroneous against the back drop of a community in which the majority of the minority voted to keep the challenged at-large system in place and said at-large system has produced a successful black candidate three times in recent memory.

DeGrandy states that "ultimate conclusions were intended to be judgments resting on comprehensive, not limited, canvassing of relevant facts." 512 U.S. 997. It is difficult to imagine how Judge Paul's opinion could have been more comprehensive. Since the ultimate finding takes into consideration many aspects of the broad picture, it is entirely possible, even likely, that a court can properly find that there has been no vote dilution even though not every single aspect of the totality of the circumstances may have leaned in the defendant's favor. DeGrandy itself was such a case. The Eleventh Circuit described that case in Nipper v. Smith, 39 F.3d 1494, 1513 (11th Cir. 1994), as follows: "In DeGrandy, the court assumed that the Gingles preconditions had been satisfied, but nevertheless concluded that section 2 relief should not be granted ... **notwithstanding the presence of continued discrimination and racial bloc voting.**" (Emphasis added.)

Appellant seems to suggest by citing Teague v. Attala County, 92 F.3d 283 (5th Cir. 1996) that the District Court's totality of the circumstances finding should be overturned because the totality finding in Teague was overturned, and implies that the "correct" answer can be found in these intensely factual cases by lining them up next to each other and matching items one at a time. Appellee does not believe that this is the analysis that the legislative history or case law has prescribed. Even if it were, Appellant's process would be thwarted by another section 2 case decided by the same court in the same year with a different outcome, Rollins v Fort Bend Independent School District, 89 F.3d 1205. The Rollins court declined to overturn the trial court's totality of the circumstances finding even though the record included evidence of a history of racial discrimination in the area and the fact that only three minority candidates had been elected in 20 years. Id. And if Appellant's method does apply, then the three elections that have produced a minority winner in Liberty County must place our case within Rollins.

IV. RACIAL BIAS CAN BE RELEVANT TO SECTION 2 CLAIMS BUT IS NOT DISPOSITIVE.

Appellee is in agreement with the District Court's sound and balanced analysis of the role racial bias should play in evaluating section 2 vote dilution claims. Gingles identified the situation that section 2 was aimed at rectifying as follows:

> [where] a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.

Gingles, 486 U.S. at 47. The reference to "social and historical conditions" would be rendered meaningless if the court could not consider racial bias in the community, for the issues arising under the Voting Rights Act are inextricably linked to racial issues. Gingles seeks to remedy exclusion from the electoral process, and its threshold factors function in such a way that they encompass exclusion resulting both from the law that by its own terms excludes minorities, as well as the law that, although neutral on its face, has the effect of excluding minorities when enacted in a racially biased atmosphere. As a result, when viewing the totality of the circumstances to determine whether exclusion from participation has occurred in violation of section 2, there may be instances where racial bias in the community is a

relevant part of that determination. Racial bias becomes relevant by virtue of the role it plays in causing the objective result of exclusion. The objective "discriminatory result" (as that phrase is explained by Judge Tjoflat in note 10 of the 1990 opinion) nevertheless remains the standard. As a corollary, there may also be instances where the cause of the objective exclusion is something other than racial bias in the community, and in those cases consideration of the racial bias issue would not further the court's determination. Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990)(Tjoflat, J., concurring), see also S.Rep.No. 417 at 33, 1982 U.S.C.C.A.N. 211. Because racial bias is only sometimes relevant, it necessarily follows that a showing by defendant of a lack of racial bias will not necessarily be dispositive. Depending on the particular facts of the case, the lack of racial bias may contribute to the overall picture sought by the totality-of-the-circumstances inquiry. Three things can be said about racial bias: 1) it is sometimes relevant; 2) it is never dispositive; and 3) its relevance is always dependent on its relationship to the objective results which remain the ultimate issue in section 2 claims.

Appellant has foregone the opportunity to address Judge Tjoflat's and the District Court's discussions of the legal issue concerning the role that racial bias should play in the totality-of-the-circumstances analysis, and once

again raises factual challenges. Appellant's contention that the District Court erred by finding that multiple regression analysis was not dispositive has no basis other than Appellant's disagreement with the finding. The District Court offered a sound basis for its finding. Appellant's contention that the finding is "contrary to this Court's decisions, which make it clear that polarized voting is a key factor" (Applt.'s Brf. at 39) misunderstands the District Court's finding on the value of multiple regression analysis. The District Court did not find that consideration of polarized voting was inappropriate, but rather found that multiple regression analysis was inappropriate as a means of proving polarized voting. R5-154-115.

V. APPELLANT'S CONSTITUTIONAL CLAIMS SHOULD FAIL BECAUSE AN ALTERNATE STATUTORY GROUND EXISTS TO RESOLVE THE DISPUTE AND BECAUSE APPELLANT HAS NOT SATISFIED THE NECESSARY ELEMENTS OF A FOURTEENTH AMENDMENT CLAIM.

It is a well established doctrine that a court will decline to decide a case on a Constitutional basis if the matter may be resolved under a statute. E.g., Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 17 (1993)(Blackmun, dissenting); Escambia County v. McMillan, 466 U.S. 48 (1984); Youakim v. Miller, 425 U.S. 231 (1976). Given the nearly thirteen years devoted to analyzing this case under the Voting Rights Act, it is clear that an alternate statutory ground exists for resolving this case and thus the Constitutional claim should not be addressed.

In addition, Fourteenth Amendment claims require a showing of both discriminatory intent and discriminatory results. Johnson v. DeSoto County Bd. of Commissioners, 72 F.3d 1556, 1560, n. 3 (11th Cir. 1996) ("The primary difference between Fourteenth Amendment claims and section 2 claims ... is that under the Fourteenth Amendment, Plaintiffs are required to show discriminatory intent as well as discriminatory results"); Lucas v.

Townsend, 967 F.2d 549, 551 (11th Cir. 1992) (per curiam). Thus a plaintiff who fails to establish discriminatory results under section 2 of the Voting Rights Act necessarily cannot establish a Fourteenth Amendment claim which requires a showing of both discriminatory results and intent. The District Court has held that the Appellants have failed to establish a section 2 claim, which prevents them from establishing discriminatory results. In addition, as the District Court noted, the "1990 county-wide referendum... shows that there is no discriminatory purpose in the continued use of at-large voting for school board elections in Liberty County." R5-154-120. As Appellants are thus unable to satisfy either requirement, their Constitutional claim must fail also.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the District Court should be upheld.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent by U.S. Mail to the following on this 1st day of December, 1997:

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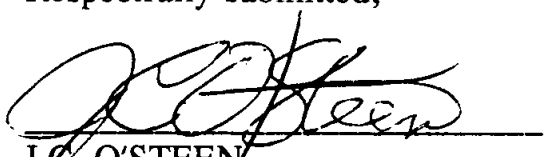
Respectfully submitted,



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