EN BANC BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 97-2540

GREGORY SOLOMON, et al.,

Plaintiff/Appellants,

vs.

LIBERTY COUNTY, FLORIDA,
et al.,

Defendants/Appellees.
_____/

EN BANC BRIEF OF LIBERTY COUNTY BOARD OF COUNTY COMMISSIONERS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

GREGORY SOLOMON, et al. v. LIBERTY COUNTY, FLORIDA, et al.

CASE NO. 97-2540

L. B. Arnold

Patricia Beckwith

James W. Bilbow

Raleigh Brinson

Joe Collins

Donnie Coxwell

Tommy Duggar

Earl Jennings

David La Croix

Liberty County, Florida

Liberty County School Board

David M. Lipman

Robert B. McDuff

J. C. O'Steen

Julius F. Parker, III

STATEMENT REGARDING ORAL ARGUMENT

This case is currently set for oral argument, by order of the Court, on June 6, 2000.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and type used in this En Banc Brief is 14 point Times New Roman. The Principal Answer Brief conforms to Rule FRAP 32(a)(7)(B) in that it contains 10,532 words.

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STATEMENT OF THE ISSUES

The issues in this case have already been framed by the Court in its en banc briefing order, and are restated verbatim therefrom.

> I. DID THE DISTRICT COURT ERR AS A MATTER OF LAW IN ACCORDING THE WEIGHT THAT IT DID TO THE ELECTORAL SUCCESS OF EARL JENNINGS, EVEN THOUGH CONTRARY EVIDENCE EXISTED?
>
> II. WHO HAD THE BURDEN OF ESTABLISHING THAT THE FOLLOWING "SENATE FACTORS" WEIGHED IN THEIR FAVOR: (1) IF THERE IS A CANDIDATE SLATING PROCESS, WHETHER MEMBERS OF THE MINORITY GROUP HAVE BEEN DENIED ACCESS TO THAT PROCESS (SENATE FACTOR" 4); (2) THE EXTENT TO WHICH MEMBERS OF THE MINORITY GROUP HAVE BEEN ELECTED TO PUBLIC OFFICE IN THEIR JURISDICTION (SENATE FACTOR" 7); AND (3) 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 ("SENATE FACTOR" 9)?
>
> III. DID THE DISTRICT COURT CLEARLY ERR IN FINDING THAT THE FOLLOWING "SENATE FACTORS" WEIGHED IN THE DEFENDANT'S FAVOR: (1) IF THERE IS A CANDIDATE SLATING PROCESS, WHETHER MEMBERS OF THE MINORITY GROUP HAVE BEEN DENIED ACCESS TO THAT PROCESS ("SENATE FACTOR" 4); (2) THE EXTENT TO WHICH MEMBERS OF THE MINORITY GROUP HAVE BEEN ELECTED TO PUBLIC OFFICE IN THE JURISDICTION ("SENATE FACTOR" 7); AND (3)

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 ("SENATE FACTOR" 9)?

IV. DID THE DISTRICT COURT ERR IN DETERMINING THERE WAS NO DILUTION OF MINORITY VOTING STRENGTH IN LIBERTY COUNTY'S AT-LARGE ELECTIONS FOR THE SCHOOL BOARD BASED UPON EARL JENNINGS' ELECTION TO THE COUNTY COMMISSION, EVEN THOUGH PLAINTIFF PRESENTED CONTRARY EVIDENCE?

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Appellee, Liberty County Board of County Commissioners, generally agrees with Appellants' statement of the Course of Proceedings, except to the extent it places undue emphasis on the concurring opinion of Judge Kravitch in the first en banc review of this case, see Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990) (en banc), cert. den., 998 U.S. 1023 (1991) (Kravitch, J., concurring), and purports to characterize that opinion as the holding of this en banc Court.

STATEMENT OF FACTS

Appellants' Statement of Facts is so one-sided and self-serving as to be of no value to this case. Therefore, Appellees present the facts as stated by the district court.

Liberty County, Florida, is located in Northwestern Florida, within the Northern District of Florida. When this case was originally tried, it had a population of 4260, of which 471, or 11.06 percent, were black. At the time of the 1990 census, Liberty County had a population of 5569, of which 982, or 17.63 percent, were black. A total of 3320 people were of voting age population (that is, over the age of eighteen), of which 831, or 25.03 percent, were black. Most blacks (approximately ninety percent in 1986) live in the northwest quadrant of Liberty County, in

residential district 1, which includes the first and second [voting] precincts (Rock Bluff and Annex, respectively). In November, 1991, blacks comprised 295 out of 640, or 46.09 percent, of all the registered voters in residential district one. Voters in Liberty County (both white and black) are predominately Democrats. The level of political competition in the county is "high."

The five members of the Liberty County School Board and of the Liberty County Board of County Commissioners each serve staggered four-year terms. The voting districts, comprised of five residency districts that are approximately equal in population (according to the 1980 census), are the same for both County Commission and School Board elections. Candidates run for numbered seats corresponding to the district in which they reside, and are elected at-large by all the qualified voters in the county. A majority of the votes cast is necessary to avoid a runoff in the primary. There is no majority vote requirement for the general election.

Prior to 19[8]6, there had been four black candidacies for countywide elected office in Liberty County. Black candidates for seats on the school board included Charles Berrium in 1968, and Earl Jennings in 1980 and 1984. In 1984, Gregory Solomon ran for a seat on the county commission. None of these black candidacies was successful.

However, in September of 1990, Earl Jennings ran for a seat on the Liberty County Commission, defeating a white opponent in the Democratic primary election and a white incumbent county commissioner in the general election. In 1992, Mr. Jennings received the highest vote total in the Democratic primary, running against three white opponents. In the 1992 runoff election, Mr. Jennings defeated the white candidate, Willis (Jack) Brown, who was the second highest vote-getter in the primary. As there was no Republican opposition, Mr. Jennings retained his seat in the runoff election. In 1996, Mr. Jennings ran for reelection against two black opponents and one white opponent. In the September 3, 1996 Democratic primary, Mr. Jennings received more votes than the other candidates, but did not receive over fifty percent of the vote. In the October 1, 1996 runoff, Mr. Jennings again defeated Mr. Brown, receiving a higher vote total in the seven of Liberty County's eight precincts and in the absentee ballots. As there was no Republican opposition, Mr. Jennings retained his District 1 seat with this victory. Aside from those individuals who ran against Mr. Jennings, there is no other record evidence of black candidacies for County Commission or School Board seats since the initial trial of this matter in 1986 (internal citations and footnotes omitted). ... (R: Vol. 5, dkt. 154, pp. 80-82).

There is no official slating organization in Liberty County. On the other hand, the county has a very informal, unofficial candidate slating process. ... 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 family groups (internal citations omitted). ... (R: Vol. 5, dkt. 154, pp. 94-95).

On September 4, 1990, Liberty County conducted a county-wide referenda election pursuant to Florida Statutes Sections 124.011 and 230.105, to determine whether single-member district elections should be adopted for county commission and school board elections. The voters in Liberty County rejected the county commission referendum by a vote of 376 (28.46 percent) for and 945 (71.54 percent) against single-member district elections. The voters in Liberty County rejected the school board referendum by a vote of 361 (27.43 percent) for and 955 (72.57 percent) against single-member district elections. Using the same methodology employed by Dr. St. Angelo[, Appellants' expert,], Dr. Douglas Zahn[, Appellees' expert,] determined that 59.1 percent of the black voters voted against single-member districts for county commission elections, and 60.0 percent voted against single-member districts for school board elections. (R: Vol. 5, dkt. 154, pp. 111-112) (internal citations and footnote omitted). Thus, the class of voters who will be affected by the

remedy the Appellants seek in this case have already rejected that remedy by referendum vote.

STATEMENT OF THE STANDARD OF REVIEW

Appellees strongly disagree with Appellants' statement that, in essence, the district court's factual findings are subject to de novo review by this Court. Initial Brief at 8. Appellants' statement that "plenary review is appropriate" can only be interpreted as suggesting that the district court's findings are subject to de novo review. The correct standard of review is that the district court's factual findings will not be disturbed unless Appellants demonstrate that those findings are clearly erroneous. See Fed. R.Civ.P. 52(a).

Appellants have seized upon language appearing in several precedents of this Court, as well as in Thornburg v. Gingles, 478 U.S. 30 (1986), which states in full:

> As we explained in Bose [Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)], Rule 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."

Id. 478 U.S. at 79. From this quote, taken out of context, the Appellants make the quantum leap that Rule 52 does not apply to appellate review of findings of fact which are based on a misunderstanding of the governing rule of law. (Initial Brief at

7). This constitutes a gross mischaracterization of the actual rule announced by the Supreme Court in Bose and Gingles. Mere recitation of this thaumaturgic incantation, according to the Appellants, is sufficient to side-step the highly deferential standard of Rule 52(a), in favor of de novo review by this Court. Appellants, however, fail to identify any governing rule of law which the district court supposedly misunderstood. To accept Appellants' position would be utterly to abolish the function of the district court in Section Two voting rights cases.

Through a careful recitation of cases in which various courts of appeals have reversed treatment by district courts of various Gingles and Senate factors, Appellants attempt to persuade this Court that it is free to substitute its own judgment on purely factual matters for that of the district court. The law is firmly established that findings of subsidiary facts as well as the ultimate fact of vote dilution are pure questions of fact, subject to the exacting and deferential standards of Rule 52(a). See Pullman- Standard v. Swint, 456 U.S. 273, 287 (1982). As the Court explained in Pullman:

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide

> findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman, 456 U.S. at 287.

Moreover, the Supreme Court, in Gingles, expressly rejected the plaintiffs' claim that both the subsidiary and ultimate facts of vote dilution are subject to anything other than the Rule 52(a) standard. The Court stated emphatically:

> We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution. As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstance" and to determine, based "upon a searching and practical evaluation of the 'past and present reality,'" whether the political process is equally open to minority voters. ... The fact that amended § 2 and its legislative history provide legal standards which a court must apply to the facts in order to determine whether § 2 has been violated does not alter the standard of review. ... Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

Gingles, 478 U.S. at 79 (internal citation omitted).

The Senate factors which form the basis of this appeal are all pure questions of fact. None involves any so-called "mixed question of law and fact." Neither have Appellants graced the Court with any supposed misunderstanding of the governing

rule of law, which could form the basis for overturning any of the court's pure factual findings. Those findings are not subject to de novo review, but are subject to the clearly erroneous standard. Accordingly, this Court may only overturn those factual findings if, despite evidence supporting the findings, the Court, after a review of the entire evidence is left with the definite and firm conviction that a mistake has been committed. See Pullman, 456 U.S. at 285, n.14.

SUMMARY OF ARGUMENT

1. The district court did not err as a matter of law in according the weight that it did to the electoral success of Earl Jennings, even though contrary evidence existed. The record, and indeed the district court's opinion, reflect that the court gave no undue weight to this particular Senate factor. The electoral success of a minority candidate during the pendency of Section Two litigation is not only probative in the defendants' favor, but, given the sustained success of Mr. Jennings, the district court properly concluded that this factor weighed heavily in favor of the defendants.

2. The burden for establishing that Senate factors 4, 7 and 9 weighed in their favor was at all times with the Appellants. The Supreme Court's decision in Johnson v. DeGrandy, 512 U.S. 997 (1994), emphasized that proof of the core Gingles factors is not sufficient to establish a claim of vote dilution. In order to establish a claim under the totality of the circumstances, the plaintiff should bear the

burden of establishing that any particular factor weighs in its favor. To place an affirmative burden on defendants in Voting Rights Act cases, of negating the existence of the Senate factors would reverse the traditional rule that defendants have no burden of proof. Moreover, such a burden-shifting approach would run afoul of the Supreme Court's pronouncement in Gingles that plaintiffs alleging vote dilution must prove their claims.

3. The district court did not clearly err in finding that Senate factors 4, 7 and 9 weighed in favor of the Defendants. While it is true that the candidate slating process in Liberty County is informal and run by powerful white families, the success of Earl Jennings and Greg Solomon in receiving the support of these families belies any claim that this process is not open to minorities. Appellants' attempts to rebut this finding with unproven allegations that Jennings was not the minority's candidate of choice were properly rejected by the district court.

The district court also properly found that the sustained electoral success of Earl Jennings weighed in favor of the Defendants. Jennings' success was not an aberration, but a continued trend of minority electoral success. The district court also properly rejected Appellants' unfounded allegations that Jennings' success was orchestrated by a closed white power structure as a means of defeating this litigation.

The district court did not clearly err in finding that the policy underlying at-large elections in Liberty County is not tenuous. While it may be argued that at one time the electoral structure of Liberty County elections may have been motivated in part by racial considerations, recent referenda elections have removed the possibility of any improper motive. The policy underlying at-large elections in Liberty County is firmly rooted in the electorate's rejection of the very remedy sought by the Appellants in this case.

4. The district court did not clearly err in determining there was no dilution of minority voting strength in Liberty County's at-large elections for the School Board based upon Earl Jennings' election to the County Commission. Whether analyzed separately or together, the conclusion of no vote dilution in Liberty County's at-large election scheme was correct. Viewed in isolation, elections for the County Commission have resulted in proportional minority representation for nearly a decade. Since the School Board electoral scheme is identical in all respects to the County Commission, it would be logically inconsistent to find dilution with regard to one system, but not with regard to another identical system.

Analyzed in tandem, the conclusion does not change. The failure to achieve minority representation on the School Board stems from the fact that no minority has run for a position thereon in the last sixteen years. Therefore, lack of minority

success is not attributable to any standard, practice, or procedure. The success of minorities on the County Commission, the only governmental body for which minorities have run for office, demonstrates the absence of vote dilution in Liberty County.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR AS A MATTER OF LAW BY PLACING UNDUE WEIGHT ON THE ELECTORAL SUCCESS OF EARL JENNINGS, DESPITE CONTRARY EVIDENCE.

A determination that the district court placed undue weight on the electoral success of Earl Jennings would be pure speculation. What can be determined from the record and a review of the district court's opinion is that the trial court did not place undue weight on Commissioner Jennings' electoral success. The court simply weighed this factor, together with the other Senate factors[1] in ultimately arriving at its conclusion that the Appellants failed to prove vote dilution under Section Two of the Voting Rights Act, 42, U.S.C. § 1973 (1982). In fact, the record clearly

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[1] The "Senate factors" derive from the Fifth Circuit's decision in Zimmer v. McKeithen, 485 F. 2d 1297 (5th Cir. 1973), aff'd sub nom, East Carrol Parish School Board v. Marshall, 424 U.S. 636 (1976), and are restated in the Senate Report, accompanying the 1982 amendments to the Voting Rights Act. See S. Rep. No. 97-417 at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 206-207.

demonstrates that the district court gave this factor no more importance than any of the other Senate factors. Its analysis of this factor, as mandated by Thornburg v. Gingles, 478 U.S. 30 (1986), consumed a mere two pages of a 121 page memorandum opinion. The district court considered all nine Senate factors, and found that seven of those factors weighed solely in favor of the Commission. (R: Vol. 5, dkt. 154, pp. 83-113). In addition, it found that of two other factors to consider, at least as far as the Commission is concerned, both weighed in the Commission's favor. (R: Vol. 5, dkt. 154, pp. 113-117). Nothing in the district court's opinion indicates that it gave this factor any more weight than any of the other factors. As a matter of law, this cannot constitute undue weight.

Moreover, the basis for Appellants' argument that the district court placed undue weight on this factor is flawed in several respects. First, Appellants claim that Jennings was not the candidate of choice of black voters, going so far as to rely on the absence of regression analysis of Jennings' elections as a basis for this unwarranted assumption. Initial en banc Brief at 17. Appellants then state that "the defendants have not explained why they failed to employ this method after remand." Id. As explained infra, Part II, the defendants did not bear the burden of proving that Jennings was the choice of black voters. Nor did they have the burden of producing any evidence analyzing the results of the Jennings elections, as Appellants suggest.

At all times, Appellants bore the burden of proving a violation of Section Two under the totality of the circumstances. Having failed to produce this evidence, and condemning the district court for drawing unwarranted assumptions based on a lack of this evidence, Appellants cannot now base their entire argument on this point on conclusions drawn from proof they failed to submit. Appellants did not analyze the Jennings elections for obvious reasons.

Appellants initially relied heavily on this Court's prior en banc decision, Solomon v. Liberty County, 899 F. 2d 1012 (11th Cir. 1989) (en banc), cert. den., 498 U.S. 1023 (1991) ("Solomon II"), finding that the three core Gingles factors had been established as a matter of law, as a basis for finding in their favor. They defend this finding as sacrosanct and inviolable, notwithstanding strong evidence indicating that subsequent developments cast doubt on the validity of this holding. (R: Vol. 5, dkt. 154, pp. 76-77). Their analysis, however, assumes facts contrary to that which they claim is otherwise conclusively established.

Appellants attempt to convince this Court that Jennings was not the candidate of choice of black voters based on a series of assumptions. Because residential district one is composed of 54 percent white voters, and Jennings received 56 percent of the first primary district 1 votes in 1992, Appellants conclude that Jennings may have received only two percent of the district one black vote. This could only

possibly be true if voting in Liberty County is not only racially polarized, but exactly diametrically polarized. The conclusion assumes that all white voters in district one voted for Jennings, the black candidate, whereas all but two percent of the black voters voted for the opposing candidate. This assumption runs directly contrary to this Court's prior finding that voting in Liberty County is racially polarized. Appellants cannot have it both ways.

Second, Appellants have mischaracterized the state of the law with regard to the importance of minority electoral success during the pendency of Section Two litigation. The Senate Report states in relevant part:

> The fact that the members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote" in violation of this section. If it did, the possibility exists that the majority citizens might evade the section, e.g. by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution ... Instead we shall continue to require an independent consideration of the record."

S. Rep. No. 97-417 at 29, (1982), reprinted in 1982 U.S.C.C.A.N. 207, n. 115, quoting Zimmer v. McKeithen, 485 F. 2d 1297, 1307 (5th Cir. 1973), aff'd sub nom, East Carroll Parish School v. Marshall, 424 U.S. 636 (1976). The clear import of this

language is not, as Appellants suggest, that minority electoral success has no probative value, but, on the contrary, that such success, while highly probative, does not conclusively refute the existence of a claim of dilution. This comports with the very language quoted by Appellants that, "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.

Appellants engage in the very speculation for which they chide the district court. Relying on language from the Supreme Court that "the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate," Gingles, 478 U.S. at 75, quoting S. Rep. 97-417, supra (emphasis added), and that election of a minority candidate "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, 485 F. 2d at 1307 (emphasis added), Appellants conclude that the defendants in this case must have manipulated the Jennings elections in order to install him as a "safe" Commissioner.

If the Appellants thought this to be the case, they should have presented some evidence in support of their claim. They did not, as explained by the district court:

> It is true that the Court must closely scrutinize the election of a minority following the onset of section 2 litigation. However, there is no evidence of any special circumstances

> in this case which would require the Court to disregard Mr. Jennings' electoral success. Mr. Jennings was not elected until 1990, some five years after Plaintiffs filed this case and over four years after the first trial. The election results show that all of his elections were extremely competitive, with as many as four opponents (including both white and black candidates). There has been no suggestion nor proof offered by Plaintiffs that white officials or white voters in Liberty County have manipulated the electoral success of Mr. Jennings in order to defeat Plaintiffs' vote dilution challenge.

(R: Vol. 5, dkt. 154, p. 105) (emphasis added). When presented with evidence supporting the inference that Jennings was the candidate of choice of black voters, and without contrary evidence, the district court correctly found that the electoral success of Earl Jennings weighed in favor of the defendants. Moreover, Jennings' race is of no moment. "Clearly, only the race of the voter, not the race of the candidate, is relevant to the vote dilution analysis." Gingles, 478 U.S. at 68. Having failed to present any evidence from which the district court could have made a contrary finding, Appellants cannot now attack that finding as clearly erroneous.

POINT II

APPELLANTS AT ALL TIMES BORE THE BURDEN OF ESTABLISHING THAT SENATE FACTORS 4, 7, AND 9 WEIGHED IN THEIR FAVOR.

The three Gingles preconditions, which plaintiffs in a vote dilution case must establish, are merely a gloss on the nine Senate factors, which have become so familiar in voting rights jurisprudence. See Solomon v. Liberty County, 865 F. 2d 1566, 1571 (11th Cir. 1988), vacated, 873 F. 2d 248 (11th Cir. 1989). Accordingly, the Appellants at all times bore the burden of establishing that any of those factors weighed in their favor. While it is tempting to adopt a burden-shifting approach (similar to that used in Title VII discrimination cases), such an approach is ill-advised for several reasons. First, as a result of the 1982 amendments to the Voting Rights Act, proving intent to discriminate is no longer an element of a vote dilution claim, unlike Title VII, which requires intentional discrimination. Second, to require a defendant in a vote dilution case to prove compliance with the Voting Rights Act, as suggested by Appellants, Initial en banc Brief at 20, would impermissibly remove the well established rule that plaintiffs in civil cases must prove their claims.

Under such a framework, the plaintiff would demonstrate the existence of the core Gingles factors, i.e., that "a bloc voting majority must usually be able to defeat

candidates supported by a politically cohesive, geographically insular minority group." Gingles, 478 U.S. at 49. If the plaintiff establishes this claim, the burden would then shift to the defendant to prove that any or all of the Senate factors weighs in its favor. At this point, the plaintiff would again bear the burden of providing evidence to rebut the claim that any or all of the Senate factors weighs in favor of the defendant. While at first blush this appears to be a remarkably tidy arrangement, it fails upon closer examination.

Because a plaintiff bringing a vote dilution case need not prove discriminatory intent, any comparison of the Voting Rights Act to Title VII is inapposite. Quite to the contrary, the Court in Gingles made it clear that the burden of establishing that a particular practice or procedure resulted in vote dilution remains at all times with the plaintiff. See Gingles, 478 U.S. at 49, n.15 ("By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.")

In this case, the district court considered and also rejected the use of such a burden-shifting framework. First, the court noted the absence of an intent requirement under the amended Act. (R: Vol. 5, dkt. 154, p. 59, n. 55). The court then explained:

> [Such an approach] ignores the fact that under DeGrandy, a "comprehensive, not limited, canvassing of relevant facts" requires that even where a plaintiff establishes the three Gingles preconditions and defendant has presented nothing in rebuttal, a district court "must also examine other evidence in the totality of the circumstances." See generally NAACP v. City of Niagara Falls, 65 F. 3d 1002, 1008 (2d Cir. 1995)(same). Cf. Sanchez [v. Colorado, 97 F. 3d 1303, 1310-11 (10th Cir. 1996)] (noting that while proof of the three Gingles factors "creates the inference the challenged practice is discriminatory," they are "not sufficient" to prove a section 2 claim); Harvell v. Blytheville Sch. Dist. #5, 71 F. 3d 1382, 1390 (8th Cir. 1995) ("Satisfaction of the necessary Gingles preconditions carries a plaintiff a long way towards a section 2 violation, but in the final analysis [the plaintiff] must still show that the challenged electoral scheme provides minority voters" with unequal access to the political process). ...

(R: Vol. 5, dkt. 154, p. 60, n. 55) (internal citation omitted).

The district court's analysis is perfectly sound. Under Gingles and DeGrandy, a plaintiff in a voting rights case is required to present evidence from which the court can conclude "under the totality of the circumstances" that the challenged practice results in vote dilution. If the burden is shifted to the defendant to show contrary evidence once the plaintiff has met the Gingles preconditions, the totality of the circumstances is collapsed into simply the Gingles preconditions. Of course a defendant faced with evidence establishing the preconditions would be ill-advised to rest without presenting contrary evidence; however, imposing upon a defendant the

burden of establishing that certain Senate factors weigh in its favor is far removed from simply requiring that, if either party wishes to present evidence in support of its case, that party should present evidence bearing on the particular Senate factor.

The implications of elevating the Senate factors into specific burdens of proof for the Defendant are also far-reaching. If a defendant bears an evidentiary burden of proving that the Senate factors weigh in its favor, failure to establish that any one factor weighs in its favor would result in a presumption that that factor weighs in favor of the plaintiff. Thus, to the extent there is any suggestion that either party bore the burden of proving that any of the Senate factors weighed in its favor, that suggestion must be rejected. The only true burden of proof, as used in the traditional sense of the term, which any party bears in a Voting Rights Act case, is the plaintiff's burden of proving that, under the totality of the circumstances, the challenged practice results in dilution of minority voting strength.

Defendants also agree with the Appellants that, in this case, regardless of where the burden of establishing that any particular Senate factor weighed in its favor is placed, it makes no difference in the outcome of this case. Appellants failed to present sufficient evidence from which the trier of fact could conclude that, under the totality of the circumstances, minority voting strength is diluted in Liberty County.

POINT III

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT SENATE FACTORS 4, 7, AND 9 WEIGHED IN FAVOR OF THE DEFENDANTS.

Prior to discussing exactly why the district court's findings as to Senate Factors 4, 7 and 9 were not clearly erroneous, a brief reiteration of the correct standard of review is appropriate. As the Court's own en banc order recognizes, the district court's findings as to the Senate factors, and the ultimate determination that no vote dilution exists in Liberty County, are pure findings of fact, subject to the clearly erroneous standard of Fed. R.Civ.P. 52(a).

Rule 52(a) states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58. ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of [sic] the credibility of the witnesses. ...

This is a highly deferential standard of review, in stark contrast to Appellants' suggestion that the district court's findings should be subject to de novo review.

The Supreme Court elaborated exactly what is meant by the clearly erroneous standard in 1982, in the landmark case of Pullman-Standard v. Swint, 456 U.S. 273

(1982). In Pullman, the plaintiffs brought a class action under Title VII, seeking relief based on an employment practice which allegedly resulted in a disparate impact on minorities. The district court issued a lengthy opinion, addressing its factual conclusions with regard to various factors it was required to consider in determining whether a seniority system had a disparate impact on minorities. Relying on the same language on which Appellants herein rely, i.e., that factual findings are not subject to Rule 52(a), when those findings "are made under an erroneous view of controlling legal principles," Pullman, 456 U.S. at 285, the Court of Appeals reversed. The Supreme Court vacated the Circuit Court's opinion, holding emphatically that both "subsidiary" and "ultimate" factual findings are subject to the strictures of Rule 52(a). See Pullman, 456 U.S. at 287.

Two years later, the Court again revisited Rule 52(a). In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Court considered a product disparagement case, involving the "actual malice" standard for judging whether the speaker made a statement he knew was false. In affirming the court of appeals' refusal to overturn the district court's factual findings, the Court explained:

> The requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others. The same "clearly erroneous" standard

> applies to findings based on documentary evidence as to those based entirely on oral testimony, ... but the presumption has lesser force in the former situation than in the latter. Similarly, the standard does not change as the trial becomes longer and more complex, but the likelihood that the appellate court will rely on the presumption tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours.

Bose, 466 U.S. at 500. Having lived with this controversy for over a decade at the time of its final opinion, the presumption that the district court's opinion was correct should, in this case, be nearly conclusive.

A. THE DISTRICT COURT DID NOT CLEARLY ERR IN WEIGHING SENATE FACTOR 4 IN FAVOR OF THE DEFENDANTS.

Senate factor 4 asks, if there is a candidate slating process, whether the members of the minority group have been denied access to that process. See Gingles, 478 U.S. at 37; see also, S.Rep. No. 97-417, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. at 206. The district court first considered the fact that there is no official slating organization in Liberty County. (R: Vol. 5, dkt. 154, p. 94). It did note, however, that there is a "very informal, unofficial candidate slating process." Id. This unofficial process, the court found, is based on aligning oneself with one of several large and influential white family groups, in order to gain their endorsement. See Id. at 94-95.

The district court based its conclusion that alignment with one of the family groups was essential to electoral success on the testimony of one of the named plaintiffs herein, Greg Solomon. See Id. at 95. The court also noted that, according to Solomon's own testimony, he was promised support by several of these families, but that the promised support was not delivered when the voters actually cast their ballots. See Id. at 95, n. 95. From this evidence two conclusions are immediately apparent. First, the Appellants' claim that they have been excluded from the very informal slating process is belied by the testimony of the lead plaintiff in this case. Second, the fact that promised support from these families did not result in his electoral success cannot negate the existence of access to the process.

Whether or not an informal slating organization is successful in actually electing its chosen representative says nothing about whether that representative had access to that support. The Senate factor merely asks whether minorities have access to the process, not whether involvement in the process actually results in electoral success. Any claim to the contrary would run directly counter to Congress' clear pronouncement in the Voting Rights Act itself 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." 42 U.S.C. § 1973(b) (1982). The Voting Rights Act

seeks to ensure that minorities have access to the process of participation in the political process. It does not guarantee success therein.

Obviously, the fact that Earl Jennings has been thrice elected to serve on the County Commission severely undercuts the Appellants' claim that minorities have been denied access to the informal slating process. For, if it is not possible on the one hand to achieve electoral success without the support of these organizations, any candidate who is successful must have had this support. Of course, the district court was careful not to rest its conclusion solely on this fact, mindful of the Supreme Court's admonition that minority electoral success alone does not automatically foreclose a successful vote dilution claim. See Gingles, 478 U.S. at 75; S. Rep. No. 97-417, at 29, 1982 U.S.C.C.A.N. at 207. (R: Vol. 5, dkt. 154, p. 96, n. 96) ("The court finds, based upon the foregoing, that the slating of Earl Jennings in the 1980 election is not enough by itself 'to permit that the candidate slating process in Liberty County is open to blacks.'") The court grounded its conclusion that blacks have had access to Liberty County's slating process in the electoral success of Earl Jennings, and the uncontradicted evidence of his prior successful slating in the 1980 elections, and the obvious support received by Plaintiff, Solomon. That conclusion, amply supported by the evidence, is not subject to reversal by this Court, even if it were

convinced that, if it were sitting as the trier of fact, it would have weighed the evidence differently. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

Appellants' attempts to convince this Court otherwise are similarly unavailing. Appellants place great weight on their allegation that Earl Jennings was not the candidate of choice of black voters. Appellants, however, support this naked conclusion with nothing but supposition and conjecture, hardly a substitute for hard evidence. Prior to this Court's en banc remand in 1990, the Appellants took an entirely different position with regard to Earl Jennings. At that time, Jennings had not been elected, and his lack of electoral success was therefore included as a valuable piece of evidence in their favor. Only when Jennings was successfully elected three times did they reverse their position and suddenly begin to question whether he was actually the candidate of choice of black voters.

Prior to Jennings' success in 1990, at Appellants' urging, every member of this Court had concluded that the Gingles preconditions had been established as a matter of law. Included in that conclusion was the fact that black voters in Liberty County are politically cohesive, evidencing a "manifest preference for those black candidates that have presented themselves." Solomon II, 899 F. 2d at 1021 (Kravitch, J., concurring). Now when it best suits their interests to disavow Jennings as a candidate

of choice, the Appellants quickly change their tune, claiming without any supporting evidence that Jennings was simply not the candidate of choice of black voters.

If this is true, however, then this Court's prior en banc decision is based on erroneous evidence. If Earl Jennings was not the candidate of choice in the three elections in which he participated, and which formed the basis of extensive analysis in the district court's first opinion, then it follows as the day the night, that in each of the elections in which Jennings was a candidate, the black voters succeeded in electing their candidate of choice. If it was not Jennings, it could only have been his opposition. The Appellants cannot have it both ways. Either Jennings was the candidate of choice, in which case his subsequent three electoral successes are powerful evidence that there is no vote dilution; or Jennings was not the candidate of choice, in which case there was no factual basis from which the prior en banc Court could have concluded that black voters are politically cohesive. Appellants chose to rely on Jennings' lack of electoral success as a prime indicator of vote dilution. Having taken that position, they cannot now, based on supposition and conjecture, ask this Court to reverse a factual finding which is based in part on the supposed truth of their original position.

Moreover, it is clear that, prior to Jennings' success in 1990, Appellants took the position that he was in fact the minority's preferred candidate. Their Initial Brief

to the first panel of this Court presented a table of election results, listing the "minority preferred candidate" or "Black Candidate" against the "White Candidate[s]." Jennings is thrice listed as the minority preferred candidate under this heading. Brief for Appellant at 39-41, Solomon v. Liberty County, 865 F. 2d 1566 (11th Cir. 1988) (reproduced in Appendix "A"). Having taken a diametrically opposed position in the prior appeal, Appellants are estopped to argue otherwise on this appeal. See McKinnon v. Blue Cross & Blue Shield of Ala., 935 F. 2d 1187, 1192 (11th Cir. 1991) ("'Judicial estoppel is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings.'"), quoting American Nat'l Bank v. Federal Dep. Ins. Corp., 710 F. 2d 1528, 1536 (11th Cir. 1983) (citation omitted).

The Appellants' reversal of their position with regard to Jennings also undercuts their claim that the "white family groups slated and engineered the election of Jennings only after this case was filed and remanded." Initial en banc Brief at 31. Again, Appellants want to have it both ways. If Jennings is unsuccessful, it is because the white power structure has used its bloc voting power to dilute the black vote. If he is thereafter successful, then it is only because the white power structure saw Jennings as a safe candidate, who could be placed on the County Commission, serving as their puppet. This position is disingenuous and should be taken for what

it is. "Where there are two permissible views of the evidence,[2] the factfinder's choice between them cannot be clearly erroneous." Anderson, 470 U.S. at 574, citing United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949). The district court's conclusion was not clearly erroneous.

B. THE DISTRICT COURT DID NOT CLEARLY ERR IN DETERMINING THAT SENATE FACTOR 7 WEIGHED IN DEFENDANTS' FAVOR.

Senate factor 7 asks the extent to which members of the minority group have been elected to public office in the jurisdiction. Again, the underpinnings of Appellants' claim on this point are dubious. Seizing on a footnote in this Court's opinion in Davis v. Chiles, 139 F. 3d 1414, 1417 n.2 (11th Cir. 1998), cert. denied, 526 U.S. 1003 (1999), Appellants declare that "[e]lections of minority candidates during the pendency of Section Two litigation ... have very little probative value." Initial en banc Brief at 19. Even in the absence of the insertion of the word "very" in this supposed quote,[3] this statement is taken out of context and ignores clear

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[2] This statement is generous to the Appellants. As the record reflects, Appellants submitted no evidence to back their allegations that Jennings' success was engineered by a white power structure to defeat this suit. Thus, the district court did not actually take a differing view of the "evidence." It merely concluded, based on Appellants' failure to submit proof on the issue, that Jennings election was bona fide.

[3] Note 2 of the Davis v. Chiles opinion actually states, "Elections of minority candidates during the pendency of Section Two litigation, however, have little

language contained in the Senate Report, as well as decades of case law on which the Report was based.

As explained, supra, Part I, the Supreme Court's position with regard to minority electoral success during the pendency of Section Two litigation is as follows: while such evidence is probative in the defendant's favor, it does not automatically defeat a Section Two claim. Moreover, the sustained electoral success of Earl Jennings is highly probative of lack of dilution. As the Supreme Court explained in Gingles:

> The District Court did err, however, in ignoring the significance of the sustained success black voters have experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.
>
> 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 have not done so here.

Gingles, 478 U.S. at 77 (internal footnote omitted). The instant case is no different. Since this Court's prior en banc remand, Earl Jennings has been consistently reelected

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probative value." Davis, 139 F. 3d at 1417, n.2.

to office. His electoral success, resulting in proportional representation,[4] severely undermines Appellants' claim that they have been denied the opportunity to elect representatives of their choice.

In sum, the district court did not clearly err in weighing recent black electoral success in favor of the Defendants. Its conclusion was based on undisputed competent and substantial evidence. The only "contrary evidence" which existed is Appellants' naked assertion that Jennings was not the candidate of choice of the black community. As explained above, this claim, which is in direct contradiction to their previous position taken in this very litigation, was properly rejected by the district court. Because a contrary conclusion by this Court would "duplicate the role of the lower court," Anderson, 470 U.S. at 573, the district court's finding in this regard should not be disturbed on appeal.

C. THE DISTRICT COURT DID NOT CLEARLY ERR IN WEIGHING SENATE FACTOR 9 IN FAVOR OF THE DEFENDANTS.

Senate factor 9 asks whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard,

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[4] Minorities have, since 1990, achieved near perfect proportional representation on the County Commission. While it is true that the same cannot be said with regard to the School Board, the point is that minorities have achieved sustained electoral success for the last decade in Liberty County.

practice,or procedure is tenuous. See Gingles, 478 U.S. at 37; S. Rep. No. 97-417 at 29 (1982), reprinted in, 1982 U.S.C.C.A.N. at 207. If the court finds that the practice or procedure in question (in this case, the use of at-large voting districts) is based on an intent by the government to discriminate against the minority, then the policy is tenuous. See United States v. Marengo County Comm'n, 731 F. 2d 1546, 1571 (11th Cir. 1984), aff'd without opinion, 811 F. 2d 610 (11th Cir. 1987). In this case, the district court found that Liberty County's use of at-large voting districts was based on a change in 1953 from single-member districts in response to a citizen's reform movement to abolish the corrupt ward-type political system which had previously existed. (R: Vol. 5, dkt. 154, p. 110). Thus, it concluded, the policy was not tenuous. The district court further considered the County's recent referenda elections which were held to decide whether the County's electoral system should be changed from at-large to single-member districts. Since these referenda were defeated soundly, with roughly 60 percent of blacks opposing the change, the court further concluded that the policy underlying the maintenance of at-large districts could not possibly be tenuous. Id. at 112.

The district court's analysis was correct and accordingly cannot be reversed under the clearly erroneous standard. As a threshold matter, it is difficult to fathom how a court could conclude that the policy underlying the use of at-large elections in

Liberty County could be tenuous when the class sought to be protected by this case has rejected the remedy these plaintiffs seek. If the policy ever was tenuous, it certainly cannot be considered tenuous now, and the district court correctly so held. With the benefit of a county-wide vote rejecting single-member districts, the district court was able to resolve this question without any speculation. There is only one policy underlying the use of at-large districts in Liberty County: at-large elections are what the voters of Liberty County want.

In the panel opinion reversing the district court, Judge Hatchett rejected this evidence as probative of the existence of a tenuous state policy. Seizing on prior language in the first panel opinion, he stated, "Whether the protected class supports the challenged system, however, is irrelevant in determining whether the system is based upon a discriminatory policy." Solomon v. Liberty County, 166 F. 3d 1135, 1150 (11th Cir. 1999), citing Solomon v. Liberty County, 865 F. 2d at 1566, 1584 (11th Cir. 1988), vacated, 873 F. 2d 248 (11th Cir. 1989) ("[C]lass opposition to the remedy that may result from the successful litigation of a section 2 claim is irrelevant in weighing the totality of the circumstances.") This broad statement finds no support in any precedents of this Court, or of the Supreme Court.[5]

[5] While the rule is based on an accurate quote of the original panel opinion, that opinion was vacated by the en banc court. Moreover, the original panel opinion cited no authority for this broad proposition. See Solomon v. Liberty County, , 865 F. 2d

In fact, the language relied upon by Judge Hatchett in support of this far-reaching statement was not made in response to the evidence before the district court on remand, namely that the voters had emphatically rejected by referendum vote, the very remedy sought to be imposed by these plaintiffs. The statement made in the panel opinion was based on a claim by the Defendants that "many members of the plaintiff class, and some of the named plaintiffs, have either become equivocal or are downright opposed to the maintenance of this lawsuit." Solomon I, 865 F. 2d at 1584. That is a far cry from an actual vote, conducted in accordance with law, as to whether to implement the remedy sought in this case.

Moreover, the electorate's decision to reject single-member districts may well be based on a concern that, if the minority is confined to a single district, the remaining four members of the Commission will have no reason to consider their interests. Judge Hill explained this phenomenon in his concurring opinion in Solomon II:

> In a democracy, elected office holders tend to advance the interests of their electorate. They have no political motivation or pressure to represent other members of the population within their state, district, county or etc. The office holder's official fate is in the hands of those who vote and they can--and historically do--demand

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1566, 1571 (11th Cir. 1988), vacated, 873 F. 2d 248 (11th Cir. 1990), cert. denied, 498 U.S. 1023 (1991).

> responsiveness. ... By gerrymandering district lines so as to encircle the black voters, blacks are prevented from being a part of the separate electorates of, usually, a majority of those to be elected. ... Where, on one board, council or commission, an issue arises with racial overtones, the members with white constituencies have no political reason to seek a middle ground and those whose electorate is black are politically compelled to resist compromise--to resist being seen as Uncle Tom. Polarization is not tempered by the new political arrangement; it is compelled by it.

Solomon v. Liberty County, 899 F. 2d 1012, 1038-39 (11th Cir. 1989) (en banc), cert. denied, 498 U.S. 1023 (1991) (Hill, J., concurring) (internal footnotes omitted). Judge Hill's opinion highlights the danger of imposing a single-district electoral scheme on an unwilling minority group. Because Commissioners elected from the other four districts have no reason to advance the interests of the minority group, the minority group is left with less power at the polls than it possessed under the at-large scheme.

Faced with a vote by the electorate of Liberty County rejecting a change to single-member districts, the district court made the only conclusion which could reasonably have been made under the circumstances, i.e., that the policy is not tenuous. To conclude otherwise would make a mockery of the Voting Rights Act itself, which seeks to assure that no vote goes uncounted. The Appellants would have this Court invoke its equitable powers to nullify completely the votes cast by the

electorate of Liberty County with regard to single-member districting. There can be no stronger case of vote dilution.

If the Voting Rights Act means anything, and thirty years of intense litigation suggests that it does, it certainly means that the polity's decision by affirmative vote with regard to single-member districting is to be respected, and not simply cast aside by a federal court, on the basis that it knows better than the voters what is best for them. This type of paternalism runs directly counter to the policy underlying the Voting Rights Act, and cannot be permitted to stand. The district court's conclusion in this respect is not clearly erroneous.

POINT IV

THE DISTRICT COURT DID NOT CLEARLY ERR IN DETERMINING THERE WAS NO DILUTION OF MINORITY VOTING STRENGTH IN LIBERTY COUNTY'S AT-LARGE ELECTIONS FOR THE SCHOOL BOARD BASED UPON EARL JENNINGS' ELECTION TO THE COUNTY COMMISSION, EVEN THOUGH PLAINTIFF PRESENTED CONTRARY EVIDENCE.

The Court has instructed the parties to brief the above issue. While the undersigned do not represent the Appellee School Board, we will nonetheless address this issue as requested by the Court.

The district court properly found that minority voting strength in Liberty County's at-large school board elections was not diluted based upon the totality of the circumstances, not solely upon the electoral success of Earl Jennings. The district court's opinion conducts a thorough and searching examination of the past and present reality of the electoral system in Liberty County, and concludes that minority voting strength is not diluted. This blended analysis is proper, because the factual basis underlying both the County Commission and School Board elections is identical. The districts are identical; the voters are identical; both use an at-large scheme, with candidates running for a seat in their residence district; and both concern the identical geographical area. In sum, the analysis with regard to the County Commission elections is identical to the analysis regarding the School Board.

As stated previously, the District Court did not err in its overall analysis of Appellants' vote dilution claim. The court considered all evidence presented, and reached a decision based thereon. Its ultimate conclusion of no vote dilution is also subject to the clearly erroneous standard of review. See Gingles, 478 U.S. at 79. Because the court's decision is based on all the evidence presented, under the totality of the circumstances, and no error of law has been demonstrated by the Appellants, the district court's ultimate decision is not clearly erroneous.

Moreover, regardless of whether the School Board is analyzed separately from the County Commission, or both are analyzed together, the conclusion would be no different. If the County Commission is considered in isolation, then there is no doubt that minority voters in Liberty County are proportionately represented, as the district court properly found. Proportional representation alone is virtually enough to defeat a Section Two claim. See Id. at 77. Since the election scheme for the School Board is identical in all respects to that of the County Commission, as a matter of law, there can be no dilution with respect to the School Board. Any contrary result would be anomalous and logically inconsistent, since one electoral scheme cannot be both violative of and compliant with the Voting Rights Act.

On the other hand, if the two are analyzed together, the conclusion does not change. Conceding, arguendo, that the proportionality inquiry would lead to a finding that minorities are not represented in proportion to their numbers, as Appellants suggest, Appellants have still failed to demonstrate vote dilution under the totality of the circumstances. The sustained electoral success of Earl Jennings, coupled with minority access to candidate slating, and the electorate's clear rejection of the single-district scheme, would still be sufficient evidence from which the district court could properly find in favor of the Defendants. The only difference would be a lack of proportional representation, a right which Congress has unquestionably

declared does not exist under the Voting Rights Act. See 42 U.S.C. § 1973(b) (1982).

Furthermore, there is no evidence in this record that any black candidate has run for a seat on the School Board since 1984. There is no dispute that black voters are capable of having their names placed on the ballot, as evidenced by the candidacies of Charles Berrium, Earl Jennings, Greg Solomon, Stafford Dawson, and Helen Hall. Solomon v. Liberty County, 166 F. 3d 1135, 1143 (11th Cir. 1999), vacated, 206 F. 3d 1054 (11th Cir. 2000). It is fundamental to a Voting Rights case that, in order to prove dilution, some minority candidate must run for election. That is the only factual difference between the County Commission elections and the School Board elections. Since no minority has run for a seat on the School Board in over a decade, Appellants cannot possibly claim their votes have been diluted with regard to the School Board. The undisputed evidence shows that, in the only governmental body in which minority candidates actually run for office, they have achieved proportional representation. Thus, the district court's ultimate finding of no vote dilution with regard to both bodies is not clearly erroneous, and must be affirmed.

CONCLUSION

Appellants have cited no erroneous application of the law in this case. The district court conducted a thorough and searching practical evaluation of the present

and past reality in Liberty County, and ultimately concluded that Appellants did not prove their case. Since the court's conclusions rest on competent substantial evidence, and its own assessment of the credibility of witnesses, this Court must defer to the district court's conclusions, even if convinced that, had it sat as the trier of fact, it would have reached a different conclusion. Appellants having demonstrated no reversible error, the judgment below should be AFFIRMED.

Respectfully submitted,

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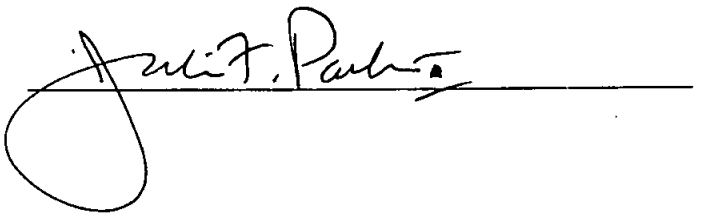
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to DAVID LA CROIX, ESQUIRE, 420 West Olympia Avenue, Punta Gorda, Florida 33950; ROBERT B. McDUFF, ESQUIRE, 767 North Congress Street, Jackson, Mississippi, 39202; and J. C. O'STEEN, ESQUIRE, 177 Salem Court, Tallahassee, Florida 32301, this 11th day of May, 2000.



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and the record include no analytical evidence of such differences, this would have minimal effect on Dr. St. Angelo's calculations given the ease to clearly discern the electoral behavior of the vast majority of whites who live outside Precincts 1 and 2 in the literally all-white homogenous Precincts 3, 4, 5, 6, and 7 (92.8% of the white registered voters of Liberty County reside in Precincts 3-7).

As the following chart reflects, when separating the mixed white precinct from the literally all white precincts No. 3, 4, 5, 6, and 7, it is irrefutably established that whites in every case did vote as a bloc sufficiently to defeat the minority preferred candidate in the critical white vs. black countywide elections:

1968 SCHOOL BOARD FIRST PRIMARY
May 7, 1968

REGISTERED DEMOCRATIC VOTERS						E L E C T I O N R E S U L T S				
Prec.	Total	White	(%)	Black	(%)	Black Candidate (Berrium)	(%)	Three White Candidates	(%)	Total Votes*
1	322	158	(49%)	164	(51%)	138	(53%)	124	(47%)	261
2-7	1890	1848	(98%)	42	(2%)	94	(7%)	1343	(93%)	1437

Source: P.Ex. 10, Table 1
*Excludes abesentee ballots.

1980 FIRST PRIMARY
SCHOOL BOARD - DISTRICT 1
September 9, 1980

REGISTERED DEMOCRATIC VOTERS E L E C T I O N R E S U L T S

Prec.	Total	White	(%)	Black	(%)	Black Candidate (Jennings)	(%)	Four White Candidates	(%)	Total Votes*
1-2	462	196	(42%)	206	(58%)	112	(33%)	224	(66%)	336
3-7	2732	2677	(98%)	55	(2%)	376	(19%)	1560	(81%)	1935

Source: P.Ex. 4, Fact 26

1980 SECOND PRIMARY
SCHOOL BOARD - DISTRICT 1
October 7, 1980

REGISTERED DEMOCRATIC VOTERS E L E C T I O N R E S U L T S

Prec.	Total	White	(%)	Black	(%)	Black Candidate (Jennings)	(%)	White Candidate (Hornsby)	(%)	Total Votes*
1-2	462	196	(42%)	266	(58%)	160	(51%)	151	(49%)	311
3-7	2732	2677	(98%)	55	(2%)	759	(40%)	1037	(60%)	1796

Source: P.Ex. 4, Fact 27

1984 FIRST PRIMARY
COUNTY COMMISSIONER - DISTRICT 1
September 4, 1984

REGISTERED DEMOCRATIC VOTERS E L E C T I O N R E S U L T S

Prec.	Total	White	(%)	Black	(%)	Black Candidate (Solomon)	(%)	Three White Candidates	(%)	Total Votes*
1-2	458	179	(39%)	279	(61%)	161	(56%)	127	(44%)	288
3-7	2322	2281	(98%)	41	(2%)	277	(21%)	1019	(79%)	1296

Source: P.Ex. 4, Fact 30
*Excludes absentee ballots.

1984 FIRST PRIMARY
SCHOOL BOARD - DISTRICT 1
September 4, 1984

REGISTERED DEMOCRATIC VOTERS E L E C T I O N R E S U L T S

Prec.	Total	White	(%)	Black	(%)	Black Candidate (Jennings)	(%)	Three White Candidates	(%)	Total Votes*
1-2	458	179	(39%)	279	(61%)	176	(52%)	162	(48%)	338
3-7	2322	2281	(98%)	41	(2%)	302	(17%)	1476	(83%)	1778

Source: P.Ex. 4, Fact 31

1984 SECOND PRIMARY
COUNTY COMMISSIONER - DISTRICT 1
October 2, 1984

REGISTERED DEMOCRATIC VOTERS E L E C T I O N R E S U L T S

Prec.	Total	White	(%)	Black	(%)	Black Candidate (Solomon)	(%)	White Candidate (Johnson)	(%)	Total Votes*
1-2	458	179	(39%)	279	(61%)	225	(70%)	95	(30%)	320
3-7	2322	2281	(98%)	41	(2%)	508	(35%)	950	(65%)	1458

Source: P.Ex. 4, Fact 32
*Excludes absentee ballots.

260 320

III. THE DISTRICT COURT ERRONEOUSLY CONSIDERED AND RELIED UPON FACTS AND CIRCUMSTANCES NOT PROBATIVE OF A SECTION 2 VIOLATION

The District Court erred by considering and relying upon factual circumstances not probative of a Section 2 violation as a basis to conclude that Liberty County's and the School Board's at-large election system does not violate Section 2.

1. 11% BLACK POPULATION

The trial court improperly gave outcome determinative weight to considerations which are not indicative of vote