97-2540

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 97-2540

GREGORY SOLOMON, et al.

Plaintiffs-Appellants,

vs.

LIBERTY COUNTY, FLORIDA, et al.,

Defendants-Appellees.
_____/

BRIEF OF APPELLEES LIBERTY COUNTY, FLORIDA,
L. B. ARNOLD, WILLARD REDDICK, DONNIE COXWELL,
JOHN T. SANDERS, and EARL JENNINGS

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Solomon, et al vs. Liberty County, et al, Case No. 97-2540

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

(Pursuant to Order of Substitution of Parties

Entered by District Court on February 8, 1991)

L. B. Arnold, Defendant-Appellee

Patricia Beckwith, Plaintiff-Appellant

James W. Bilbow, Defendant-Appellee

Raleigh Brinson, Plaintiff-Appellant

Joe Collins, Defendant-Appellee

Donnie Coxwell, Defendant-Appellee

Tommy Duggar, Defendant-Appellee

Earl Jennings, Defendant-Appellee

David La Croix, 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 Defendants-Appellees

Maurice Paul, United States District Judge

Donnie Phillips, Defendant-Appellee

Willard Reddick, Defendant-Appellee

John T. Sanders, Defendant-Appellee

Gregory Solomon, Plaintiff-Appellant

Herbert Whittaker, Defendant-Appellee

STATEMENT REGARDING ORAL ARGUMENT

This Court is already familiar with the evidence and issues involved in this case, which are well expounded in the prior opinions of this Court and the District Court. Only very limited new evidence was offered after remand. The United States Supreme Court has answered the essential question upon which this Court was previously divided. Therefore, all that is left for the Court to do is determine if the District Court's findings are clearly erroneous. Since that matter will be thoroughly addressed in briefs, Appellees Liberty County, Florida, and its elected County Commissioners, L. B. Arnold, Willard Reddick, Donnie Coxwell, John T. Sanders, and Earl Jennings (hereinafter referred to collectively as "Liberty County Commission Appellees") believe that oral argument will be of only marginal assistance in that regard.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief was prepared using courier new regular 12-point type with 10 characters per inch. It is not proportionally spaced.

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STATEMENT OF JURISDICTION

The Liberty County Commission Appellees agree with the Plaintiffs-Appellants' Statement of Jurisdiction.

STATEMENT OF THE ISSUES

Although the Plaintiffs-Appellants have attempted to disguise their arguments as ones involving issues of law, they all relate to the weight, quality, and sufficiency of the evidence before the District Court and the District Court's findings, both as to "subsidiary facts" and the "ultimate fact" that the totality of the circumstances demonstrates that the at-large voting system in use in Liberty County has not resulted in black citizens having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Thus, the only issue involved in this appeal is whether the District Court's finding as to any particular circumstance or as to the totality of the circumstances is clearly erroneous.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

The Liberty County Commission Appellees agree with the Plaintiffs-Appellants' Statement of the Course of Proceedings and Disposition in the Court Below, except for the paraphrasing of the prior opinions of this Court and the opinion of the District Court, all of which speak for themselves.

Statement of Facts

The Liberty County Commission Appellees agree with the Plaintiffs-Appellants' limited Statement of the Facts, except for the last sentence, that being that "[The one black County Commissioner who has been elected three times to the Liberty County Commission] 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." This statement is not supported by the evidence, by the findings of the District Court, or by the Record page references included by the Plaintiffs-Appellants. The actual case will be included in the following additional statement of facts.

Prior to 1990, there had been only four black candidacies for a countywide elected office in Liberty County. In 1968, Charles Berrium ran for a seat on the school board, as did Earl Jennings in 1980 and 1984. In 1984, Gregory Solomon ran for a seat on the

County Commission. None of these candidacies was successful. (R5-154-81 to 82)

In the original trial of this action, and in the ensuing appeal to this Court, the conclusion that "whites in Liberty County vote sufficiently as a bloc that they usually are able to defeat the minority's preferred candidate" (R5-154-13) was based only on those four unsuccessful candidacies. (R5-154-19 to 20)

In 1990, Earl Jennings, one of the original black plaintiffs in this action, ran for a seat on the County Commission, defeating a white opponent in the Democratic primary and a white incumbent commissioner in the general election. In 1992, Mr. Jennings retained his seat, defeating three white opponents in the Democratic primary and one of them in a runoff. In 1996, Mr. Jennings again retained his seat, defeating two black and one white opponents in the Democratic primary and the white opponent in the runoff. (R5-154-82) In all of these elections, Mr. Jennings was the candidate of choice of black voters. (R5-154-96, note 97)

As testified to in 1991, after remand, by expert witness Dr. Billings, the success of Mr. Jennings verified Dr. Billings' prediction at the original trial that black candidates would soon have success in Liberty County under the at-large voting system as they learned how to run a very personal campaign, which is the basis of electoral success in Liberty County because of its demographics. (R5-154-49 to 53)

The District Court closely scrutinized these election results;

found that all of the elections were extremely competitive; and noted that there had been no proof offered by the plaintiffs that the election process had in any way been manipulated because of this litigation. (R5-154-105)

As to various factors affecting the ultimate conclusion that the totality of the circumstances demonstrated no violation of the Voting Rights Act in this case, the District Court found the following:

1. Despite some lingering effects of racial discrimination, there is no evidence that the ability of black citizens to participate in the political process in Liberty County has been hindered in any way, as supported by the testimony of every witness. (R5-154-87 to 88)

2. Based on the prior opinions of this Court, the District Court felt it had to hold that there is a high degree of racially polarized voting in Liberty County, even though that conclusion was originally supported by only four unsuccessful candidacies and in spite of the fact that Mr. Jennings' elections necessarily required a large number of votes from white voters. (R5-154-89)

3. There are no voting practices or procedures utilized in Liberty County that enhance the possibility of discrimination against black voters except for a majority vote requirement and, to a slight extent, the size of voting districts. (R5-154-90 to 91, 93)

4. A number of large, white, politically-active families

engage in an informal "slating" process in Liberty County and "horse-trade" with each other for support. Alliances between these family groups are fluid, and successful candidates must generally align themselves with one or more family groups. (R5-154-94 to 95) The District Court found no evidence that blacks had been excluded from this informal slating process and that the only one of the four pre-1990 black candidates who had used this process and aligned himself with a slate of candidates had been unsuccessful the first time but was successfully elected the next three times. (R5-154-95 to 96)

5. There are remaining socio-economic effects of past racial discrimination in Liberty County, but, based on the testimony of both plaintiffs' and defendants' witnesses, these socio-economic conditions do not hinder black participation in the political process. (R5-154-99 to 102)

6. There is no evidence of any overt or subtle racial appeals in elections in Liberty County in the last twenty-plus years. (R5-154-103)

7. The black voters of Liberty County have now elected their candidates of choice in three out of seven black candidacies for countywide elected office, and their recent successes in County Commission elections are proof that they have equal access to the political process in Liberty County. (R5-154-104 to 105)

8. The Liberty County Commission has been responsive and open to the needs of the black citizens of Liberty County. While the

Liberty County School Board has a mixed history in terms of responsiveness to the needs of black citizens, recent years have shown more responsiveness. Isolated incidents of unresponsiveness have not hindered the access of black citizens to the political process. (R5-154-106 to 109)

9. The adoption of at-large elections for the Liberty County Commission by the State Legislature was not racially-motivated or tenuous. While the State Legislature's 1947 adoption of its policy of allowing at-large elections for school boards was racially motivated, the Liberty County School Board's change to at-large elections in 1953 was not racially motivated or tenuous. (R5-154-109 to 111) Neither is the continued maintenance of either at-large system racially motivated or tenuous, particularly considering that referenda elections were held in 1990 to determine whether single-member districts should be adopted for the County Commission and School Board elections. Analysis of the results of such elections showed that both black and white voters rejected the proposal, the black voters by a 60% majority. (R5-154-111 to 112)

10. Based in part on the testimony of the plaintiffs and their own expert witness, the District Court found that Liberty County is not driven by racial animus or racial bias in the electoral process. (R5-154-113 to 116)

11. Black voters have achieved representation on the Liberty County Commission proportional to their percentage of the total county population, but have not done so on the Liberty County

School Board. (R5-154-117)

Based on all of these findings, the District Court found, as its ultimate conclusion of fact, that, based on the "totality of the circumstances," the plaintiffs had failed to show that the use of an at-large voting system in Liberty County has resulted in black citizens having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (R5-154-118 to 119)

The District Court made further findings and conclusions relative to the plaintiffs' constitutional claims, but these only involved the Liberty County School Board, not the Liberty County Commission Appellees.

Statement of the Standard of Review

Findings of fact, including "ultimate" facts as well as "subsidiary" facts, may not be set aside by an appellate court unless clearly erroneous. E.g., Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); Rule 52, Fed.R.Civ.P. After briefly acknowledging that this is so, and that a finding of no vote dilution under the Voting Rights Act is a finding of ultimate fact, the Plaintiffs-Appellants have suggested that they are arguing misconceptions of law underlying the District Court's factual findings. Nevertheless, the arguments of the Plaintiffs-Appellants all go to the weight, quality, and sufficiency of the evidence supporting the District Court's findings on various applicable

circumstances and its ultimate factual finding as to the "totality of the circumstances." Viewing the Plaintiffs-Appellants' arguments as they are, and not as they are attempted to be cast, it is clear that the "clearly erroneous" standard is applicable to each of them.

SUMMARY OF ARGUMENT

In deciding this case, the District Court utilized a 'results test;' considered the various factors identified and discussed in Thornburg v. Gingles, 478 U.S. 30 (1986), and in the Congressional Report which outlined the purpose of the 1982 amendment to the Voting Rights Act; and made an ultimate determination based on the totality of the circumstances that the at-large voting system in Liberty County does not deprive black voters there of an equal opportunity to participate in the democratic process and to elect their preferred candidates.

Based on direction from the Supreme Court and the Congressional Report, the District Court made appropriate findings, supported by the evidence, on the relevant factors. No particular factor was seen by the District Court as determinative of its ultimate conclusion. In fact, the District Court was very careful to ground its ultimate conclusion on a broad and searching inquiry as to the totality of the circumstances.

Plaintiffs-Appellants' argument throughout their Brief boils down to a claim that, in every instance in which the District Court

found that the Plaintiffs-Appellants had proved a particular factor relevant to a vote dilution claim, it did not 'assign sufficient weight' to that factor; while, in every instance in which the District Court found that the Plaintiffs-Appellants had not proved a particular relevant factor, it 'assigned too much weight' to that factor. This is simply a device to avoid the "clearly erroneous" standard in regard to the District Court's findings of fact, particularly its finding of ultimate fact--that the use of an at-large system in Liberty County does not deprive black voters there of an equal opportunity to participate in the democratic process and elect their candidates of choice.

The Plaintiffs-Appellants have questioned whether the District Court properly concluded that this is one if those unusual instances in which the totality of the circumstances demonstrates that black voters in Liberty County are not deprived of an equal opportunity to participate in the democratic process and elect representatives of their choice, despite the existence of the three core Thornburg v. Gingles factors which this Court has previously said have been established. In an effort to show that the District Court's conclusion was "clearly erroneous," the Plaintiffs-Appellants have said that the conclusion is supported only by the District Court's underlying factual conclusions regarding "racial animus, the Jennings election, and the resulting 'proportionality'." But, the Plaintiffs-Appellants have failed to acknowledge that it is not a Jennings 'election' in this case.

There are several untainted, unmanipulated Jennings elections that are in evidence--not just an isolated instance as to which the Plaintiffs-Appellants have introduced some evidence that it was somehow tainted or manipulated.

Since this case was originally tried, Earl Jennings--a black former plaintiff in this litigation--has three times defeated white candidates for a seat on the Liberty County Commission. In these three elections, he was involved in six separate primaries, primary runoffs, and general elections, against both black and white opponents. Now, therefore, the success of a black candidate against white opponents in three out of seven county-wide races since 1980, and in six out of twelve total elections, when the black population of the county is such a small percentage of the total population, definitely points to a conclusion that black voters' preferred candidates are not usually defeated by Liberty County's white majority.

Using the same methodology as the Plaintiffs-Appellants' expert witness did in performing his bivariate regression analyses of earlier elections, Mr. Jennings had to be the black voters' candidate of choice in these elections, and the District Court correctly so found.

Although the extent of success of black candidates is clearly one of the factors set out in the Congressional Report and in Thornburg v. Gingles to be considered in regard to vote dilution claims, the Plaintiffs-Appellants claim that Mr. Jennings elections

should not be so considered because they are somehow "suspect." How or why they are suspect is anyone's guess, because, as the District Court noted, the Plaintiffs-Appellants introduced no evidence that these elections were in any way tainted or manipulated. The Plaintiffs-Appellants suggest that they are tainted because--as is the process in Liberty County--some of the large white families must have supported Mr. Jennings. In other words, the Plaintiffs-Appellants' argument is: (1) in a county that is predominantly white, no black candidate can be elected without significant white vote, even when blacks vote solidly as a bloc; and (2) if the white voters in such a county vote sufficiently as a bloc so as to usually defeat the black voters' candidates of choice, there is a violation of the Voting Rights Act; (3) yet, if white voters do not vote sufficiently as a bloc so as to usually defeat the black voters' candidates of choice, election of those candidates should not be considered in determining whether there is a violation of the Voting Rights Act, because, obviously, quite a few white voters supported and voted for them.

The Plaintiffs-Appellants have also failed to acknowledge that the District Court's conclusion is also bolstered by findings that:

1. Despite some lingering effects of racial discrimination, there is no evidence that the ability of black citizens to participate in the political process in Liberty County has been hindered in any way, as supported by the testimony of <u>every</u>

witness.

2. There are no voting practices or procedures utilized in Liberty County that enhance the possibility of discrimination against black voters except for a majority vote requirement and, to a slight extent, the size of voting districts.

3. There is no evidence that blacks had been excluded from Liberty County's informal slating process, and the only one of the four pre-1990 black candidates who had used this process and aligned himself with a slate of candidates had been unsuccessful the first time but was successfully elected the next three times.

4. There are remaining socio-economic effects of past racial discrimination in Liberty County, but, based on the testimony of both plaintiffs' and defendants' witnesses, these socio-economic conditions do not hinder black participation in the political process.

5. There is no evidence of any overt or subtle racial appeals in elections in Liberty County in the last twenty-plus years.

6. The Liberty County Commission has been responsive and open to the needs of the black citizens of Liberty County. While the Liberty County School Board has a mixed history in terms of responsiveness to the needs of black citizens, recent years have shown more responsiveness. Isolated incidents of unresponsive-ness have not hindered the access of black citizens to the political process.

7. The adoption of at-large elections for the Liberty County

Commission by the State Legislature was not racially-motivated or tenuous. While the State Legislature's 1947 adoption of its policy of allowing at-large elections for school boards was racially motivated, the Liberty County School Board's change to at-large elections in 1953 was not racially motivated or tenuous.

Even though these findings adequately supported its ultimate conclusion, the District Court did not consider other factors which it could and should have in determining that the use of an at-large voting system in Liberty County does not violate the Voting Rights Act.

First, the District Court declined to consider the 1990 referenda elections held in Liberty County and the established overwhelming black voter opposition to the Plaintiffs-Appellants' requested change to single-member districts. This decision was based on the prior opinion of Judge Tjoflat in this case that opposition of members of the class had no bearing on the Court's analysis. A plain reading of Section 2 of the Voting Rights Act demonstrates , however, that it provides a class right and a class remedy.

It is clear, from the discussion in Thornburg v. Gingles, supra, of the Congressional debates and reports concerning the new Section 2 of the Voting Rights Act, that this new Section 2 was focused on claims of minority group vote dilution through the use of multi-member districts or other devices.

While the Plaintiffs-Appellants herein can apparently allege

an individual cause of action under Section 2 of the Voting Rights Act based on alleged vote dilution of a minority class, when it is demonstrated that the class itself is opposed to the remedy sought by the Plaintiffs-Appellants, it would be inequitable to impose such remedy on the class.

In the 1990 referenda, 60 percent of the black voters (what was formerly the plaintiff class in this action) voted to not change to a single-member district system for County Commission and School Board elections! (Yet, the Plaintiffs-Appellants still argue in their Brief that the at-large system in Liberty County is now maintained for tenuous or racial purposes!)

The Plaintiffs-Appellants argue in their Brief that, in their opinion, the District Court was being "paternalistic" in some of its fact findings. Yet, the Plaintiffs-Appellants would have preferred that the District Court tell the black voters of Liberty County, "I know what's best for you, even if you don't want it!" The Voting Rights Act was not adopted to perpetuate that sort of obvious, Old-South paternalism, as the Plaintiffs-Appellants would have this Court interpret it.

The District Court could also have re-examined, which it declined to do, the issue of racially-polarized voting, because the evidence now shows that white majority voters in Liberty County do not vote sufficiently as a bloc so as to usually defeat a minority group's preferred candidates; and this Court's holding that this factor had been established as a matter of law is not the law of

the case since additional evidence was taken which compels a contrary result.

Since the District Court properly concluded, based on the factors it did consider, that the at-large voting system in place in Liberty County does not violate the Voting Rights Act, whether or not it could have considered other factors supportive of that conclusion is a moot point.

Since the District Court found no evidence that the at-large voting system in Liberty County was driven by racial bias or that racial bias played any part in elections in Liberty County, and since that factual finding was clearly correct, whether or not that is a factor that should have been considered is also moot. If there was insufficient evidence, based on the totality of the circumstances but not including the issue of racial bias, to support a finding that the at-large system in Liberty County does not deprive black voters of an equal opportunity to participate in the democratic process and to elect their preferred candidates, the analysis and conclusion would not change if the District Court also considered that the Plaintiffs-Appellants had not proved any racial bias.

ARGUMENT

NONE OF THE DISTRICT COURT'S FINDINGS IS CLEARLY ERRONEOUS.

The District Court traced the history of the 1982 amendment to the Voting Rights Act, 42 U.S.C. § 1973; determined that the Congressional intent was that a challenged structure or practice could only violate the Act under a "results" test; and set out the following factors as relevant to that test:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in areas such as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction. (R5-154-18 to 19)

The District Court also pointed out that the Congressional

Report on the 1982 amendment also stated that the following factors are relevant in some cases, while other factors may also have some bearing on the issue of alleged vote dilution:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. (R5-154-19)

The District Court then quoted the Congressional Report that such factors should

> not be used in isolation, nor as a "mechanical 'point counting' device," but should be examined in a "searching practical evaluation" of the totality of the circumstances "to determine whether the voting strength of minority voters is . . . minimized or canceled out." [Citations omitted.] (R5-154-19)

Thereafter, the District Court discussed the various opinions issued in Thornburg v. Gingles, 478 U.S. 30 (1986), noting that the use of the 'results test,' consideration of the various factors identified in the Congressional Report, and an ultimate determination based on the totality of the circumstances were all sanctioned by the Supreme Court in a Voting Rights Act case challenging an at-large voting system. (R5-154-19 to 24) The District Court also noted that the Supreme Court determined three 'threshold' conditions to be necessary to establishing a vote dilution claim challenging multi-member districts:

> (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically

> cohesive; and (3) the minority's preferred candidate is usually defeated by white majority bloc voting. [Citation omitted.] (R5-154-21)

Finally, the District Court discussed several evidentiary matters dealt with in Thornburg v. Gingles, including that proportional representation was a significant indication that an at-large election system had not resulted in vote dilution in violation of the Voting Rights Act. (R5-154-21 to 22)

The District Court also noted that, in Johnson v. DeGrandy, 512 U.S. 997 (1994), the Supreme Court resolved the issue which had divided this Court in the earlier appeal of this case, holding that, while proof of the three threshold factors was necessary to establish a vote dilution claim, the ultimate determination to be made by the courts is still whether, under the "totality of the circumstances"--and "without isolating any other arguably relevant facts from the act of judgment"--a challenged at-large election system denies minority voters "equal political opportunity." (R5-154-32)

Based on this direction from the Supreme Court and the Congressional Report, the District Court made appropriate findings, supported by the evidence, on the relevant factors.

History of Official Discrimination

While the Plaintiffs-Appellants have summarized the evidence upon which the District Court based its finding regarding this factor and disagreed with the District Court's conclusion, the Plaintiffs-Appellants have pointed to no evidence in the record to

support a contrary conclusion--that racial discrimination in Liberty County in the past in any way inhibits black voters in Liberty County from having an opportunity equal to that of white voters to elect their candidates of choice. Based on the fact that there was no conflicting evidence, the District Court could not have been clearly erroneous in this determination.

The Plaintiffs-Appellants complain that the District Court "placed substantial weight on the fact that black citizens are free to register, cast ballots, and run for office;" but that is exactly what this factor literally says in the Congressional Report. Furthermore, the District Court was clear in pointing out that Thornburg v. Gingles and Johnson v. DeGrandy required no particular factor to be considered in isolation or to be weighted to any particular extent; and the District Court carefully did not weight any factor or assign any value or particular significance to any subsidiary finding.

Degree of Racially Polarized Voting

The Plaintiffs-Appellants do not disagree with the District Court's finding, based on this Court's prior opinions, that there is a high degree of racially polarized voting in Liberty County. However, the evidence now suggests that this factor should not be given great weight.

The District Court concluded that it was not free to re-evaluate the issue of racially polarized voting after remand because of the opinions of this Court. However, there was new

evidence presented which weighed heavily on this factor. While this Court held that this factor had been established as a matter of law, such holding is not the law of the case when additional evidence is taken which compels a contrary result. Westwego Citizens for Better Government v. Westwego, 906 F.2d 1042 (5th Cir. 1990), and cases cited therein, particularly Doran v. Petroleum Management Corp., 576 F.2d 91 (5th Cir. 1978), which was one of the precedents adopted by this Court in Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981). As held in Falcon v. General Telephone Co., 815 F.2d 317, 320 (5th Cir. 1987), the law of the case doctrine is to be followed unless substantially different evidence is produced at a subsequent trial.

Racially polarized voting is one of the three Thornburg v. Gingles factors necessary to proving a vote dilution claim, but what is required is not just racially-polarized voting. What has to be proved is that white majority voters vote sufficiently as a bloc so as to usually defeat a minority group's preferred candidates. Thornburg v. Gingles, supra at 50-51. While there is generally great latitude as to how one interprets statistical evidence, the statistics themselves are, in this case, the most significant evidence. The evidence now reveals that, in Liberty County prior to the original trial of this cause, only three black citizens had ever offered themselves as candidates for elected public office in four different elections: Charles Berrium for School Board in 1968; Earl Jennings for School Board in 1980 and

1984; and Gregory Solomon for County Commission in 1984. These black candidates were involved in six different primaries and primary runoffs. The results of these efforts were that none of the three candidates was elected.

Only four elections were determined, in East Jefferson Coalition v. Parish of Jefferson, 926 F.2d 487, 493 (5th Cir. 1991), to constitute insufficient evidence for a determination of racially polarized voting. Similarly, as the Liberty County Commission Appellees have argued in the past, the evidence in this case may originally have been insufficient to determine whether black voters' preferred candidates are usually defeated by the white majority in Liberty County, since in this case there were also only four elections involving black candidates.

Since this case was originally tried, however, Earl Jennings has three times defeated white candidates for a seat on the Liberty County Commission. In these three elections, he was involved in six separate primaries, primary runoffs, and general elections, against both black and white opponents. Now, therefore, the success of a black candidate against white opponents in three out of seven county-wide races since 1980, and in six out of twelve total elections, when the black population of the county is such a small percentage of the total population, definitely points to a conclusion that black voters' preferred candidates are not usually defeated by Liberty County's white majority.

The Plaintiffs-Appellants have tried very hard to undermine

the District Court's finding that Earl Jennings was the black voters' candidate of choice, even suggesting that the defendants in this case somehow failed to carried the burden of demonstrating an absence of racially polarized voting by not having a bivariate regression analysis done of the results of the Jennings elections. It was the Plaintiffs-Appellants, however, who carried the burden of proving that whites in Liberty County vote sufficiently as a bloc so as to usually defeat the black voters' candidates of choice. The Plaintiffs-Appellants did not have performed any bivariate regression analysis of the Jennings elections, as they had for earlier elections, for obvious reasons.

The District Court's conclusion that Earl Jennings was the candidate of choice of black voters was clearly correct. Mr. Jennings received 75.52 percent of the votes cast in the 1990 primary election in Liberty County's district 1, in which the County's black voters are concentrated and in which 46.09 percent of the registered voters are black. Mr. Jennings then received 76.81 percent of the vote in district 1 in the 1990 general election. In the 1992 primary runoff, in which he was re-elected to office, Mr. Jennings received 72.04 percent of the votes cast in district 1. In the 1996 primary runoff, in which Mr. Jennings was again re-elected, he received 73.02 percent of the votes cast in district 1. (R5-154-96 to 97)

The Plaintiffs-Appellants have claimed that if all of the white voters in district 1 had voted for Mr. Jennings in each of

these elections, it is possible that he was not the black voters' candidate of choice. However, the assumption made by the Plaintiffs-Appellants' own witness in doing his regression analysis of the pre-1990 elections was that white voters in district 1 (precincts 1 and 2) voted the same as white voters did in precincts 3, 4, 5, 6 and 7, in which there are only a few black voters. (R1-67-11) In these precincts, the percentage of the vote garnered by Mr. Jennings in these elections was as follows:

1990 primary: 683 of 1287 total votes = 53.1 percent (R2-107-Ex. A)

1990 general election: 542 of 1139 total votes = 47.6 percent (R2-107-Ex. A)

1992 primary runoff: 843 of 1724 total votes = 48.9 percent (R3-133-Ex. A)

1996 primary runoff: 904 of 1732 total votes = 52.2 percent (R4-148-Ex. A)

Thus, it is easy to determine what the results of a bivariate regression analysis would have been. Had approximately half of the white registered voters in district 1 (53.91 percent of the registered voters in that district) voted for Mr. Jennings in any of these elections, the same as white voters in the rest of the county, he would not have gotten 72 to 76 percent of the total votes in district 1 without overwhelming black voter support.

Enhancing Factors

The District Court found in the Plaintiffs-Appellants' favor

on this subsidiary fact. The thrust of the Plaintiffs-Appellants' argument is that the District Court did not weigh its finding in this regard sufficiently in determining the overall totality of the circumstances. But, again, the District Court did not assign any particular weight to any particular factor. The District Court, in its opinion, carefully evaluated all of the evidence and found that the size of the Liberty County voting districts, to some extent, and the majority vote requirement, to a greater extent, could work to the disadvantage of black candidates in Liberty County. That finding is not clearly erroneous.

Plaintiffs-Appellants claim, without citing any authority, that using numbered seats is tantamount to an anti-single shot provision. However, an anti-single shot provision only has relevance when voters can cast more than one vote in a race for more than one position, but not when candidates run for specific positions, as in Liberty County. E.g., United States v. Marengo County Commission, 731 F.2d 1546, 1570-71 n.45 (11th Cir. 1984), cert. den. 469 U.S. 976 (1984).

Candidate Slating Process

On this finding, the Plaintiffs-Appellants again argue that the District Court was incorrect in finding that Mr. Jennings was the black voters' candidate of choice--which he clearly had to have been--and, again, that the District Court improperly weighted this finding--which, of course, it did not do because it did not assign any particular weight to any particular factor. "Assigning weight"

to particular subsidiary factors seems to be the Plaintiffs-Appellants' manner of saying that they disagree with the District Court's overall finding based on the totality of the circumstances; but it's a way of saying it that tries to cast this as a legal issue to avoid the "clearly erroneous" standard of review.

What the District Court found as to this factor is simply that some of the large, white families in Liberty County tend to vote as blocs--much as the black voters do--and that, for any candidate to win, he or she must align himself or herself with the fluid and shifting alliances formed of these various groups. The District Court also found, correctly based on the evidence before it, that the few black candidates there have been in Liberty County other than Mr. Jennings, have not been excluded from this process, they simply didn't avail themselves of it or were unaware of its value and effect. Now that Mr. Jennings has demonstrated to black candidates how to successfully become involved with and use this unofficial slating process, others will no doubt also use it and, depending on the strength of their political alliances, be successful at times.

Present Socio-Economic Effects of Past Discrimination

The District Court found, based on the evidence, that, while there are lingering socio-economic effects of past discrimination in Liberty County, these effects do not inhibit the ability of black citizens to participate effectively in the political process. That is precisely how the Congressional Report states this factor

should be considered. Plaintiffs-Appellants confuse an ability to participate in the political process with electing black candidates--which is another factor to be considered, as the District Court appropriately did. Again, the Plaintiffs-Appellants are simply disagreeing with the finding of the District Court on this matter in a way that attempts to avoid the "clearly erroneous" standard.

As stated in McCord v. City of Ft. Lauderdale, 617 F.Supp. 1093, 1103-04[1] (S. D. Fla. 1985): "Consequently, although the court received evidence presented by plaintiff in [the areas of education, employment and health], the qualification in the Senate report of effects `which hinder their ability to participate effectively in the political process' makes such evidence irrelevant as a practical matter." See also United States v. Marengo County Commission, supra at 1567.

Racial Appeals

The District Court did not, as the Plaintiffs-Appellants claim, 'count this factor [the absence of racial appeals in modern times] in the defendants' favor.' What the Court did is simply say that there was no evidence introduced by the Plaintiffs-Appellants

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[1]In McCord v. City of Tallahassee, 787 F.2d 1528 (11th Cir. 1986), this Court affirmed the decision of the district court. This Court's opinion was vacated in favor of en banc reconsideration after the Supreme Court issued its opinion in Thornburg v. Gingles. See McCord v. City of Ft. Lauderdale, 804 F.2d 611 (11th Cir. 1986). This subsequent history has no effect on the proposition cited above.

of racial appeals in modern times in Liberty County to support their claim of vote dilution--and that is absolutely correct. The Plaintiffs-Appellants again confuse this factor with another--the election of black candidates. What the District Court discussed, however, in relation to this factor is simply that candidates would be foolish to use racial appeals in Liberty County because the black voters vote sufficiently as a bloc to make it essential to not alienate this entire bloc of voters with racial appeals--which, again, is absolutely correct.

Extent of Electoral Success

The Plaintiffs-Appellants have argued extensively that the District Court has attached too much significance to Mr. Jennings' elections because he was not the black candidate of choice and because he was only elected with the assistance of white voters. This claim must be examined in the proper context.

As explained above, using the same methodology as the Plaintiffs-Appellants' expert witness did in performing his bivariate regression analyses of earlier elections, Mr. Jennings had to be the black voters' candidate of choice, and the District Court correctly so found.

Although the extent of success of black candidates is clearly one of the factors set out in the Congressional Report and in Thornburg v. Gingles to be considered in regard to vote dilution claims, the Plaintiffs-Appellants claim that Mr. Jennings elections should not be so considered because they are somehow "suspect."

How or why they are suspect is anyone's guess, because, as the District Court noted, the Plaintiffs-Appellants introduced no evidence that these elections were in any way tainted or manipulated. The Plaintiffs-Appellants suggest that they are tainted because--as is the process in Liberty County--some of the large white families must have supported Mr. Jennings. In other words: (1) in a county that is predominantly white, no black candidate can be elected without significant white vote, even when blacks vote solidly as a bloc; (2) if the white voters in such a county vote sufficiently as a bloc so as to usually defeat the black voters' candidates of choice, there is a violation of the Voting Rights Act; (3) yet, if white voters do not vote sufficiently as a bloc so as to usually defeat the black voters' candidates of choice, election of those candidates should not be considered in determining whether there is a violation of the Voting Rights Act, because, obviously, quite a few white voters supported and voted for them. By that absurd reasoning, the smaller a black minority is, and the more successful their candidates are, the easier it would be for them to prove a vote-dilution claim!

The Plaintiffs-Appellants again claim that the District Court erred by placing "substantial weight" on its subsidiary finding in regard to this factor, but how much weight did the District Court give this finding? No particular weight was assigned to this factor, or to any other. No particular factor was seen by the

District Court as determinative of the ultimate question of whether, in Liberty County, the use of an at-large voting system violates the Voting Rights Act by depriving black voters of an equal opportunity to elect candidates of their choice. In fact, the District Court was very careful to ground its ultimate conclusion on a broad and searching inquiry as to the totality of the circumstances.

Plaintiffs-Appellants' argument throughout their Brief boils down to a claim that, in every instance in which the District Court found that the Plaintiffs-Appellants had proved a particular relevant factor, it did not 'assign sufficient weight' to that factor; while, in every instance in which the District Court found that the Plaintiffs-Appellants had not proved a particular relevant factor, it 'assigned too much weight' to that factor. Again, this is simply a device to avoid the "clearly erroneous" standard in regard to the District Court's finding of ultimate fact--that the use of an at-large system in Liberty County does not deprive black voters there of an equal opportunity to participate in the democratic process and elect their candidates of choice.

Unresponsiveness of Elected Officials

Since the District Court's conclusion that the Liberty County Commission has been responsive to the needs of the black community is clearly supported by the evidence, as detailed in its opinion, the Plaintiffs-Appellants have made this another 'weight assigned' argument. The District Court's factual conclusion is obviously not

"clearly erroneous."

As to the isolated instances of unresponsiveness in the past by the Liberty County School Board, that finding does not affect the Liberty County Commission Appellees.

Tenuous State Policy

Oddly, in discussing this factor, the Plaintiffs-Appellants do not mention the 1990 referenda conducted in Liberty County, in which 60 percent of the black voters (what was formerly the plaintiff class in this action) voted to not change to a single-member district system for County Commission and School Board elections! How could there possibly be an argument that an at-large system in Liberty County is now maintained for tenuous or racial purposes?

What the Plaintiffs-Appellants do mention in their Brief, however, is that, in their opinion, the District Court was being "paternalistic" in some of its fact findings. Yet, the Plaintiffs-Appellants would have preferred that the District Court tell the black voters of Liberty County, "I know what's best for you, even if you don't want it!" The Voting Rights Act was not adopted to perpetuate that sort of obvious, Old-South paternalism, as the Plaintiffs-Appellants would have this Court interpret it.

Racial Bias in the Voting Community

The District Court properly determined this factor on the basis of the evidence before it, which is detailed in its opinion. The finding of the District Court is not "clearly erroneous."

The District Court attempted to incorporate into its analysis the views of five Judges of this Court that racial bias was a matter to be considered in determining whether a voting practice or procedure violated the Voting Rights Act. Since the District Court found no evidence that the at-large voting system in Liberty County was driven by racial bias or that racial bias played any part in elections in Liberty County, and since that factual finding was clearly correct, whether or not it should have been considered is moot. If there was insufficient evidence, based on the totality of the circumstances but not including the issue of racial bias, to support a finding that the at-large system in Liberty County does not deprive black voters of an equal opportunity to participate in the democratic process and to elect their preferred candidates, the analysis and conclusion would not change if the District Court also considered that the Plaintiffs-Appellants had not proved any racial bias.

Extent of Proportional Representation

The Plaintiffs-Appellants claim that the District Court erroneously considered "proportional representation" in its "totality of the circumstances" inquiry, because of its reliance on Johnson v. DeGrandy in doing so. It is true that Johnson v. DeGrandy, supra at 1000, describes "proportional representation" in terms of whether or not black voters form majorities in a number of districts roughly proportional to their respective share of the voting age population. However, if the District Court had

considered "proportional representation" in that fashion, it would clearly, in this case, have weighed in on the side of a finding of no vote dilution, since the black voters in Liberty County constitute 17.63 percent of the total population and 25.03 percent of the voting age population, and they constitute a majority in one of five election districts (20 percent). As the term is used in Johnson v. DeGrandy, this is as close to proportional as it can be in a five-district voting system.

Nevertheless, it is obvious that, while referencing Johnson v. DeGrandy, the District Court was considering "proportional representation" as the term was used in Thornburg v. Gingles. In Thornburg v. Gingles, in that portion of the Court's majority opinion by Justice Brennan dealing with proportional representation, at 478 U.S. 77, which was concurred in by Justice White (478 U.S. 83), and agreed with by Justices O'Connor, Burger, Powell and Rehnquist (478 U.S. 102), the term was used meaning electoral success of black candidates. In fact, what the Court said at 478 U.S. 77 is equally applicable to this case:

> In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives, but appellees [plaintiffs] have not done so here. . . . [Footnote omitted.]

In this case, the Plaintiffs-Appellants presented no evidence that the continued success of Earl Jennings in County Commission elections does not accurately reflect the ability of black voters in Liberty County to elect their preferred representatives.

Without having offered any evidence that these elections were in any way tainted or manipulated, the Plaintiffs-Appellants simply ask this Court to assume that is so in order to avoid any consideration of continued success of black candidates roughly proportional to the percentage of black voters in Liberty County.

The Plaintiffs-Appellants also attempt to make the distinction between proportional representation on the County Commission and no representation on the School Board. Since the Liberty County Commission Appellees are Defendants-Appellees in only one of these two consolidated cases, that argument--along with the findings of historical non-responsiveness by School Board officials and the Plaintiffs-Appellants' constitutional claims--does not affect them, and they will not respond to it. As to the Liberty County Commission, black voters have clearly attained proportional representation.

It should be noted that the Plaintiffs-Appellants' claim in this regard points out how fallacious their position is in regard to the Earl Jennings elections. The Plaintiffs-Appellants urge this Court to assume, without there being a shred of evidence in the record to support it, that somehow a great number of white voters in Liberty County were smart enough and had the capability to manipulate three different County Commission elections for the purpose of affecting the outcome of this litigation. It would seem that, if that were the case, these white voters would also have been smart enough to also manipulate the election of a black School

Board member!

Totality of the Circumstances

The Plaintiffs-Appellants have questioned the ultimate factual conclusion of the District Court that this is one if those unusual instances in which the totality of the circumstances demonstrates that black voters in Liberty County are not deprived of an equal opportunity to participate in the democratic process and elect representatives of their choice, despite the existence of the three core Thornburg v. Gingles factors which this Court has previously said have been established.

In an effort to show that the District Court's conclusion was "clearly erroneous," the Plaintiffs-Appellants have said that the conclusion is supported only by the District Court's underlying factual conclusions regarding "racial animus, the Jennings election, and the resulting 'proportionality'." But, the Plaintiffs-Appellants have failed to acknowledge that it is not a Jennings 'election' in this case. There are several untainted, unmanipulated Jennings elections that are in evidence--not just an isolated instance as to which the Plaintiffs-Appellants have introduced some evidence that it was somehow tainted or manipulated.

The Plaintiffs-Appellants have also failed to acknowledge that the District Court's conclusion is also bolstered by findings that:

1. Despite some lingering effects of racial discrimination, there is no evidence that the ability of black citizens to

participate in the political process in Liberty County has been hindered in any way, as supported by the testimony of every witness. (R5-154-87 to 88)

2. There are no voting practices or procedures utilized in Liberty County that enhance the possibility of discrimination against black voters except for a majority vote requirement and, to a slight extent, the size of voting districts. (R5-154-90 to 91, 93)

3. There is no evidence that blacks had been excluded from Liberty County's informal slating process, and the only one of the four pre-1990 black candidates who had used this process and aligned himself with a slate of candidates had been unsuccessful the first time but was successfully elected the next three times. (R5-154-95 to 96)

4. There are remaining socio-economic effects of past racial discrimination in Liberty County, but, based on the testimony of both plaintiffs' and defendants' witnesses, these socio-economic conditions do not hinder black participation in the political process. (R5-154-99 to 102)

5. There is no evidence of any overt or subtle racial appeals in elections in Liberty County in the last twenty-plus years. (R5-154-103)

6. The Liberty County Commission has been responsive and open to the needs of the black citizens of Liberty County. While the Liberty County School Board has a mixed history in terms of

responsiveness to the needs of black citizens, recent years have shown more responsiveness. Isolated incidents of unresponsiveness have not hindered the access of black citizens to the political process. (R5-154-106 to 109)

7. The adoption of at-large elections for the Liberty County Commission by the State Legislature was not racially-motivated or tenuous. While the State Legislature's 1947 adoption of its policy of allowing at-large elections for school boards was racially motivated, the Liberty County School Board's change to at-large elections in 1953 was not racially motivated or tenuous. (R5-154-109 to 111)

Even though these findings adequately supported its ultimate conclusion, the District Court did not consider other factors which it could and should have in determining that the use of an at-large voting system in Liberty County does not violate the Voting Rights Act.

As noted in Thornburg v. Gingles, supra at 45, "The [Congressional] Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of §2 violations, particularly to vote dilution claims (Footnote omitted.), other factors may also be relevant and may be considered."

First, the District Court declined to consider the 1990 referenda elections and the established overwhelming black voter

opposition to the Plaintiffs-Appellants' requested change to single-member districts. (R5-154-113) This decision was based on the prior opinion of Judge Tjoflat in this case that opposition of members of the class had no bearing on the Court's analysis.

Allowing the remaining Plaintiffs-Appellants to pursue an end directly opposed to the interests of the class they once purported to represent circumvents an important justification that led to the development of the class action: the protection such a mechanism affords absentees. Advisory Committee Notes on Rule 23, Fed.R.Civ.P., 28 U.S.C.A. pp.427-29. This safeguard, and the circumvention thereof, are all the more painfully evident in this case because members of a Fed.R.Civ.P. Rule 23(b)(2) class action may not "opt out." Warren v. City of Tampa, 693 F.Supp. 1051, 1062 (M.D. Fla. 1988). In other words, the members of the class will be bound equally by the adjudication of the action even though a majority of the individual members of the class opposes the relief sought. The results of the September, 1990 referenda establish that the class as a whole--not merely a few individuals--opposes the relief sought by the Plaintiffs-Appellants.

In his specially concurring opinion in the prior appeal of this case, Judge Tjoflat accurately traced the history of Section 2 of the Voting Rights Act and how it got to its present form. While Section 2 has been used in the past to challenge a variety of voting practices and procedures which effectively denied or abridged the right of a citizen to vote, as Judge Tjoflat pointed

out, it was not the basis of the early lawsuits attacking single-member districts. Whitcomb v. Chavis, 403 U.S. 124 (1971), and White v. Regester, 412 U.S. 755 (1973), the basis for such attacks was the Fourteenth Amendment. However, in City of Mobile v. Bolden, 446 U.S. 55 (1980), such a challenge was brought under Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments.

Judge Tjoflat then traced the Legislative history of the 1982 amendment to the Voting Rights Act, as the U.S. Supreme Court did in Thornburg v. Gingles, supra. From these opinions and the Senate Judiciary Committee Report quoted in both of them, it is clear that the sole purpose of the 1982 amendment was to provide an effective remedy for at-large voting district challenges, where appropriate (based on the totality of the circumstances), without requiring the discriminatory intent test established in City of Mobile v. Bolden. By the 1982 amendment, the original Section 2 of the Voting Rights Act, with few minor changes, was made into subsection (a) of Section 2 and subsection (b) was added.

It is fairly clear that subsection (b) was intended as the Legislative remedy for minority groups large enough and geographically compact enough to bring a challenge to an at-large election system which effectively diluted the votes of members of the minority class. Following the 1982 amendment to Section 2, subsection (b) provides:

(b) A violation of subsection (a) of this section is

> established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added.)

In Thornburg v. Gingles, supra, the United States Supreme Court interpreted this new Section 2 and set down guidelines for its application, while affirming (except as to one voting district) the decision of a district court in a class action suit reported as Gingles v. Edmiston, 590 F.Supp. 345 (E.D. N.C. 1984). In Gingles v. Edmiston, supra at 375 n.33, in dealing with an issue of which of two districting schemes was less 'vote dilutive,' the Court said:

> . . . While the dilemma is a real one, we think it is one that Congress has, in effect, committed to the judgment of the black community to whom it has given the private right of action under amended § 2. The right created is, by definition, that of a "class" and the procedural means of vindicating it by a class action has also been provided by Congress in Fed.R.Civ.P. 23. When, as here, such a class action is brought by a class which includes such a fragmented concentration of black voters, a group judgment about the group's best means of access to the political process must be assumed reflected in the specific claim made by the class. The legitimacy of that group judgment, from the standpoint of members of the class identified, can be put to the test by standard procedures: by challenges to the adequacy of representation or the typicality of claims by any members of the identified class who question the validity of the class

> claim under Rule 23(a)(3) & (4), Fed.R.Civ.P., or even by attempted intervention under Rule 24, Fed.R.Civ.P. . . .

As the district court noted in Gingles v. Edmiston, the plain reading of the statute is that it provides a class right and a class remedy. There are many other statutory provisions which clearly provide rights and remedies to individuals who are denied the right to vote, to be qualified to vote, or to register to vote [42 U.S.C. § 1971(a)]; whose right to vote is interfered with by threats, coercion, or intimidation [42 U.S.C. § 1971(b)]; who has been denied the right to vote on account of race or color through the use of a test or device [42 U.S.C. § 1973a(b)]; who cannot effectively vote because of language disabilities [42 U.S.C. § 1973a(e) and (f)]; who is subject to a poll tax [42 U.S.C. § 1973h]; whose vote is not tabulated or counted [42 U.S.C. § 1973i(a)]; not to mention 42 U.S.C. § 1983 and the Fourteenth and Fifteenth Amendments themselves.

It is clear, however, from the discussion in Thornburg v. Gingles, supra, of the Congressional debates and reports concerning the new Section 2 of the Voting Rights Act, that this new Section 2 was focused on claims of minority group vote dilution through the use of multi-member districts or other devices. As stated in Thornburg v. Gingles, supra at 47-9:

> The essence of a § 2 claim is that 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. This Court has long recognized that multimember districts and at-large

> voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.' (Footnote and citations omitted.) The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters. (Footnote and citations omitted.) Minority voters who contend that the multimember form of districting violates § 2 must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. (Citation omitted.) (Emphasis added.)

Shortly thereafter, at 478 U.S. 50-1, the Court discussed the three essential factors that "the minority group" must demonstrate as preconditions in order to demonstrate a violation of Section 2 through the use of multi-member districts. Throughout all of the Court's subsequent discussion, and in many other reported opinions from many courts, it appears to be well-accepted that only a minority group can possibly have its vote diluted by an at-large voting system in such a fashion as to amount to a violation of Section 2.

The en banc opinions of this Court in this case also demonstrate a recognition that Section 2 provides what is essentially a minority class remedy. Judge Kravitch's special concurrence, in discussing the necessary preconditions or threshold requirements for such an action, continuously speaks in terms of what the "minority group" must prove. Solomon v. Liberty County, 899 F.2d 1012, 1017-20 (11th Cir. 1990) (en banc), cert. den. 498 U.S. 1023 (1991). Judge Tjoflat's special concurrence adheres to his original panel opinion (899 F.2d at 1021), in which he set out

his own test of how a "minority group" may establish a Section 2 violation. Solomon v. Liberty County, 865 F.2d 1566, 1571 (11th Cir. 1988).

Section 2 now refers to classes and, it is urged, this was intentional by Congress with full knowledge of the requirements of Rule 23, Fed.R.Civ.P. It is axiomatic that Congress is presumed to have acted with full knowledge of the subject of the legislation before it as well as existing conditions and other matters involved (here, Rule 23). 82 C.J.S., Statutes, § 316; Prudential Insurance Co. v. Benjamin, 328 U.S. 40 (1946).

While the Plaintiffs-Appellants herein can apparently allege an individual cause of action under Section 2 of the Voting Rights Act based on alleged vote dilution of a minority class, when it is demonstrated that the class itself is opposed to the remedy sought by the Plaintiffs-Appellants, it would be inequitable to impose such remedy on the class.

The District Court could also have re-examined the issue of racially-polarized voting, as noted above, because the evidence now shows that white majority voters in Liberty County do not vote sufficiently as a bloc so as to usually defeat a minority group's preferred candidates; and this Court's holding that this factor had been established as a matter of law is not the law of the case since additional evidence was taken which compels a contrary result.

Nevertheless, since the District Court properly concluded,

based on the factors it did consider, that the at-large voting system in place in Liberty County does not violate the Voting Rights Act, whether or not it could have considered other factors supportive of that conclusion is a moot point.

CONCLUSION

For the reasons stated, and based upon the authorities cited, herein, the Liberty County Commission Appellees urge this Court to affirm the decision of the District Court.

DATED this 25th day of November, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Robert B. McDuff, Esq., 767 North Congress Street, Jackson, Miss. 39202, and J. C. O'Steen, Esq., 177 Salem Court, Tallahassee, Fla. 32301, by U. S. first class mail, postage prepaid, this 25th day of November, 1997.

DAVID LA CROIX, ESQ.