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 PLAINTIFFS-APPELLANTS

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Solomon v. Liberty County, No. 97-2540

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Patricia Beckwith, Plaintiff-Appellant

Raleigh Brinson, Plaintiff-Appellant

Joe Burke, Defendant-Appellee

Joseph C. Combs, Defendant-Appellee

Tommy Duggar, Defendant-Appellee

Geene Free, Defendant-Appellee

Ras Hill, Defendant-Appellee

J.S. Johnson, Defendant-Appellee

James E. Johnson, Defendant-Appellee

David LaCroix, Counsel for Defendants-Appellees

Liberty County, Florida, Defendant-Appellee

Liberty County School Board, Florida, Defendant-Appellee

David M. Lipman, Counsel for Plaintiffs-Appellants

Robert B. McDuff, Counsel for Plaintiffs-Appellants

J.C. O'Steen, Counsel for Defendant-Appellees

Maurice Paul, United States District Judge

W.L. Potter, Defendant-Appellee

John T. Sanders, Defendant-Appellee

Gregory Solomon, Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

This is a complex voting rights case with a lengthy procedural history. It already has been argued en banc before this Court on an earlier appeal, resulting in an evenly divided Court and a remand. The appellants believe that oral argument will assist the Court on this appeal from the district court decision after the en banc remand.

CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal from a final judgment of the district court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Where this Court, sitting en banc, previously and unanimously held that the Thornburg v. Gingles factors have been established by the plaintiffs in this case as a matter of law, was it proper for the district court nevertheless to rule in the defendants' favor by placing substantial weight on the successful candidacy of the only black person ever elected to public office in Liberty County, particularly where (a) he was elected only after this litigation was underway and the case was remanded by this Court, (b) the district court specifically found that the support of slating organizations controlled by certain white families is essential to success in Liberty County elections, (c) the district court also found that the success of this single black candidate was due to the support of these white family organizations, and (d) there is no evidence he was the candidate of choice of black voters?

2. In the face of the Gingles factors, was it proper for the district court to place substantial weight on the fact that black citizens are free to register, cast ballots, and run for office, and to assume that the defeat of black candidates was caused not by polarized voting in the at-large system, but by what the district court called "a lack of knowledge of the dynamics of running effective campaigns"?

3. Did the district court err in its analysis of certain

factors under the totality of circumstances?

4. Given the presence of the Gingles factors, did the district court err in nevertheless concluding that the plaintiffs have not proven a Section 2 violation under the totality of circumstances?

5. In light of the unanimous holding of this en banc Court that the Gingles factors were proven as a matter of law, as well as the supporting evidence adduced by the plaintiffs, do at-large elections for the county commission and school board in Liberty County violate Section 2 under the totality of circumstances?

6. Given the holding of the district court, as well as this Court in previous cases, that the 1947 Florida statute mandating at-large school board elections was motivated by an effort to dilute black voting strength, does the resulting adoption of at-large school board elections in Liberty County and their uninterrupted use since then violate the Fourteenth and Fifteenth Amendments?

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

This case was filed in 1985, challenging the at-large election system for the County Commission of Liberty County, Florida as violative of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the at-large system for the Liberty County School Board as violative of Section 2 and the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States District Court for the Northern District of Florida found no violations and

rendered judgment for the defendants in 1987. On appeal, a panel of this Court reversed and remanded for further findings, Solomon v. Liberty County, 865 F.2d 1566 (11th Cir. 1988), but that opinion was vacated when this Court took the case en banc. In a per curiam order, the en banc Court also reversed and remanded. Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990) (en banc), cert. denied, 498 U.S. 1023 (1991). Two concurring opinions were issued along with the per curiam order, one by Judge Kravitch reflecting the views of five active judges of the Court and another by Chief Judge Tjoflat reflecting the views of four active judges and Senior Judge Hill, who was sitting by virtue of having served on the original panel which heard the case.

The key differences between the views expressed in the two opinions were as follows: First, Judge Kravitch contended that proof by Section 2 plaintiffs of the three primary factors outlined in Thornburg v. Gingles, 478 U.S. 30 (1986), was sufficient to demonstrate a Section 2 violation and end the inquiry, 899 F.2d at 1017, 1021 (Kravitch, J., concurring), while Chief Judge Tjoflat contended that proof of the Gingles factors does not automatically and in every case demonstrate a Section 2 violation if the defendants can respond by carrying certain burdens under the totality of circumstances to counter the Gingles factors. Id. at 1022 (Tjoflat, C.J.,concurring). (To a certain extent, this particular dispute has since been resolved by the Supreme Court, which held in Johnson v. DeGrandy, 512 U.S. 997 (1994), that even after proof of the Gingles factors, a court still must examine the

totality of circumstances before declaring a particular election system violative of Section 2). Second, Chief Judge Tjoflat asserted that racial bias is part of the Section 2 inquiry in the sense that defendants can rebut proof of the Gingles factors by demonstrating that voters in the particular community involved are generally not driven by racial animus, id. at 1022, 1035 (Tjoflat, C.J., concurring), while Judge Kravitch said that racial animus is irrelevant to the Section 2 calculus. Id. at 1016 (Kravitch, J., concurring).

However, all members of the en banc Court held that the plaintiffs had proven the three Gingles factors. Solomon, 899 F.2d at 1013; id. at 1017 (Kravitch, J., concurring); id. at 1037 (Tjoflat, C.J., concurring). Indeed, the per curiam order stated that "as a matter of law, the appellants have satisfied the three Gingles factors." Id. at 1013 (emphasis added). Those factors, as explained by the Supreme Court in Gingles, are as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.***
>
> Second, the minority group must be able to show that it is politically cohesive.***
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances . . . -- usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. Because of the even division among the en banc Court about the import of this proof and the role of racial animus in the Section 2 inquiry, this Court's per curiam remand order required the district court to give "due consideration to the views

expressed in Chief Judge Tjoflat's and Judge Kravitch's specially concurring opinions." 899 F.2d at 1013.

In this connection, it is important to note that although Judge Kravitch and the four other members of en banc Court who joined her opinion said that proof of the three Gingles factors was sufficient in this case to make out a Section 2 vote dilution claim, id. at 1017 (Kravitch, J. concurring), they went on to hold that the "plaintiffs in this case also adduced strong evidence establishing the other supportive factors." Id. at 1017, n. 3. They thus concluded that "[o]n the totality of the evidence in the instant record, plaintiffs have clearly established their claim." Id.

On remand, the district court held a hearing in 1991 to take additional evidence. R5-154-5. Over five years later, in March of 1997, the district court issued its opinion on remand, once again denying the plaintiffs' claims.

In so doing, the district court first acknowledged that Johnson v. DeGrandy, 512 U.S. 997 (1994), requires review of the totality of circumstances even where the three Gingles factors are proven. R5-154-31-33. Second, the district court concluded that while the presence or absence of racial animus is not necessarily the dispositive factor in every Section 2 case, its absence is evidence that should be weighed in favor of defendants in evaluating the totality of circumstances. Id. at 47-72. Third, the district court held that there was no intervening evidence sufficient to alter the unanimous conclusion of all of the Judges

of this en banc Court to the effect that the plaintiffs had established the three principal Gingles factors. Id. at 74-79. Fourth, the district court held that even though the Gingles factors had been established, even though upon remand the district court agreed that "there is a high degree of racially polarized voting in Liberty County," id. at 89, and even though bloc voting by white voters in Liberty County generally defeats the candidates of choice of black voters, the at-large elections do not violate Section 2. Id. at 83-119. Fifth, the district court rejected the constitutional claim and said that, despite this Court's prior decisions in NAACP v. Gadsden County School Board, 691 F.2d 978, 982 (11th Cir. 1982), and McMillan v. Escambia County, 638 F.2d 1239, 1245 (5th Cir. 1981) -- which held that the 1947 Florida legislation requiring counties to adopt at-large school board elections was motivated by a desire to dilute black voting strength -- the resulting and uninterrupted use of at-large school board elections in Liberty County does not violate the Fourteenth and Fifteenth Amendments. Id. at 110-111, 120.

Statement of Facts

Liberty County, located in northwest Florida, is one of the most rural and underpopulated counties in the state. Its voting age population according to the 1990 census is approximately 25% black, up substantially from a decade earlier. The Liberty County Commission has five members, as does the Liberty County School Board, all of whom are elected at-large on a countywide basis. Thus, the electorate for each of the seats is heavily white. Id.

at 80-81. By contrast, if a single-member district plan were drawn, at least one of the districts would be majority black. Id. at 77 n.75. Elections are characterized by what the district court, agreeing with this Court's unanimous en banc view, called "a high degree of racially polarized voting." Id. at 89. Black voters are politically cohesive, but their candidates of choice are usually defeated by the bloc voting of white voters in the at-large system. Id. The county is unusually large -- 836 square miles -- with the a population density of only 7 people per square mile, the lowest level of population density in the state. Id. at 89-90. The county uses a majority vote requirement in party primaries and numbered posts. Id. at 81. There is a long-running history of official discrimination with remaining vestiges, and the socioeconomic gap between whites and blacks is huge. Id. at 83-87, 97-102. No black person has ever been elected to the school board, and only one has served on the county commission. He was elected only after this case was remanded by this Court for further findings, and his election came about as the result of slating from the powerful white families that, according to the district court, control politics in Liberty County. Id. at 94-95, 104-105.

Statement of the Standard of Review

While the ultimate finding of vote dilution under Section 2 is a finding of fact subject to Rule 52, F.R.Civ.P., the Rule 52 standard does not apply to appellate review of those findings of fact which are "based on a misunderstanding of the governing rule of law." Gingles, 478 U.S. at 79. See, Carrollton Branch of NAACP

v. Stallings, 829 F.2d 1547, 1554 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988) ("[T]he clearly erroneous standard does not prevent the court from correcting findings of fact based on misconceptions of law"). Each of the district court errors identified in this brief resulted from a misunderstanding of the proper rule of law and the proper mode of legal analysis. Accordingly, plenary review is appropriate. However, to the extent this Court deems any of our claims to be challenges to factual findings, we contend those findings are clearly erroneous.

SUMMARY OF ARGUMENT

Sitting en banc, this Court unanimously ruled that the plaintiffs established the three Gingles factors as a matter of law. As several circuits have held, "it will only be the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances." Clark v. Calhoun County, 21 F.3d 92, 97 (5th Cir. 1994). Yet the district court here held, in light of its own view of the totality, that no violation exists. In so doing, it committed several errors.

First, it placed substantial weight on the election of a sole black candidate, Earl Jennings, to the county commission (no black citizen has ever been elected to the school board), even though the election occurred only after the en banc remand from this Court, and even though the district court itself found that the election was caused by the endorsement of powerful white family slating groups. This is the type of manipulation that the Supreme Court

warned against in Gingles and that this Court has warned against in other cases. The district court's action is particularly problematic given that Jennings does not appear to be the candidate of choice of black voters. His election proves only that the white slating families can elect candidates of their choice, but does not prove that black voters can do so.

Second, the district court relied heavily upon the fact that black voters are free to register, cast ballots, and run for office, and assumed without any basis that the defeat of black candidates was caused not by the polarized voting found by this Court as part of the Gingles factors, but by what the district court called "a lack of knowledge of the dynamics of running effective campaigns."

Third, the district court improperly analyzed a number of the totality of circumstances factors and weighed them against the plaintiffs when it should not have done so.

Indeed, when the totality is examined independent of the errors committed by the district court, it is clear that the at-large elections in Liberty County violate Section 2. The Gingles factors have been established as a matter of law. As Judge Kravitch's concurring opinion noted when this case previously was reviewed en banc, the plaintiffs have adduced a great deal of corroborating evidence. Clearly this is not one of those those "very unusual case[s] in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances."

Clark, 21 F.3d at 97.

Finally, the district court erred in denying the constitutional claim regarding the school board. The district court found, as has this Court in two previous cases, that the 1947 legislation requiring Florida counties to go from single-member to at-large school board elections was motivated by an effort to dilute black voting strength. Yet the district court denied the constitutional claim, holding that the at-large scheme had not been maintained over the years for discriminatory reasons. However, the Fourteenth Amendment is violated if the challenged scheme is either adopted or maintained for discriminatory reasons. The district court also denied the claim because the plaintiffs had not proved an accompanying discriminatory result under the Section 2 results test. However, an intent-based constitutional violation does not require the same level of proof of discriminatory effect that is mandated under the Section 2 results test.

ARGUMENT

I. THE DISTRICT COURT ERRED BY PLACING SUBSTANTIAL WEIGHT ON THE SUCCESSFUL CANDIDACY OF THE ONLY BLACK PERSON EVER ELECTED TO PUBLIC OFFICE IN LIBERTY COUNTY, PARTICULARLY WHERE (A) HE WAS ELECTED AFTER THIS LITIGATION WAS UNDERWAY, (B) THE DISTRICT COURT SPECIFICALLY FOUND THAT THE SUPPORT OF THE INFORMAL SLATING ORGANIZATIONS CONTROLLED BY CERTAIN WHITE FAMILIES IS ESSENTIAL TO SUCCESS IN LIBERTY COUNTY ELECTIONS, (C) THE DISTRICT COURT SPECIFICALLY FOUND THAT THE SUCCESS OF THIS SINGLE BLACK CANDIDATE WAS DUE TO THE SUPPORT OF THESE WHITE FAMILIES, AND (D) THERE IS NO EVIDENCE THAT HE WAS THE CANDIDATE OF CHOICE OF BLACK VOTERS.

It is a long-standing axiom of Section 2 jurisprudence that the election of a single black elected official does not demonstrate the absence of racial vote dilution. The legal significance of the post-remand success of a single black individual is dubious since, as the Supreme Court said, "the election of a few minority candidates does not 'reasonably foreclose the possibility of dilution of the black vote.'" Gingles, 478 U.S. at 75. Otherwise, said the Court, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." Gingles, 478 U.S. at 75, quoting Sen. Rep. No. 97-417, 97th Cong. 2d Sess. (1982), U.S. Code Cong. and Admin. News 1982, Pg. 29, n. 115 (legislative History of amended Voting Rights Act of 1982), quoting Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973)

(en banc), aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam).

Thus, this Court has recognized that the electoral success of a black candidate following the filing of an at-large election challenge "might be attributable to political support motivated by different considerations -- namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds." Zimmer v. McKeithen, 485 F.2d at 1307; United States v. Marengo County Commission, 731 F.2d 1546, 1572 (11th Cir. 1984); NAACP v. Gadsden County School Board, 691 F.2d 978, 983 (11th Cir. 1982).

In the present case, the district court's finding of no violation was based in large measure on the election of Earl Jennings, the only black person elected to political office in Liberty County. As the district court noted, no black person had ever been elected in the county as of 1986. R5-154-104. As of the present, none has been elected to the School Board. Id. at 104. Indeed, none has been elected to any office, id., except for Jennings, who was elected to a seat on the County Commission in 1990, shortly after the remand from this Court, and re-elected twice since then. Id. at 97 and n.97. Because of the Jennings election, the district court concluded that there has been "consistent electoral success by the black candidate of choice for public office" that "obviously undercuts Plaintiffs' claims that blacks have been denied equal access to the political process in the county." Id. at 105. In evaluating the totality of

circumstances, the district court relied heavily on its own holding that the Jennings election "giv[es] blacks roughly proportional representation on the county commission." Id. at 119.

At the same time the district court placed such emphasis on the Jennings election, it made specific findings showing that his election was not the result of an open system in which voters of all races participate fairly, but instead was specifically engineered by the same white political power structure that kept Liberty County politics segregated for so many years. After noting the extensive and fairly recent history of blatant racial discrimination in politics and public life in Liberty County, id. at 83-86, the district court made findings of the dominance of several white families in controlling the county's politics:

> [T]he county has a very informal, unofficial candidate slating process. "Much of the politics of Liberty County is based on family membership . . . . [or] contacting heads of families." St. Angelo Test., 1986 Tr., Doc. 81 at 157. A number of large white families, including the Burkes, Hosfords, Johnsons, Revells, Shulers, Stricklands and Summers . . . are very active in local politics, and generally select one of their own family members or acquaintances who are politically aligned with them to run for office. . . . In order for candidates to be successful in Liberty County, they must align themselves with one or more [of these] family groups.

Id. at 94-95 (emphasis added). (The district court's entire discussion of these "family groups," id. at 95, related to the particular "large white families" it mentioned earlier in the same paragraph. Id. at 94 (emphasis added). There was no evidence -- and no discussion by the district court -- of any black families or slating groups who played a determinative role in the racially polarized environment of Liberty County politics. Thus, whenever

the district court speaks of "family groups" or "family factions," the reference is clearly to these white family slating organizations.)

The district court went on to note that, because of the dominance of these white family slating groups, Earl Jennings would not have been elected but for their involvement and support.

> [T]he evidence shows that candidate slating is essential to a successful campaign in Liberty County. Therefore, there can be little question that Mr. Jennings must have received the support of at least some of [the] family factions in order to be elected.

Id. at 96 n.97 (emphasis added). There was no evidence -- and the district court cited to none -- of any other black candidate ever receiving support from these white family slating organizations.

Given that no black candidate other than Jennings has ever been elected in Liberty County, given that Jennings' election occurred after the remand from this Court and was caused by the white slating groups, and given that these groups control Liberty County politics and had theretofore insured that its government remained segregated, this presents a classic case of the concern expressed by the Supreme Court in Gingles. If this sort of election of a sole minority candidate is given too much weight, said the Court, "the majority citizens might evade [Section 2] by manipulating the election of a 'safe' minority candidate." 478 U.S. at 75.

Indeed, while it is clear -- as the district court found -- that Jennings was the candidate of choice of some of the white slating organizations, it appears he was not the candidate of

choice of black voters. No regression analysis was presented on remand by the defendants of the Jennings elections, and they therefore have not proven -- as is their burden after establishment of the Gingles factors, see, e.g., Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994) (opinion of Tjoflat, C.J.) -- that he was the candidate of choice of black voters. R5-154-89 n.89. The district court attempted nevertheless to claim that Jennings was the black candidate of choice because he received 75.52% of the first primary votes and 76.81% of the second primary votes in 1990 in district 1, which was 46.09% black in voter registration. Id. at 96 n.97. However, the district court's assumption of black support is not accurate and is no substitute for the regression analysis the defendants failed to perform. For example, the white voters, who constituted 54% of the electorate in district 1, might have given all of their votes to Jennings, meaning only 21 or 22% of his votes came from black voters -- less than half of the 46% black electorate. In the 1992 election, as the district court noted, Jennings received only 55.84% of the first primary district 1 votes and 72.04% of those in the second primary. Id. Thus, as little as two percent of his first primary votes may have come from black voters and as little as 18% of the second primary votes -- a small portion of the 46% black electorate in the district. The 1996 election casts even more doubt on the district court's conclusion. There, as that court noted, Jennings received only 24.06% of the district 1 vote in the first primary while another black candidate received 52.83% of it and another 12.26%. It was because of

support from the other districts, much more heavily white than district 1, that Jennings beat the other two black candidates and made the runoff against a white candidate. Id. at 82 and 96-97 n.97. In the runoff, Jennings received 73.02% of the district 1 vote. Id. at 96-97 n.97. Again, as little as 19% of these votes may have come from black voters -- a small portion of the district's 46% black electorate.

Indeed, Jennings was previously recognized by Chief Judge Tjoflat's panel opinion in this case as an aberrational candidate with a paucity of black support. 865 F.2d at 1577, n. 18; id. at 1581 ("Earl Jennings, although black, may not have been perceived as a black candidate").

Every member of this en banc Court has concluded that the three Gingles factors have been established by the plaintiffs -- including the fact that white bloc voting usually defeats the candidate of choice of black voters in Liberty County. Solomon, 899 F.2d at 1013; id. at 1020-1021 (Kravitch, J., concurring); id. at 1037 (Tjoflat, C.J., concurring). The district court agreed on remand, stating that "there is a high degree of racially polarized voting in Liberty County." R5-154-89. The Jennings election does not prove otherwise and does not prove that the candidates of choice of black voters can be elected in at-large balloting. While the evidence and the district court's findings establish that the white family slating groups have controlled county politics and insured Jennings' election, the defendants have not established that Jennings was the candidate of choice of black voters. If

anything, it appears that black voters far preferred one of Jennings' black opponents in the 1996 election, but because of the white slating groups and the white voters, Jennings was elected over that black candidate.

Section 2 requires that black voters have an equal opportunity with white voters to elect candidates of choice. As the Court pointed out in Gingles, Section 2 is not satisfied simply because the white majority and the white power structure manipulate the election of a "safe" black candidate, particularly where this occurs during the course of Section 2 litigation. 478 U.S. at 75. In Liberty County, the most that can be said is that a sole black person has been elected because he was supported by a closed white power structure after the remand by this Court. Jennings has not been proven the candidate of choice of black voters, and when black voters have supported another black candidate, the choice of those voters was defeated and Jennings, the choice of the white slating organizations, was elected. That is not a demonstration of equal opportunity and is not proof of compliance with the Voting Rights Act. As this Court stated in Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1559 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988), "it is the access of minority voters to the political process, not the majority's access to the black vote which is the chief concern of Section 2 of the Voting Rights Act."

Because the district court placed so much weight on the Jennings elections, contrary to the interpretation of Section 2 by the Supreme Court in Gingles and by this Court in Marengo County,

Carrollton, and other cases, reversal is necessary.

II. THE DISTRICT COURT ERRED BY PLACING GREAT WEIGHT ON THE FACT THAT BLACK CITIZENS ARE FREE TO REGISTER, CAST BALLOTS, AND RUN FOR OFFICE, AND ALSO ERRED BY ASSUMING THAT THE DEFEAT OF BLACK CANDIDATES WAS CAUSED NOT BY BLOC VOTING IN THE AT-LARGE SYSTEM, BUT BY WHAT THE DISTRICT COURT CALLED "A LACK OF KNOWLEDGE [BY BLACK CANDIDATES] OF THE DYNAMICS OF RUNNING EFFECTIVE CAMPAIGNS."

The essence of a Section 2 claim is that the challenged electoral practice 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, 478 U.S. at 47.

As Congress and the Supreme Court have both recognized, at-large election systems can dilute black voting strength even in situations where black voters are free to register, cast ballots, and run for office. Indeed, Section 2 was amended in 1982 to outlaw those particular at-large systems that result in racial vote dilution. The fact that black voters are free -- as they have been for the most part since the 1965 passage of the Voting Rights Act -- to cast ballots and qualify for office does not provide evidence that a particular at-large scheme complies with Section 2.

Yet the district court relied heavily on this. In evaluating the totality of circumstances, the court said: "[T]here are no official blocks to the political process. . . . [B]lacks are not

precluded from effective campaigning, and blacks have full and equal access to the ballot box." R5-154-119. See also, id. at 88 ("perhaps most telling of all is that every witness who spoke on this point concluded that there are not blocks to the political process. . . ."). Moreover, in stressing the ability to cast ballots and run for office, the district court attributed black political defeat in Liberty County not to the fact that the white bloc vote usually defeats black candidates of choice -- even though all of the judges of this en banc Court held that this was the effect of bloc voting. Solomon, 899 F.2d at 1013; id. at 1020-1021 (Kravitch, J., concurring); id. at 1037 (Tjoflat, C.J., concurring). Instead, the district court assumed that, since black voters are able to cast ballots and black candidates are able to run for office, black defeat must be the fault of the black candidates themselves.

> [B]lack voters in Liberty County are not actually hindered in registering, casting ballots, qualifying to run, and campaigning for public office. The greatest obstacle to effective black participation in the political process has been a lack of knowledge of the dynamics of running effective campaigns.

R5-154-102.

This is a totally unsupported and improper conclusion by the district court. The only proof cited by the district court to bolster this proposition is that "blacks have frequently not known nor asked about alternatives to paying qualifying fees;" that plaintiff Solomon (who had run for office) did not know a voter registration list was available to help target those more likely to vote; that plaintiff Solomon testified to the importance of

"get[ting] to know the public" in running for office; and that the defense expert testified that the Jennings election 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. But these things do not support the district court's conclusion. First of all, the district court was incorrect when it said blacks "frequently" were unaware of the qualifying fee alternatives. Indeed, the district court itself cited only one example of that and found that the fee had not discouraged any black candidates. Id. at 100. Even if it had, that does not demonstrate a "lack of knowledge of the dynamics of running effective campaigns" among those black candidates who did run, nor does it explain the reasons for their defeat in polarized elections. Similarly, 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. As each of the judges of this en banc Court found, white voters consistently voted against black candidates, and it is unrealistic to assume this pattern would have changed had Solomon been able to identify the white voters who are more likely to vote than others. Similarly, Solomon's testimony that "get[ting] to know the public" is important does not demonstrate a "lack of knowledge of the dynamics of running efffective campaigns," nor is this demonstrated by the conclusory testimony of a defense expert that Jennings had become more knowledgeable and run a personal campaign.

Certainly, as each of the members of this en banc Court found,

and as the district court reaffirmed on remand, Solomon, 899 F.2d at 1013; id. at 1020-1021 (Kravitch, J., concurring); id. at 1037 (Tjoflat, C.J., concurring); R5-154-89, black voters are politically cohesive and have generally supported the black candidate in black-white elections. Clearly, the black candidates had sufficient "knowledge of the dynamics of running effective campaigns" to obtain black voter support. The problem has been -- in a county wracked by a history of racial discrimination and by the exclusionary political control of a few white families -- that white voters generally refuse to vote for the candidates of choice of black voters, thereby defeating those candidates through bloc voting. Yet the district court supplanted the focus on legally significant bloc voting mandated by Gingles and its progeny and replaced it with this unsupported contention that black candidates do not know how to campaign for public office. It is paternalistic, and revealing of a double standard, for the district court to assume that white candidates have sufficient "knowledge of the dynamics of running effective campaigns," but that most black candidates do not.

This is quite similar to the error that led to reversals by the former Fifth Circuit sitting en banc in Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (en banc), and by this Court in United States v. Dallas County Commission, 739 F.2d 1529 (11th Cir. 1984). In Kirksey, the district court held that depressed black political participation resulted not from historical discrimination, but from "apathy" on

the part of black citizens. Given the presence of a history of discrimination and other exclusionary factors, the Fifth Circuit held that it was improper to attribute black exclusion to "apathy." Apathy, said the Court, "is not a matter for judicial notice." 554 F.2d at 145. Similarly, in Dallas County, this Court said:

> The district court concluded that apathy was the prime cause of black defeat at the polls. In this the court erred. The existence of apathy is not a matter for judicial notice. Kirksey, 554 F.2d at 145; see also, Marengo County, 731 F.2d at 1574. The record does not contain evidence supporting the district court's finding that apathy was a prime cause of black defeat.

739 F.2d at 1536. See also, Teague v. Attala County, 92 F.3d 283, 295 (5th Cir. 1996) ("The record before us does not contain evidence to support the district court's conclusion that voter apathy is the reason for the failure of blacks in Attala County to elect the candidates of their choice to political office").

Just as it is improper for a district court to assume that black defeats in the face of polarized voting are caused by "apathy," it also is improper to assume they are caused by "a lack of knowledge of the dynamics of running effective campaigns." This error, combined with the related and unwarranted emphasis given by the district court to the ability of black voters to cast ballots and run for office, requires reversal.

III. THE DISTRICT COURT MADE A NUMBER OF ERRORS IN ANALYZING INDIVIDUAL FACTORS UNDER THE TOTALITY OF CIRCUMSTANCES AND IN HOLDING THAT CERTAIN FACTORS DEMONSTRATE THAT THE AT-LARGE SYSTEM DOES NOT VIOLATE SECTION 2.

In reviewing certain individual factors under the totality of circumstances, and in holding that some of these factors demonstrate Section 2 compliance, the district court made a number of errors.

History of Discrimination

The district court found that there is "a long history of extensive official discrimination in Florida, and in Liberty County in particular." R5-154-83. The effects of this tragic history still remain, said the district court. "Several lingering effects of Liberty County's sad history of racial discrimination remain in the present. To a great extent, the county is still racially segregated." Id. at 86. Among the relics of the discrimination in Liberty County is the fact that, according to the district court, the key civic groups in the county are all-white or nearly all-white. Id.

Yet the district court discounted this history and the lingering effects, primarily because there are no formal obstacles to black people registering, casting ballots, and running for office.

> Notwithstanding the remaining vestiges of official discrimination in Liberty County, there is no evidence that the ability of blacks to participate in the political process has been hindered by that discrimination. . . . Black candidates have been invited to speak at all of the Democratic party political rallies. Two blacks . . . 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. The Court agrees.

Id. at 88 (citations omitted). Also, as noted in Section II of the argument portion of this brief, the district court supported its totality finding with the conclusion that "there are no official blocks to the political process" and that "blacks are not precluded from effective campaigning, and blacks have full and equal access to the ballot box." Id. at 119.

It was error for the district court to discount the history of discrimination simply because black people are able to cast ballots and run for office. Soon after the passage of the 1965 Voting Rights Act, black citizens in all states were finally able to register and cast ballots and run for office. If that were enough to discount the history of discrimination, this would not be a factor in any Section 2 case. But the courts have clearly held that it is. See, e.g., United States v. Dallas County, 739 F.2d 1529, 1537 (11th Cir. 1984); United States v. Marengo County Commission, 731 F.2d at 1567, 1574; McMillian v. Escambia County, 748 F.2d 1037, 1044-1045 (5th Cir. 1984); Westwego Citizens for Better Government v. Westwego, 872 F.2d 1201, 1211-1212 (5th Cir. 1989).

Moreover, the history and its lingering effects should not have been discounted simply because black candidates were invited to speak at Democratic rallies and because two black people are members of the county Democratic executive committee. It would be

quite remarkable if the Democratic Party invited only white candidates to its rallies and not black candidates. The fact that the party allows black candidates to speak does not dissipate the meaning of the history of discrimination. And the presence of only two black members on a county Democratic executive committee does not mean the vestiges of discrimination have disappeared.

Accordingly, the district court erred in its treatment of this factor.

Enhancing Factors

"A vote dilution case 'is enhanced by a showing of the existence of large districts, majority vote requirements, [and] anti-single shot voting provisions . . . .'" United States v. Marengo County, 731 F.2d at 1570, quoting, Zimmer v. McKeithen, 485 F.2d at 1305.

The district court noted that "Liberty County presents a vast area to cover in an at-large campaign." R5-154-89. It is 836 square miles in size, with a population density of seven people per square mile. It has the lowest population density of any county in the state, and the second lowest overall population of any county. Id. This size makes it particularly difficult to campaign for those who have little money. As the district court found: "[T]he lower economic status of blacks in Liberty County could cause blacks to have a greater difficulty campaigning." Id. at 90. Nevertheless, the district court discounted the size of the county. "[T]his campaign disadvantage is offset somewhat by the fact that voters within Liberty County are very active in politics, and

generally attend one or more of the political rallies held in [the towns of] Bristol, Hosford, and Sumatra." Id. at 90-91. The district court was wrong to discount this. Black candidates and the black voters who support them are generally less affluent than white candidates and the white voters who support them. Even though some political rallies are well-attended, the poorer candidates and their supporters are hurt by the large size of the at-large countywide election district that is used for school board and county commission elections.

For election to the Liberty County Commission and the Liberty County School Board, a majority vote is required to win the party nomination, but a plurality is sufficient in the general election. Fla. Stat. §§ 100.061, 100.81, 100.091, and 230.10; R5-154-91. The district court found that this scheme "can operate in a manner that dilutes the minority vote in Liberty County," and cited "ample proof that the continued use of a majority vote requirement can work to the detriment of black candidates." Id.

Candidates for the school board and county commission run for numbered posts. Id. at 91-92. "Because of this requirement," said the district court, "an anti-single shot provision is irrelevant." Id. at 92. This analysis is incorrect. The numbered post requirement is the equivalent of an anti-single shot provision in that both preclude the value of single-shot voting.

The district court concluded its discussion of the enhancing factors as follows:

> In summary, the Court finds that only the majority vote requirement, and to a much lesser extent the size of Liberty

> County, can enhance the possibility of discrimination against black voters in 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.

Id. at 93. While the district court was correct in its analysis of the majority vote requirement, it erred in failing to recognize that a numbered post requirement is the equivalent of an anti-single shot voting mechanism. In addition, the district court erred in discounting the difficulty created for the less affluent black community by the large size of the countywide at-large district.

Candidate Slating Process

The district court's analysis of the slating factor was discussed in Section I of the argument portion of this brief. Based on the fact that the white families who control Liberty County elections had slated one black candidate -- Earl Jennings -- the district court concluded "that Plaintiffs have failed to establish that blacks have been denied access to Liberty County's informal candidate slating process." Id. at 97. In evaluating the totality of circumstances, the district court said, "[b]lack voters' candidates of choice have been allowed to participate in the unofficial candidate slating process . . . . ", and weighed this in the defendants' favor. Id. at 119.

The district court was wrong both as a factual and a legal matter. Factually, as noted in Section I, it is not clear that Jennings was the candidate of choice of black voters, and it was incorrect for the district court, when evaluating the issue of slating, to suggest that he was the candidate of choice. Further,

even if Jennings had been the black voters' candidate of choice, it was inaccurate for the district court state that "black voters' candidates [plural] of choice" were slated, since only one of them -- Jennings -- was tapped by the controlling white families to join their slate.

Legally, it was improper for the district court to weigh this factor in favor of the defendants for the same reason it was improper to place so much weight on the Jennings election -- a point discussed in Section I of this brief. Just as "the majority citizens might evade [Section 2] by manipulating the election of a 'safe' minority candidate," Gingles, 478 U.S. at 75, they can do the same thing by slating a "safe" minority candidate as a precursor to his or her election, thereby having this factor "weighed" against minority plaintiffs. This is a particular danger in a place like Liberty County, where -- as the district court found -- politics are controlled by a few powerful white families, who can easily manipulate the political process through the power of their unofficial slates. To reiterate a point made in Section I of the argument, the purpose of Section 2 of the Voting Rights Act is to give black voters an equal opportunity to elect candidates of their choice. The Act is not satisfied simply because white slating organizations can put in office a black candidate of their own choice.

Present Socioeconomic Effects of Past Discrimination

In its opinion, the district court outlined the vast socioeconomic disparities between white and black citizens in

Liberty County, id. at 97-99, noting for example, that the average per capita income of whites is $13,127, while that of blacks is only $3,935, less than a third of the white figure. Id. at 98. Despite these pronounced disparities, which are vestiges of the long history of official discrimination against black people, the district court weighed this factor in favor of the defendants and against the finding of a Section 2 violation. The district court did so because black voter registration has equaled or exceeded that of whites in the recent past, id. at 99, and because black citizens are able to register, cast ballots, and run for office. Id. at 102. In reviewing the totality of circumstances, the district court gave weight to the following: "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." Id. at 119.

We already have discussed, in the subsection of this brief regarding the history of discrimination, the district court's error in discounting that history simply because black citizens are now free to cast ballots and run for office. The same point applies with respect to socioeconomic disparities. United States v. Marengo County, 731 F.2d at 1568.

As for the district court's point about registration and turnout, it first should be noted that while the evidence does show a slightly higher registration rate among blacks than whites, R5-154-99, there is nothing to show higher turnout rates. The

district court cited to testimony by a defense expert that black turnout is "uniformly high," id. at 99-100, but that in no way compares white and black turnout or suggests that white turnout is lower. Moreover, the courts have made it clear that dilution can exist that is violative of Section 2 even where black registration and turnout equal or exceed that of whites. See, United States v. Dallas County Commission, 739 F.2d at 1538 (permitting plaintiffs to maintain a Section 2 case even though black registration rates equal those of whites); Collins v. City of Norfolk, 883 F.2d 1232, 1235 (4th Cir. 1989), cert. denied, 111 S.Ct. 340 (1990) (same). See also, Smith v. Clinton, 687 F.Supp. 1310, 1318 (E.D. Ark.) (three-judge court), aff'd mem., 109 S.Ct. 548 (1988) (Section 2 violation found even though no evidence presented of relative voter registration rates). In a bloc voting at-large scenario where whites have a decided numerical and electoral advantage for all seats on the governing body, the fact that black registration rates may have been slightly higher than white rates is not enough to enable black voters to elect candidates of choice.

Racial Appeals

As the district court noted, racial appeals were part of the political landscape in Liberty County in the 1950s and even into the 1960s and 1970s. R5-154-102-103. However, said the Court, there is no evidence of racial appeals since that time. Id. at 103. According to the district court, "[t]he absence of racial appeals is not surprising because the small number of voters in the county dictates that candidates for office typically need the black

vote in order to get elected." Id. at 103. Based on this conclusion, the district court weighed this factor in favor of the defendants and against the plaintiffs. In canvassing the totality of circumstances, the district court said: "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." Id. at 119.

The district court erred here in a couple of respects. First, the small number of voters by itself does not dictate that candidates "typically need the black vote in order to get elected." The importance of the black vote to a candidate's prospects are not determined by the overall number of voters, but instead by the portion of the electorate comprised by black voters. Only 25% of the Liberty County voting age population is black, which means the black vote is much less important in countywide elections than it would be if black citizens comprised, say, 45% of the voting age population. Moreover, in the context of polarized voting, the black vote is effectively nullified by the larger white bloc vote. Thus, black voters are unable to elect candidates of choice if the white bloc goes the other way -- as it typically does when black voters support a black candidate. The only means by which black support can generally make a difference is if black citizens provide the "swing vote" among competing white candidates. But given that black voters are generally cohesive behind black candidates, yet are unable to elect them because of white bloc voting, the "swing vote" ability in some all-white elections does

not mean black voters are able to elect candidates of their choice. As this Court held in Carrollton, "[i]t is the access of minority voters to the political process, not the majority's access to the black vote which is the chief concern of Section 2 of the Voting Rights Act." 829 F.2d at 1559.

Second, and more importantly, this Court has held that the absence of racial appeals should not be counted against plaintiffs in their efforts to establish a Section 2 violation. In United States v. Marengo County Commission, 731 F.2d at 1571, this Court specifically discussed the district court's finding of no racial appeals in that case, and noted that such appeals are much less frequent in modern times than in earlier decades. But said the Court, the continuing effects of past discrimination, including racial vote dilution, are still with us. The Court added:

> This is one of the principal reasons Congress found it necessary to adopt a results test to root out the effects of past discrimination. Evidence of racism can be very significant if it is present. But its absence should not weigh heavily against a plaintiff proceeding under the results test of Section 2.

Id. (citations omitted). See also, Thornburg v. Gingles, 478 U.S. at 48-49 n.15 ("factors . . . such as . . . the use of appeals to racial bias in election campaigns . . . are supportive of, but not essential to, a minority voter's claim"). The district court erred by counting this factor in the defendants' favor.

Black Electoral Success

This factor -- and the district court's errors with respect to it -- already have been discussed in Section I of the argument portion of this brief.

Unresponsiveness

According to the district court, "[t]he evidence shows that Liberty County School Board members have had some problems with sensitivity towards the black community." Id. at 106. However, because "[t]here is no record evidence of any racial discrimination by the School Board [in the past] thirteen years," the district court concluded that "the more recent history suggests that school board officials have become more responsive." Id. at 107.

As for the county commission, the district court held that it is responsive to the black community even in the face of evidence that -- as with many localities victimized by a history of discrimination -- streets in the black areas are largely unpaved and kept in much worse shape than in white neighborhoods. Id. at 107-109. The district court concluded: "Any isolated instances of unresponsiveness by elected officials in Liberty County do not hinder black access to the political process." Id. at 108-109. In reviewing the totality, the district court weighed this factor in the defendants' favor, stating that "[e]lected officials are responsive to the needs of the black community." Id. at 119.

By giving weight to this in the defendants' favor, the district court erred. This Court has held many times responsiveness is of limited importance and the fact that elected officials may pay some attention to black interests does not transform a dilutive election system into one that complies with Section 2. See, e.g., United States v. Marengo County Commission, 731 F.2d at 1572 (unresponsiveness is of limited importance under

Section 2 of the Voting Rights Act since the Act "protects the access of minorities not simply to the fruits of government but to participation in the process itself."); McMillan v. Escambia County, 638 F.2d 1239, 1249 (5th Cir. 1981) ("Whether current office holders are responsive to black needs 'is simply irrelevant; a slave with a benevolent master is nonetheless a slave'"); NAACP v. Gadsden County, 691 F.2d 978, 983 (11th Cir. 1982).

Tenuous State Policy

Concluding that there is no tenuous state policy underlying the at-large elections in Liberty County, the district court weighed this factor in favor of the defendants and against the plaintiffs in evaluating the totality of circumstances. Id. at 119. This was error for two reasons.

First, with respect to the school board, the district court correctly found that the 1947 Florida legislation changing county school board elections from single-member district elections to at-large elections "was designed to dilute the voting power of the black community." R5-154-110. Indeed, this Court previously has held that this legislation was racially motivated. NAACP v. Gadsden County School Board, 691 F.2d at 982; McMillan v. Escambia County, 638 F.2d at 1245-1246. But the district court mistakenly assumed that the legislation simply allowed counties to make this change if they wanted, and that Liberty County did not do so until 1953. According to the district court:

> [N]otwithstanding the Legislature's racial animus, Liberty County was not similarly motivated when it changed its school board elections from single-member district elections to at-large elections. Dr. Charles Billings and Mr. Johnny Eubanks

testified that Liberty County made the change in approximately 1953. The adoption of at-large school board elections resulted from a citizen's reform movement in the county to abolish the existing ward-type political system. The ward system had allowed a single family or faction to control each district -- effectively disenfranchising other voters (who at that time were all white), while furthering the special interests of the family or faction at the expense of the rest of the county. *Billings Test., 1986 Tr.,* Doc. 77 at 17-18; *Eubanks Test., 1986 Tr.,* Doc. 79 at 54-56. Such a policy of reform to eliminate factional politics is not tenuous.

R5-154-110-111. The district court also said:

> Plaintiff's expert, Dr. Schofner, had testified that the Florida Legislature's purpose behind the 1947 change was to dilute the black vote. *Schofner Test., 1986 Tr.,* Doc. 82 at 34-35. However, Dr. Schofner also indicated that he was unaware of the details of how Liberty County changed to at-large school board elections. He did not know that Liberty County had maintained, by population act, single-member district elections for the school board until well into the 1950s. Furthermore, he did not realize that the purpose behind the change was to abolish corrupt ward politics. Id. at 97.

R5-154-110 n.107.

However, none of the evidence cited by the district court demonstrates that the school board (as distinct from the county commission) changed to at-large elections in 1953 as a result of reform politics rather than in 1947 as a result of the racist Florida legislation. Dr. Billings did testify generally on direct examination about a change from single-member to at-large elections in Liberty County in 1953 -- a change he said was motivated by an effort to get away from ward politics -- but he did not specify on direct whether this change involved the school board or the county commission. R1-77-17-18. However, on cross-examination, he was specifically asked about that:

> Q. I believe you testified regarding a changeover in 1950 from single member districts to an at-large election system in

Liberty County, is that right?

A. In the early 50s, that is right. Approximately '53.

Q. Which jurisdiction were you referring to?

A. Liberty County.

Q. Which governmental entity? The school board, the county commission, or both?

A. The county commission.

R1-79-4.

Mr. Eubanks, whose testimony also was cited by the district court for this proposition, testified that he was not specifically aware of a change from single-member to at-large elections in the early 1950s. Id. at 54. He said he had been told in general terms by others older than him of some reform efforts designed to get away from ward politics, but he did not speak in terms of specific dates or in terms of the school board. Id. at 54-56. See also, id. at 56 (Eubanks states to the attorney questioning him, "[i]f this happened in the -- as you stated, in the early '50s, I don't recall that we had any black voters at that time").

As for Dr. Schofner, also cited by the district court, he was asked the following on cross-examination:

Q. . . . Are you aware that Liberty County, by population act, remained a single member -- maintained the single district electoral system for school board member until well into the fifties?

A. No, I didn't realize that.

R1-82-97. There was no testimony or evidence about this purported population act maintaining single-member school districts into the 1950s, and the only mention of it at trial was by a defense

attorney asking a question.

Instead, as this Court has frequently pointed out, the 1947 legislation required county school board elections to be held at-large and did not allow a local option. Chief Judge Tjoflat mentioned this in his panel opinion in the present case.

> The Florida legislature instituted the at-large system for the election of county school boards in 1947. . . . The Florida legislature required the counties to use the at-large system to elect school board members until 1984, when it enacted the "School District Local Option Single-Member Representation Law."

865 F.2d at 1578 (emphasis added). The former Fifth Circuit said the same thing in McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981):

> From 1907, 1907 Fla. Laws, ch. 5697, § 1, until 1945, there was clear support for single-member district elections for School Board members. During this period the primary elections for School Board were conducted as single-member district elections, while the general elections were at-large. Because the all-white Democratic primary was tantamount to the election, from 1907 through 1945 the School Board was a de facto, if not de jure, single-member district body. . . .
>
> The 1945 decision in Davis v. State ex rel. Cromwell, 23 So.2d 85 (1945) (en banc), changed that, however, by declaring unconstitutional the white primary. In the very first legislative session following Davis, the legislature enacted statutes requiring at-large elections in both the primary, 1947 Fla. Laws, ch. 23726, § 7, and the general election, 1947 Fla. Laws, ch. 23726, § 9.

638 F.2d at 1245 (emphasis added).

Thus, it is clear that Liberty County went to at-large school board elections because it was required to do so by the racially motivated 1947 legislation, not because -- as the district court said on the basis of no supporting evidence -- of some changeover in the 1950s motivated by some sort of alleged "reform" movement.

That being the case, it is clear the district court's entire analysis regarding the tenuousness of the school board at-large policy is completely wrong. The school board's at-large election system was caused by and is based on racially motivated legislation and stems from a tenuous policy.

Second, even if the district court were right, the non-tenuousness of any state policy should not be counted -- as the district court did here -- in the defendants' favor.

> Even a consistently applied practice premised on a racially neutral policy would not negate a plaintiffs' showing through other factors that the challenged practice denies minorities fair access to the process.

United States v. Marengo County, quoting, S. Rep. at 29 n. 117. See also, McMillan v. Escambia County, 748 F.2d at 1045.

Racial Animus

The district court held that plaintiffs are not required to prove racial animus by the electorate in order to establish a Section 2 violation. R5-154-47. At the same time, that court held that since racial animus on the part of the county had not been proven, this would be weighed against the plaintiffs. "The Court may simply consider this [lack of racial animus] as additional evidence that blacks are not denied equal access to the political process in Liberty County." Id. at 116. In canvassing the totality, the district court said: "Racial animus within the community is the unusual exception, and not the rule." Id. at 119.

The district court erred in at least two respects. First, in considering the issue of racial animus, the court held that the pattern of polarized voting established by regression analysis is

irrelevant and "inappropriate in examining the presence or absence of racial bias." Id. at 115. That is directly contrary to this Court's decisions, which make it clear that polarized voting is a key factor -- and probably the most important factor -- in examining racial animus among the electorate. "[T]he surest indication of race-conscious politics is a pattern of racially polarized voting." United States v. Marengo County Commission, 731 F.2d at 1567.

Second, for the reasons set out by the district court in its opinion, R5-154-47-63, it is clear that racial animus should not be a controlling factor in the Section 2 analysis. For these same reasons, we contend -- contrary to the view of the district court, id. at 116, -- that its absence should not be weighed in favor of the defense at all under the totality of circumstances. Further, if it is to be weighed, it should only be weighed to the extent that the defendants demonstrate non-racial reasons -- unlikely to be replicated in the future -- for the frequent black political defeats at the hands of polarized voting. See, Thornburg v. Gingles, 478 U.S. at 100 (O'Connor, J., concurring). Here, that has not happened. The district court's discussion of this issue cites only general opinions from witnesses about the absence of racial animus in recent times and the absence of recent racial campaign appeals. R5-154-116. No evidence was presented or cited by the district court to explain the black political defeats that were part of the electoral record leading this Court unanimously to conclude that the Gingles factors had been established as a matter

of law. Indeed, the only respect in which the district court discussed this was when it said "[t]he greatest obstacle to effective black participation in the political process has been a lack of knowledge of the dynamics of running effective campaigns." R5-154-102. The flimsiness of that explanation already has been detailed in Section II of this brief.

To summarize on this point, the purported absence of racial animus should not be weighed at all in favor of the defendants. If it is to be weighed, the district court erred by examining it independent of the polarized voting that this Court found to exist as a matter of law through the Gingles factors. Similarly, the district court erred by counting this factor in the defendant's favor even though the defendants did not prove, and the district court did not find, any non-racial explanation for the black electoral defeats that led this Court to hold that the Gingles factors exist as a matter of law.

Proportional Representation

While noting there is no proportional representation on the school board, since no black candidate has ever been elected to it, the district court held that "blacks have clearly achieved proportional representation on the county commission" inasmuch as 20% of the commission is black and 25.03% of the county's voting age population is black. R5-154-117. According to the district court, while "[s]uch proportional representation does not automatically preclude a finding of section 2 liability, . . . it is obviously some evidence that blacks have equal access to the

political process in Liberty County." Id. In its review of the totality, the district court weighed in the defendants' favor the conclusion that the Jennings election "giv[es] blacks in Liberty County roughly proportional representation on the county commission." Id. at 119.

This is error. The district court cited Johnson v. DeGrandy in support of this proposition, R5-154-117, but Johnson's reference to "proportionality" dealt not with the proportion of black candidates elected, but with the proportion of black-majority electoral districts. 512 U.S. at 1017-1018. In Liberty County, of course, all seats on the county commission and the school board are elected by a majority white electorate voting countywide on an at-large basis. So black voters have a majority for none of the seats and white voters have a majority for 100% of the seats. That is not proportionality.

The proportionality measure utilized by the district court deals with the number of black people sitting on the county commission -- one of five. (Again, no black citizens sit on the school board, and none have ever done so). That is a much less telling indicator of black political strength, particularly in the context of bloc voting. When black citizens constitute a majority of the electorate in a given district, they possess the power to elect candidates of choice even in the face of polarized voting. But where, as in Liberty County, they do not, they are dependent upon white political power to elect black candidates. As outlined in Section I of this brief, the presence of a black citizen on the

Liberty County Commission is due to the manipulation of the white family slating organizations who have controlled county politics for years, keeping it all-white until this case was remanded by this Court for further findings, after which the organizations moved to insure the election of Earl Jennings. Just as the district court erred in placing too much emphasis on the Jennings election, it also erred by counting his presence on the Commission as some sort of proportionality that weighs in the defendant's favor.

Finally, if proportionality is to be considered so heavily in the manner contemplated by the district court, that court should consider Jennings as only one black official among the ten county commission and school board members (five on each body) elected at-large, rather than as one of five. The Section 2 portion of this case looks at the effect of the at-large system for both bodies, and only 10% of their membership is black, far below the 25% black voting age population in the county.

IV. THE DISTRICT COURT ERRED IN ITS OVERALL ANALYSIS AND CONCLUSIONS REGARDING THE TOTALITY OF CIRCUMSTANCES.

As a number of appellate courts have held:

> [I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances. In such cases, the district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act.

Clark v. Calhoun County, 21 F.3d 92, 97 (5th Cir. 1994), quoting, Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1135 (3rd Cir. 1993), cert. denied, 114 S.Ct. 2779 (1994). See also, NAACP v. City of Niagara Falls, 65 F.3d 1002, 1019-1020 n.21 (2nd Cir. 1995) (quoting the same language).

Despite the unanimous view of each of the judges of this en banc Court that the plaintiffs had established the Gingles factors, and despite the district court's agreement to that effect, the district court found no violation based on its analysis of the totality of circumstances. Specifically, the district court relied on its conclusions that "there are no official blocks to the political process. . . ., blacks are not precluded from effective campaigning, and blacks have full and equal access to the ballot box," that black voter registration and turnout are higher than that of whites, that there have been no recent racial appeals in campaigns, that "[r]acial animus . . . is the unusual exception and not the rule," that elected officials are responsive, that no tenuous policy underlies the at-large system, and that Earl Jennings has been slated by the white family slating groups, thus winning election to the county commission and "giving blacks in Liberty County roughly proportional representation on the county commission." Id. at 119.

In the prior sections of this brief, we have noted that the district court erred in its analysis of each of these individual points. While the district court found that black citizens can cast ballots and run for office, that there are no recent racial

campaign appeals, that elected officials are somewhat responsive, and that no tenuous policy underlies the system, those things are true in most Section 2 cases, even where violations have been found. Further, the fact that black registration exceeds white registration slightly is not sufficient to give black voters an opportunity to elect candidates of choice. As the Supreme Court in Gingles made clear, a finding in plaintiffs' favor on these factors is "supportive of, but not essential to, a minority voter's claim." 478 U.S. at 49-50 n.15 (emphasis added). Certainly, a holding that the plaintiffs have failed to prove these factors -- that is, a holding in the defendants' favor such as that made by the district court regarding these factors -- should not be utilized to defeat a Section 2 claim.

That leaves only the district court's holdings regarding racial animus, the Jennings election, and the resulting "proportionality" to undergird its ultimate judgment against the plaintiffs. As discussed in the racial animus subsection of Section III of this brief, the purported absence of racial animus among the electorate is irrelevant to the results test. Alternatively, even if relevant, the district court erred here in holding that racial animus is absent inasmuch as the district court refused to consider polarized voting as being germane to the racial animus issue, and inasmuch as there was no proof or findings of any non-racial reasons that explain the pattern of black defeat unanimously found by this en banc Court as part of the Gingles factors.

Once the racial animus portion of the district court's totality finding is removed, the only thing left is the Jennings election and the resulting "proportionality." For the reasons stated in Section I and the proportionality subsection of Section III of this brief, those matters do not justify the district court's ruling under the totality of circumstances.

Indeed, the errors committed here are somewhat similar to those made by the district court in Teague v. Attala County, where the Fifth Circuit reversed a district court's totality-based denial of a Section 2 claim, and instead rendered judgment for the plaintiffs on liability. There, the Fifth Circuit said the district court's totality conclusion was flawed because "[t]he district court did not place this [totality evidence] in the context of the area's history of voter exclusion nor give voice to any plausible nonracial explanation for Attala County's voting patterns." 92 F.3d at 293.

Clearly, this is not one of those "very unusual case[s] in which the plaintiffs can establish the existence of the three Gingles factors but still have failed to establish a violation of § 2 under the totality of circumstances." Clark, 21 F.3d at 97.

V. UNDER THE TOTALITY OF CIRCUMSTANCES IN THIS CASE, THE PLAINTIFFS HAVE PROVEN THAT AT-LARGE ELECTIONS FOR THE LIBERTY COUNTY SCHOOL BOARD AND LIBERTY COUNTY COMMISSION VIOLATE SECTION 2.

The Gingles factors have been established and unanimously

confirmed as a matter of law by this en banc Court. The district court has agreed, noting on remand that "there is a high degree of racially polarized voting in Liberty County." R5-154-89. Also, as Judge Kravitch held in her en banc concurrence, "plaintiffs in this case also adduced strong evidence establishing the other supporting factors." 899 F.2d at 1017 n.3 (Kravitch, J., concurring). The county utilizes a majority vote requirement in party primaries, a numbered post requirement, and an unusually large election district. There is a long history of discrimination affecting the right to vote and there are pronounced socioeconomic disparities. No black person has ever served on the Liberty County School Board and only one black person has served on the Liberty County Commission, but his election was engineered by the white family slating organizations and he does not appear to have been the candidate of choice of black voters.

This demonstrates a classic Section 2 violation stemming from at-large elections. This Court should reverse the district court and order that judgment be entered for the plaintiffs on their Section 2 liability claim, with the case remanded for implementation of a remedy.

VI. THE DISTRICT COURT ERRED IN ITS ANALYSIS AND CONCLUSIONS REGARDING THE CONSTITUTIONAL CLAIMS.

The Fourteenth and Fifteenth Amendment claims cover only the school board. As noted in the subsection on tenuousness in Section III of this brief, both the district court in this case and this

Court in prior cases have held that the 1947 legislation mandating at-large county school board elections in Florida was motivated by an effort to dilute black voting strength. R5-154-110; NAACP v. Gadsden County School Board, 691 F.2d at 982; McMillan v. Escambia County, 638 F.2d at 1245-1246. (To the extent the district court held that Liberty County went to at-large school board elections not as a result of the 1947 legislation, but because of a reform movement in the early 1950s, see, R5-154-110-111, our discussion in the subsection on tenuousness demonstrates the district court was wrong in that regard).

Despite the racist motivation of the 1947 legislation, the district court rejected the constitutional school board claim. It did so for two reasons. First, it focused not on the adoption of at-large elections, but instead on their maintenance, holding "that there is no discriminatory purpose in the continued use of at-large voting for school board elections in Liberty County." R5-154-120. Second, the district court held, "based on the same analysis used in assessing Plaintiffs' claims under the Voting Rights Act," that "blacks in Liberty County suffer no dilution of their votes as a result of the at-large voting system." Id.

However, the district court erred in both respects. First, a constitutional claim is made out if either the adoption or the maintenance of the challenged practice was motivated by a racially discriminatory intent. Plaintiffs are not required to prove both. See, Thornburg v. Gingles, 478 U.S. at 35 (discussing the constitutional test, in which "minority voters must prove that a

contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose").

Second, once discriminatory intent is proven, the plaintiffs are not also required to prove a discriminatory result commensurate with that necessary in a Section 2 case. Indeed, in the recent line of cases beginning with Shaw v. Reno, 509 U.S. 630 (1993), and including Miller v. Johnson, 115 S.Ct. 2475 (1995), the Supreme Court has held that the Fourteenth Amendment is violated simply by redistricting on the basis of race, even where there is no dilutive effect on the voting strength of a particular racial group and where the districting is motivated by benign rather than malignant considerations. If the ameliorative legislative districting actions in those cases violate the Constitution even absent a dilutive effect, certainly the more malicious racism represented by the 1947 Act violates the Constitution without requiring proof of a discriminatory impact or result.

Alternatively, if the Constitution does require proof of a dilutive effect as well as a racist intent, the magnitude of that effect is far less than what is required under Section 2. As Judge Myron Thompson has explained:

> The discriminatory results needed to establish a section 2 violation in the absence of intentional discrimination should not be confused with the present day adverse racial impact needed to establish [an] . . . intent claim. The former is more a term of art, established according to certain Congressionally approved criteria . . . ; whereas the latter is less stringent and may be met by any evidence that the challenged action is having significant adverse impact on black persons today.

Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459,

1467-1468 n.10 (M.D.Ala. 1988) (emphasis in original). This point is clear from the Supreme Court's decision in Hunter v. Underwood, 471 U.S. 222 (1985). The Supreme Court in Hunter struck down under the Fourteenth Amendment a long-standing Alabama disfranchisement statute because it had been enacted, in part, with a racially discriminatory purpose. The only present-day effect referenced by the Supreme Court in declaring the statute unconstitutional was that, in the two counties where the appellees lived, black people were 1.7 times as likely to suffer disfranchisement under the statute as whites.

Of course, that is far less of a discriminatory impact than the at-large school board elections have in Liberty County. As already explained, this en banc Court has unanimously held that the Gingles factors are established; no black citizen has ever served on the school board; school board elections are characterized by a majority vote requirement, numbered posts, and an unusually large election district; and black citizens suffer from the effects of a long history of discrimination and severe socioeconomic disparities. This sort of dilutive effect is far from minimal. In light of the discriminatory motivation behind the adoption of at-large school board elections in Florida and Liberty County, it is not necessary for the plaintiffs also to prove a full-blown Section 2 results case to meet their constitutional burden.

Moreover, much of the district court's Section 2 holding was based on the Earl Jennings election and the resulting "proportionality" on the county commission. In addition, the

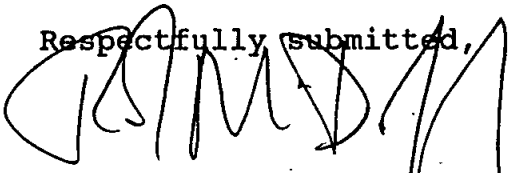
district court held that the school board has been much less responsive to black citizens than the county commission. R5-154-106-107. For purposes of the constitutional claim, the district court should have examined discriminatory impact vis-a-vis only the school board, and not imported wholesale the Section 2 analysis, which relied so heavily on the matters relating only to the county commission.

In light of the discriminatory motivation behind the 1947 adoption of at-large scheme for school board elections -- a scheme which has continued uninterrupted to this day -- it is clear the plaintiffs have made out their constitutional claim.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the district court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiffs-Appellants has been served by first-class mail, postage prepaid, on the following:

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This 24 day of October, 1997. All parties required to be served have been served.

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