**UNITED STATES OF AMERICA**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA**, | ) | |
| | ) | |
| **Plaintiff**, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| **CITY OF EASTPOINTE; EASTPOINTE CITY COUNCIL; SUZANNE PIXLEY**, in her official official capacity as Mayor of Eastpointe; **CARDI DEMONACO JR., MICHAEL KLINEFELT, SARAH LUCIDO**, and **JOHN MARION** in their official capacities as members of the Eastpointe City Council; and **STEVE DUCHANE**, in his official capacity as Eastpointe City Clerk, | ) | Civil Action No. 4:17-cv-10079 |
| | ) | |
| **Defendants**. | ) | |

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

The Plaintiff United States of America Department of Justice alleges the City of Eastpointe ("Eastpointe") is liable under Section 2 of the Voting Rights Act, 52 U.S.C. §§ 10301 because black voters have an unequal opportunity to elect candidates of their choice.
For liability, Plaintiff must establish "the white majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate." *Thornberg v. Gingles*, 478 U.S. 30, 51 (1986).

In a surprising turn of events, Plaintiff admits to the identities of the black-preferred candidates and to the facts that demonstrate they are not usually defeated. Those admissions definitively demonstrate that black-preferred candidates are not usually defeated as required for the third *Gingles* precondition. Those admissions alone are sufficient for summary judgment. They are the material facts that neither party disputes.

Plaintiff attempts to distract the Court from the success of black-preferred candidates by emphasizing perceived factual nuances of each election; injecting the race of the candidate (instead of minority voters' preferences) into the analysis; and criticizing Eastpointe's case-by-case analysis of individual elections. While conditions surrounding an election are relevant in the totality of the circumstances analysis, they are not part of the third precondition. While Plaintiff argues the Court should only consider the race and success of black candidates, the law says black voters' preferences and not the race of the candidates are the issue. Finally, Plaintiff fails to offer a logical alternative to Eastpointe's case-by-case approach.

Summary judgment is most appropriate for the simple reason that black-preferred candidates are usually elected. Plaintiff attempts every possible diversion to obfuscate that success. Ultimately, the third *Gingles* precondition cannot be met under any circumstances.

## II. DEFENDANTS' RESPONSE TO PLAINTIFF'S COUNTER-STATEMENT OF MATERIAL FACTS

### a. Dr. Handley's Illustrative City Council District Map

121. Not controverted by Defendants. Deemed admitted.

122. Not controverted by Defendants. Deemed admitted.

123. Not controverted by Defendants. Deemed admitted.

124. Dr. Handley provided an illustrative map in which black residents have a two-person majority of the voting age population in one of the four districts. Defendants' Ex. 7, Handley Dep. 71:2-7.

125. Not controverted by Defendants. Deemed admitted.

126. Defendants admit the boundaries Plaintiff asserts are correct.

### b. Dr. Handley's Analysis of Voter Preferences

127. Not controverted by Defendants. Deemed admitted. However, the citation fails to refer to an exhibit. Assuming the exhibit is Plaintiff's Ex. 2, the statements are admitted.

128. Eastpointe admits Dr. Handley's report makes the cited statements.

129. Eastpointe admits Dr. Handley maintains she was unable to use BISG prior to 2013. Eastpointe admits Dr. Handley's purported reason for her failure to use BISG is a lack of data.

130. Eastpointe cannot find reference to this fact from the citation provided.

131. Eastpointe admits Dr. Handley made that conclusion.

132. Eastpointe admits the cited portions of Dr. Handley's reports are criticisms of Dr. Jeffrey Zax's analysis. No portion of the reports cited state Dr. Zax's analysis does not withstand "scrutiny or critique."

133. Eastpointe's expert analyzed each candidate in each election and discusses black voters'

top preference in elections with one seat or preferences in elections with two seats to provide an overall summary. See generally, Def. Ex. 4; See specifically Def. Ex. 4, p. 8 and 11 as examples.

134. Not controverted by Defendants. Deemed admitted.

135. Eastpointe admits Dr. Handley's reports make the statements cited in this paragraph.

**c. Recent Eastpointe Elections (2015 – 2017)**

136. This citation references three tables with Dr. Handley's ACS and BISG analysis. There is no reference to cohesion and no support for this conclusion. The tables are merely numerical. In addition, the analysis refers to BISG methodology that is the subject of a contemporaneous *Daubert* motion. The motion demonstrates the BISG analysis is unreliable. This paragraph relies entirely on BISG analysis and should be struck if the *Daubert* motion is granted.

137. Defendants admit the first sentence. Plaintiff fails to provide a citation that reflects the accuracy of the second sentence.

138. Object to the form of this paragraph as it is not a short, concise paragraph pursuant to Rule 56 but instead contains a panoply of statements. To respond accordingly, Defendants offer the following:

a. <u>First sentence response:</u> Defendants admit Dr. Handley's reports indicates she made similar statements to the first sentence in this paragraph. However, to the extent the opinion relies on BISG analysis, it should be struck if the contemporaneous *Daubert* motion is granted.

b. <u>Second sentence response:</u> Plaintiff cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this statement should be struck. If denied, Duren's deposition indicates he campaigned on the instant litigation, churches and neighborhood watch to make the City of Eastpointe more secure. Plaintiff's Ex. 10, 26:12-23.

c. Third sentence response: Plaintiff cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this statement should be struck. If denied, the citation does not support the statement in the paragraph. Plaintiff's citation is to a numerical table that speaks for itself.

d. Fourth sentence response: Plaintiff cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this statement should be struck. If denied, Dr. Handley's report states "It is likely that some white case no second vote." There is no indication Dr. Handley made a definitive statement.

e. Fifth sentence response: Plaintiff cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this statement should be struck. If denied, Defendants admit Dr. Handley's reports makes similar statements to the one asserted.

139. Defendants admit the first sentence. The remainder of the assertions are not relevant to this motion and should be struck. They relate to the totality of the circumstances analysis.

140. These assertions are not relevant to this motion and should be struck. They relate to the totality of the circumstances analysis.

141. The first sentence cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this statement should be struck.

142. Not controverted by Defendants. Deemed admitted.

143. These assertions are not relevant to this motion and should be struck. They relate to the totality of the circumstances analysis.

144. This paragraph cites to Dr. Handley's BISG analysis. This analysis is subject to a *Daubert* motion for its lack of reliability. If granted, this paragraph should be struck.

145. Defendants admit the first three sentences. Defendants admit Klinefelt ran unopposed in a

special election for a two-year term following his June 2015 appointment.

146. Defendants admit the portions of the paragraph that do not rely on BISG analysis. The fourth and fifth sentences that relate to BISG are subject to a *Daubert* motion for lack of reliability. If granted, these sentences should be struck.

**d. Other Eastpointe Elections in the Last Ten Years (2009 – 2013)**

147. The 2009 City Council election included two black candidates and two white candidates. The 2011 City Council election included one black candidate and three white candidates. Plaintiff's Ex. 2, p. 23. The 2013 City Council election included four white candidates. Plaintiff's Ex. 2, p. 32. Dr. Handley's analysis indicates that white candidates received higher point estimates than black candidates from black voters. Plaintiff's Ex. 2, 16, 19, 24, 32.

148. Defendants admit the portions of the paragraph that do not relate to the BISG analysis. The portion that relates to the BISG analysis is subject to a *Daubert* motion for reliability. If granted, that portion should be struck.

149. Defendants admit the first sentence. The remainder of the assertions are not relevant to this motion and should be struck. They relate to the totality of the circumstances analysis.

150. Not controverted by Defendants. Deemed admitted.

151. Not controverted by Defendants. Deemed admitted.

152. Not controverted by Defendants. Deemed admitted.

153. Not controverted by Defendants. Deemed admitted.

**e. Other Interracial Contests in Eastpointe**

154. The source of this statement is unclear. The citation to Dr. Handley's report, page 17, refers to "seven recent non-city council elections." The Plaintiff's statement refers to "eight other contests." Defendants cannot ascertain the specific elections or contests referred to in this

paragraph.

155. Plaintiff's exhibits 25 and 26 fail to contain the year in which the election occurred and cannot be independently admitted. However, Defendants admit the numbers in the documents correspond to the numbers Plaintiff provides in this paragraph.

156. Defendants admit the first three sentences. The last sentence is irrelevant to this motion and should be struck. It is subject to the totality of the circumstances analysis.

157. Dr. Handley's report indicates Washington's point estimate among black voters was 41.2 which is less than most of the black voters. Defendants admit the remainder of the paragraph.

158. Dr. Handley's analysis in the East Detroit School Board election in November 2014 indicates that DeVita received the highest point estimate at 34.6 according to ecological regression. Dr. Handley's ecological inference estimate indicates Jackson received the highest point estimate at 34.0. Plaintiff's Ex. 2, Table 5, p. 25. The portion of the paragraph that relates to the BISG analysis is subject to a *Daubert* motion for reliability. If granted, that portion should be struck.

159. The entire paragraph relies on BISG analysis that is subject to a *Daubert* motion for its lack of reliability. If granted, this paragraph should be struck.

160. Not controverted by Defendants. Deemed admitted.

161. Not controverted by Defendants. Deemed admitted. However, the portion of the paragraph that relies on BISG is subject to a *Daubert* motion for its lack of reliability. If granted, that portion should be struck.

162. Not controverted by Defendants. Deemed admitted.

163. Dr. Handley's analysis for the November 2010 Michigan Supreme Court election indicates Morris' point estimate was 35.6 – 41 percent among black voters. Davis, a white

candidate, received a point estimate from 24.7 to 26.5 from black voters. Kelly, another white candidate, received a point estimate from 18.7 to 20.9. The remaining black candidate, Young, received a point estimate from 12 to 15.4 from black voters. Eastpointe admits the remainder.

**f. The Defeat of Black-Preferred Candidates by White Bloc Voting**

164. Defendants admit Dr. Handley's reports make the statements cited in this paragraph.

165. Plaintiff's citation is incorrect. If Plaintiff is citing to Plaintiff's Ex. 2, then the first page fails to mention black voters' support of black candidates and the second page is Dr. Handley's Professional Background and Experience. See, Plaintiff's Ex. 2 pages 1-2. The second citation to pages 15-21 of Dr. Handley's report fails to include an analysis or conclusion regarding black voters' support for black candidates.

166. Dr. Handley's report states "Black voters were *usually* cohesive in support of their candidates…" Plaintiff's Ex. 2, p. 1. Plaintiff omits the word usually.

167. Not controverted by Defendants. Deemed admitted.

168. This paragraph is a legal conclusion inappropriately labelled as a fact.

**g. Eastpointe Has an Extensive History of Discrimination.**

Defendants cannot ascertain any reason for the inclusion of these paragraphs. Analysis of whether Eastpointe has a history of discrimination is the first factor in the totality of the circumstances analysis. See, *Gingles* 478 U.S. at 37. The instant motion refers to the *Gingles* preconditions. They are completely separate examinations. Since these assertions are completely irrelevant to the issues in this motion, paragraphs 169 through 178 should be struck in their entirety. They are not responsive or even related to any argument in Defendants' Motion for Summary Judgment.

## III. ARGUMENT

### a. Plaintiff's evidence demonstrates they fail to meet the third *Gingles* precondition.

"*Gingles* teaches that the success of minority-preferred candidates is the standard of evaluation for purposes of the third pre-condition." *Cousin v. Sundquist,* 145 F.3d 818, 825 (6th Cir. 1998) Unless black voters "experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability to elect." *Valladolid v. City of National City,* 976 F.2d 1293, 1296 (9th Cir. 1992). "A fifty-percent rate of success for the candidates of choice of the African-American community does not clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice." *Anthony v. Michigan,* 35 F.Supp.2d 989, 1006 (E.D.MI 1999). *Anthony* holds that Plaintiff could not meet the third *Gingles* precondition when black-preferred candidates were successful 50% of the time "as a matter of law." *Id*. at 992.[1]

### b. Plaintiff admits black-preferred candidates win 60% of the time in the most probative endogenous elections.[2]

Plaintiff's Brief in Opposition ("Doc. #38") demonstrates the parties agree on many things. First, the parties agree that Eastpointe City Council elections involving black and white candidates are most probative. See, Doc. #38 p. 23 citing *Bone Shirt v. Hazeltine,* 461 F.3d 1011 (8th Cir. 2005). According to Plaintiff, there have been six contests for Eastpointe City Council that involve black and white candidates. See, Doc. #38, Table 1, p. 34. Having agreed on the most relevant elections for analysis, the question becomes the identities of the black-preferred

[1] *Anthony* was decided on a motion for summary judgment on the third *Gingles* precondition.
[2] "Endogenous races are elections in a single district which are held to elect that district's legislative seats." *Bone Shirt,* 461 F.3d fn 8. In this case, elections for Eastpointe City Council are endogenous elections.

candidates. The parties agree on their identities. The final question is whether the black-preferred candidates are usually defeated. *Id*. at 1020. The answer to that is objectively established in the agreed-upon election results.

Table 1 in Plaintiff's Doc. #38, p. 24 provides objective proof of their failure to meet the third precondition. The table below is a reproduction of the table in Plaintiff's Brief. (Note that black and white voters agree on many of their top choices.) The summary table was generated by Eastpointe.

**Table 1: Interracial City Council Contests[3]**

| Election | Black-Preferred Candidates | White-Preferred Candidates | Elected Candidates |
|---|---|---|---|
| 2017 Regular | Johnson (B)<br>Owens (B) | DeMonaco (W)<br>Williams (B) | DeMonaco (W)<br>Owens (B) |
| 2017 Special | Gladney (B) | Klinefelt (W) | Klinefelt (W) |
| 2015 Regular | Bibb Williams (B)<br>Lucido (W) | Lucido (W)<br>Marion (W) | Lucido (W)<br>Marion (W) |
| 2015 Special | Owens (B) | DeMonaco (W) | DeMonaco (W) |
| 2011 Regular | Guastella (W)<br>LaForest (W) | LaForest (W)<br>Guastella (W) | LaForest (W)<br>Guastella (W) |
| 2009 Regular | Sweeney (W)<br>Richardson (W) | Sweeney (W)<br>Richardson (W) | Sweeney (W)<br>Richardson (W) |

**SUMMARY OF PLAINTIFF'S TABLE 1: Interracial City Council Contests**

| | | | |
|---|---|---|---|
| **Total Candidates Elected** | 6 | 9 | 10 |
| **Percent of Winning Candidates** | **60%** | 90% | 100% |

The above table is a complete analysis of the third precondition. It provides: 1) the most probative elections; 2) the black-preferred candidates' identities; and 3) the winning candidates' identities. From these mutually agreed facts, the Court can objectively quantify that black-

[3] Plaintiff's Table 1 is based on its BISG analysis. That analysis is the subject of a contemporaneous *Daubert* motion for being an unreliable methodology.

preferred candidates are successful in 60% of the most probative elections.[4]

**c. Plaintiff admits black-preferred candidates win 66% of the time in the most probative exogenous elections.[5]**

Plaintiff argues the next most probative elections are exogenous elections that include black and white candidates. See, Doc. #38, p. 25 adopting categories from Dr. Handley's testimony. Defendants concede that point only for purpose of this motion but the results are the same in any set of elections.[6] Black-preferred candidates usually win.

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[4] Compare Plaintiff's Table 1, p. 24 in Doc. #38 with Defendants' Table labelled "Endogenous Elections with Black and White Candidates (BISG/ACS)" in their Memorandum in Support of Summary Judgment, p. 15. The tables are identical except Eastpointe provides two summary rows at the end.

[5] "Exogenous elections are elections in a district for positions that are not exclusively representative of the district…" *Bone Shirt*, 461 F.3d fn. 9.

[6] Caselaw is not clear as to whether exogenous elections involving black and white candidates are more probative than endogenous elections involving only white candidates.

The following table is also taken from Plaintiff's Brief. See, Doc. #38, p. 34, Table 2. Again, black and white voters often agree on their most preferred candidates.

**Table 2 – Interracial School District, County and State Elections**[7]

| Election | Black-Preferred Candidates | White-Preferred Candidates | Most Votes in Eastpointe / Advanced from Primary |
|---|---|---|---|
| Nov. 2009 EDPS | Washington (B)<br>Wodecki (W)<br>Seibert (W) | Wodecki (W)<br>Seibert (W)<br>Gruenberg (W) | Wodecki (W)<br>Seibert (W)<br>Gruenberg (W) |
| Nov. 2014 EDPS | Jackson (M)<br>DeVita (W)<br>Borsa (W) | DeVita (W)<br>Borsa (W)<br>Jackson (M) | DeVita (W)<br>Borsa (W)<br>Jackson (M) |
| Nov. 2016 Macomb Cir. Ct. (general) | Dennings (B)<br>Servitto (W) | Servitto (W)<br>Rancilio (W) | Servitto (W)<br>Dennings (B) |
| Aug. 2016 Macomb Cir. Ct. (primary) | Dennings (B)<br>Servitto (W) | Servitto (W)<br>Rancilio (W) | Servitto (W)<br>Rancilio (W)<br>Dennings (B)<br>Velardo (W) |
| 2012 MCCC | Jackson (M) | Cusumano (W) | Cusumano (W) |
| Nov. 2014 Mich. Supreme Ct. | Thomas (B) | Viviano (W) | Viviano (W) |
| Nov. 2012 Mich. Supreme Ct. | Johnson (B) | Zahra (W) | Johnson (B) |
| Nov. 2010 Mich. Supreme Ct. | Morris (B)<br>Davis (W) | Kelly (W)<br>Young (B) | Kelly (W)<br>Young (B) |

**SUMMARY OF PLAINTIFF'S TABLE 2: Interracial School District, County and State Elections**

| | | | |
|---|---|---|---|
| **Total Candidates Elected** | 10 | 14 | 15 |
| **Percent of Winning Candidates** | **66%** | 93% | 100% |

Again, the parties agree on the identities of the black-preferred candidates. The parties also agree on the number of elections within this category and the parties agree on the winning candidates. From these mutually agreed facts, the Court can objectively quantify that black-

[7] This table is based on Plaintiff's BISG analysis. That analysis is the subject of a contemporaneous *Daubert* motion for being an unreliable methodology.

preferred candidates win 66% of the time in exogenous elections involving both black and white candidates.[8]

**d. Plaintiff admits black-preferred candidates win 100% of the time in elections involving only white candidates.**

The Sixth Circuit makes it clear that endogenous elections with white candidates are part of the *Gingles* three analysis and must be considered. ("Dr. Cole's limiting his analysis to black/white elections thus focuses his inquiry too narrowly." *Cousin*, 145 F.3d at 825.)

The Sixth Circuit has not detailed the amount of weight given to these elections except to say they are not as probative as endogenous elections involving minority candidates. *Rural W. Tenn.*, 209 F.3d 835, 840 (6th Cir. 2000). Nonetheless, these elections reinforce the findings from the most probative elections to provide assurance that black-preferred candidates usually win.

Plaintiff admits black-preferred candidates won 100% of the time in the portion of facts labelled "Endogenous Elections Involving White Candidate." See, Doc. #38, Appendix: Response to Statement of Undisputed Material Facts ¶78.

**e. Black-preferred candidates usually win even if the Court finds special circumstances.**

Plaintiff argues Monique Owens' election in 2017 occurred under "special circumstances" and has "little probative value." Doc. #38, p. 29. Plaintiff provides two reasons for this argument. First, they argue that since only one white candidate ran for an election with two seats, a black candidate had to win. Second, they argue Owens' election while this litigation was pending propelled her success. These reasons are not persuasive.

[8] Compare Plaintiff's Table 2, p. 34 in Doc. #38 with Defendants' Table labelled "Exogenous Elections Involving Black and White Candidates (BISG/ACS)" in their Memorandum in Support of Summary Judgment, p. 19. The tables are identical except Eastpointe provides two summary rows at the end.

Plaintiff argues Owens' success was due to special circumstances because "it was inevitable that a *black candidate* would be elected." Doc. #38, p. 29. (emphasis added) This argument highlights Plaintiff's misunderstanding of Section 2 litigation. While it is true that a black candidate would win, it cannot be said that a *black-preferred* candidate would win. In fact, there were five candidates and only two votes at issue. The chances were higher that a black-preferred candidate would *not* be elected. Plaintiff's attempt to equate the success of any black candidate with success of the black-preferred candidate "runs afoul of the principles embodied in the Equal Protection Clause." *Harvell v. Blytheville School Dist. No. 5,* 71 F.3d 1382, 1386 (1995).

Plaintiff also argues that Owens' election should be considered less probative because it occurred after this litigation. That argument is a double-edge sword. While Plaintiff seeks to discount Owens' election in 2017, they fail to alter the weight given to the other City Council members elected in 2017. In other words, if Owens' election is given less weight because it occurred after this litigation was instigated, the same should occur for all City Council members elected in 2017.

Eastpointe suggests that if this approach is taken, the Court should either discount the 2017 election in its entirety or give the entire election full probative value. Plaintiff's approach that only discounts the portion of the election to its disadvantage is inherently unjust.

Even if this Court finds Owens' election was due to special circumstances, Plaintiff has still not met the third *Gingles* precondition. A finding of special circumstances advises the court to view that one election "with some caution." *Gingles*, 478 U.S. at 76. Thus, even discounting Owens' election does not change the fact that black-preferred candidates' success is more than "minimal and sporadic." *Id*. at 60. *Gingles* advises courts to look at how the system "generally

works" for minority voters. *Id*. at 76.

## IV. Plaintiff's totality of the circumstances arguments are not relevant to analysis of the third *Gingles* precondition.

Plaintiff's would have this Court examine the circumstances surrounding each election in an attempt to distract the court from the success of black-preferred candidates. The circumstances of each election become relevant only after Plaintiff establishes each of the three *Gingles* preconditions. (If all three preconditions are established, then a court must "consider the 'totality of the circumstances' and [] determine, based 'upon a searching and practical evaluation of the past and present reality,' whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79.)

Plaintiff's Sections V(A), V(A)(1) and V(A)(3) of its Brief in Opposition are all attempts to distract this court from the relevant analysis. For example, Plaintiff's disparagement that black candidates were "little-known" and had "no real prospect of being elected" are circumstances appropriately considered if this Motion fails. See, Doc. #38, p. 30.)

As an aside, Eastpointe cannot discern Plaintiff's criticism that it fails to analyze elections on a case-by-case basis. See, Doc. #38, p. 25. Eastpointe provides analysis of each individual election and the identities of each black-preferred candidate. Further analysis would only delve into the totality of the circumstances – a distraction that is irrelevant.

## V. Plaintiff's focus on the race of the candidate over black voters' preference is contrary to Section 2 analysis.

Section 2 is focused on minority voters' preferences, not the race of the candidate. See, *Clay v. Board of Education of City of St. Louis*, 90 F.3d 1357, 1361-1362 (8th Cir. 1996) and fn. 10. The Supreme Court is definitive on this point. ("Under §2, it is the *status* of the candidate as the

*chosen representative of a particular racial group*, not the race of the candidate, that is important. *Id*. at 68 court emphasis) Rather than accepting the will of minority voters, Plaintiff would have the Court focus on the race of the candidate. This argument runs contrary to Section 2 analysis. [9]

Plaintiff claims Eastpointe violates Section 2 because black-preferred candidates can only win if they are white. They cite *Rural W. Tenn*., 209 F.3d at 840 as support for that proposition. See, Doc. #38, p. 23. However, that case is inapposite. The issue in *Rural W. Tenn.* was the probative value of exogenous elections and elections involving only white candidates. ("It is evident, therefore, that the court's decision as to whether whites generally vote as a bloc to defeat the black preferred candidate will turn on how much weight the court affords the white-white and exogenous elections." *Id*. at 456.) In this case, the parties agree exogenous and white only elections are probative, just not as much as Eastpointe City Council elections involving black and white candidates.

Plaintiff also relies on *Anthony* as support for its assertion that this court should focus on the race of candidates. See, Doc. #38, p. 22. Yet, Plaintiff admits the *Anthony* court "did not expressly note" the candidates' race. *Id*. Despite the Court's silence, Plaintiff claims the race of the candidate was the "relevant point" in the case. *Id*. Eastpointe's position is that courts are mindful of placing their opinions in writing. If a court wanted to make a relevant point then it would have written it down. Since *Anthony* was silent on the issue, Plaintiff's unsupported assertion that the court's "relevant point" was about the race of the candidate is conjecture. *Anthony*, 35 F.Supp.2d. (No pinpoint cite can be provided because the Court was silent on the

[9] Eastpointe admits the race of the candidate can be a consideration. *Harvell*, 71 F.3d at 1386. However, the cases that emphasize this consideration are ones in which the minority preferred candidates were almost always a member of that minority. See, *Harvell* finding that <u>every</u> black candidate was also black-preferred. *Id*.

issue.)

Finally, Plaintiff's emphasis on the candidate's race belies the will of black voters. In Eastpointe, black voters chose white candidates over black candidates 40 - 50% of the time. (The parties agree that Richardson, Sweeney, Guastella and LaForest are white candidates preferred over black candidates. While Plaintiff's ACS analysis agrees with Eastpointe that Lucido is the most preferred candidate for black voters, their BISG analysis identifies Bibb-Williams. Doc. #38, Appendix ¶51 and ¶59. For purposes of this motion, Eastpointe accepts Plaintiff's lower percentage.[10]) In this situation where black voters freely choose white candidates over black candidates, Plaintiff's attempt to demean that choice by emphasizing the race of the candidate is inappropriate.

## VI. CONCLUSION

For the reasons above, the City of Eastpointe respectfully requests this Court GRANT its Motion for Summary Judgment and all other relief as is just and proper.

Dated this 24th day of May, 2018.

Respectfully Submitted,

_/s/ Angela Bullock Gabel_____
Angela Bullock Gabel #58227MO
ABG Law Office
7710 Carondelet Ave., Suite 405
Clayton, MO 63105
(314)721-8844
agabel@abglawoffice.com

[10] Plaintiff's BISG analysis is subject to a *Daubert* motion as unreliable.

Richard S. Albright
Calvin C. Brown
Robert D. Ihrie
Ihrie O'Brien
24055 Jefferson Ave., Suite 2000
P.O. Box 420
St. Clair Shores, MO 48080
(586) 778-7778
ralbright@ihrieobrienlaw.com
cbrown@ihrieobreinlaw.com
ihriebob@aol.com

**CERTIFICATE OF SERVICE**

I, Angela Bullock Gabel, certify that on May 24, 2018, I filed the foregoing document using the e-filing system thereby serving electronic copies via email to all named parties below:

George Eppsteiner
Jasmyn G. Richardson
Daniel J. Freeman
U.S. Department of Justice
Voting Section, Civil Rights Division
950 Pennsylvania Ave., NW
NWB Room 7236
Washington, DC 20530
(202) 616-5777
George.eppsteiner@usdoj.gov
Jasmyn.richardson@usdoj.gov
Daniel.freeman@usdoj.gov

Luttrell Levingston
U.S. Department of Justice
211 W. Fort Street, Suite 2001
Detroit, MI 48226
(313) 226-9539
Luttrell.levingston@usdoj.gov

**DEFENDANTS' INDEX OF PRIMARY CASES**

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

1. *Anthony v. Michigan*, 35 F.Supp.2d 989 (E.D. MI 1999).
2. *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).

35 F.Supp.2d 989
United States District Court,
E.D. Michigan,
Southern Division.

Wendell ANTHONY, Joann Watson, individually and as President and Executive Director of the Detroit Branch of the NAACP, respectively, and the NAACP, Beulah Work, the Legal Aid and Defender Association, the National Bar Association and the National Conference of Black Lawyers, Plaintiffs,

v.

The State of MICHIGAN, Defendant.

No. 96–74626.
|
Feb. 16, 1999.

**Synopsis**
Individual registered voters in city of Detroit and organizational plaintiffs brought suit, challenging merger of Recorder's Court for city of Detroit with Wayne County Circuit Court. Upon state's motion for summary judgment, the District Court, Cohn, J., held that: (1) plaintiffs lacked standing to assert constitutional claims; (2) merger was not unconstitutional under Fourteenth and Fifteenth Amendments; and (3) merger did not violate Voting Rights Act.

Motion granted.

West Headnotes (7)

[1] **Election Law**
Judicial Review or Intervention

Whether an electoral system has diluted the voting power of a minority group is a factual question, as is whether such a system was adopted with racially discriminatory intent. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

Cases that cite this headnote

[2] **Federal Civil Procedure**
In general;injury or interest

To have standing, individual plaintiffs must show that: (1) they have suffered an injury in fact, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Cases that cite this headnote

[3] **Associations**
Actions by or Against Associations

To have standing, organizational plaintiffs must demonstrate: (1) that its members would otherwise have standing to sue in their own right; (2) that interests it seeks to protect are germane to the organization's purpose; and (3) that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Cases that cite this headnote

[4] **Constitutional Law**
Particular Questions or Grounds of Attack in General

Individual registered voters in city of Detroit and organizational plaintiffs lacked standing to assert constitutional challenges to merger of Recorder's Court for city of Detroit with Wayne County Circuit Court; plaintiffs did not articulate how they were particularly harmed as a result of the merger, and record was devoid of evidence of a concrete and particularized injury to either the individual or organizational plaintiffs. M.C.L.A. § 600.9931.

25 Cases that cite this headnote

  

[5] **Constitutional Law**
⇦ Fifteenth Amendment

**Constitutional Law**
⇦ Judges, regulation and discipline

**Constitutional Law**
⇦ Juries

**Courts**
⇦ Consolidation

Merger of Recorder's Court for city of Detroit with Wayne County Circuit Court was not motivated by potentially adverse consequences of the merger on the African–American judges of the Recorder's Court, as well as the jury pool, and therefore was not unconstitutional under Fourteenth and Fifteenth Amendments. U.S.C.A. Const.Amends. 14, 15; M.C.L.A. § 600.9931.

8 Cases that cite this headnote

[6] **Election Law**
⇦ Dilution of voting power in general

"Racial bloc" or "racially polarized" voting exists for purposes of Voting Rights Act where there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently. Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

Cases that cite this headnote

[7] **Election Law**
⇦ Dilution of voting power in general

Merger of Recorder's Court for city of Detroit with Wayne County Circuit Court did not violate Voting Rights Act since it could not be said that preferred non-incumbent candidates of the African–American community for the Wayne County Circuit bench were "usually" defeated within the meaning of *Gingles* and its progeny. M.C.L.A. § 600.9931; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

24 Cases that cite this headnote

**Attorneys and Law Firms**

***990** Melissa Z. El, Harold D. Pope, Detroit, MI, for Plaintiffs.

Denise C. Barton, Katherine C. Galvin, Assistant Attorneys General, Lansing, MI, for Defendant.

**OPINION AND ORDER**

COHN, District Judge.

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***991 I. Introduction**

This is a challenge to the merger of the Recorder's Court for the City of Detroit with Wayne County Circuit Court. Effective October 1, 1997, Recorder's Court was abolished and the judges of Recorder's Court became judges of Wayne County Circuit Court. *See* Mich. Comp. Laws Ann. § 600.9931. Plaintiffs claim that the merger violates their rights protected by the Fourteenth and Fifteenth Amendments to the United States Constitution because it was motivated by a racially discriminatory purpose, and that it violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because the white majority in Wayne County voting as a bloc usually defeats the preferred candidates of the African–American voters in Wayne County Circuit Court elections.

Before the Court is defendant State of Michigan's motion for summary judgment. With respect to the constitutional claims, defendant argues that plaintiffs do not have standing to bring the claims because plaintiffs, as voters residing in the City of Detroit, have not established that they suffered an injury in fact as a result of the merger. Defendant alternatively argues that, even if plaintiffs have standing to sue, plaintiffs have not established that the two courts were merged due to a discriminatory purpose. With regard to the claim under the Voting Rights Act, defendant argues that plaintiffs have not established that the preferred candidates of the African–American

community for the Wayne County Circuit bench are usually defeated by the white voting bloc in Wayne County. Thus, according to defendant, plaintiffs have not satisfied the third precondition required under *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), to bring such a claim.

Plaintiffs' constitutional claims will be dismissed. Plaintiffs base their claim of standing solely on the fact that they are registered voters residing in the City of Detroit. This fact alone, however, is insufficient to establish that plaintiffs have suffered a concrete and particularized injury in fact due to the merger. Plaintiffs claim of generalized harm cannot confer them standing. Nevertheless, even if plaintiffs had standing, the constitutional claims have serious shortcomings. Plaintiffs assert that the abolition of Recorder's Court will significantly reduce the number of African–American judges in Wayne County because African–American candidates must now run county-wide to be elected. Plaintiffs, however, offer no relevant evidence to indicate that the courts were merged because of this potentially discriminatory effect. Rather, the merger was part of a larger effort by the state to equitably fund its trial courts, which it had not done since legislation in 1980 resulted in a large subsidy from the state for only three of its trial courts: Wayne County Circuit Court, Recorder's Court, and 36th District Court. ***992** In sum, the merger went forward in spite of the potentially adverse effects.

The claims under the Voting Rights Act also will be dismissed. To prevail under § 2 of the Voting Rights Act, plaintiffs must establish that preferred candidates of the African–American community are usually defeated by a white voting bloc. The parties furnished the Court with statistical analyses of the Wayne County Circuit Court races in general elections from 1986 to 1996. During this time period, eleven of eleven, or one-hundred percent, of the preferred incumbent candidates of the African–American community were elected to the Wayne County Circuit bench, and four of eight, or fifty percent, of the preferred non-incumbent candidates of the African–American community were elected. As a matter of law, these rates of success do not establish that the minority-preferred candidates are usually defeated.

Accordingly, for the reasons articulated in detail below, defendant's motion will be granted and this case will be dismissed.

## II. Background

### A. The Parties

The individual plaintiffs, Wendell Anthony, Joann Watson, and Beulah Work, are registered voters in the City of Detroit. Wendell Anthony also is the President of the Detroit Branch of the NAACP, and Joann Watson is its Executive Director. Plaintiffs National Association for the Advancement of Colored People (NAACP), National Conference of Black Lawyers (NCBL), National Bar Association (NBA), and the Legal Aid and Defender Association have members who are registered voters in the City of Detroit. Other than those noted above, the individual members of the organizational plaintiffs are not parties to this lawsuit. The defendant is the State of Michigan. [1]

### B. Wayne County Circuit Court

Article 6, Section 1 of the Michigan Constitution of 1963 states:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Wayne County Circuit Court in its current incarnation was created by Article 6, Section 11 of the Michigan Constitution of 1963. [2] Under Article 6, Section 12 of the Michigan Constitution: "Circuit judges shall be nominated and elected at non-partisan elections in the circuit in which they reside, and shall hold office for a term of six years and until their successors are elected and qualified." In other words, Wayne County Circuit Court judges are elected at large in county-wide races by voters

residing in Wayne County. [3] The elections are technically "non-partisan."

Prior to the merger, Wayne County Circuit Court had jurisdiction over civil matters with over $10,000 in controversy as well as all criminal felonies that occurred in Wayne County outside of the City of Detroit. Residents *993 of Wayne County comprise the jury pool for Wayne County Circuit Court. Immediately prior to the merger, Wayne County Circuit Court consisted of thirty-five judges: twenty-eight whites and seven African Americans.

### C. Recorder's Court

Recorder's Court originated as the result of a merger: the Detroit Mayor's Court, the Police Court of 1850, and the criminal jurisdiction of Wayne County Circuit Court were consolidated into the Recorder's Court for the City of Detroit by the Charter of the City of Detroit in 1857. Historically, the jurisdiction of Recorder's Court was limited to felonies occurring in the City of Detroit. Judges of the Recorder's Court were elected by voters of the City of Detroit, and residents of the City of Detroit constituted the jury pool for Recorder's Court. Immediately prior to the merger, Recorder's Court consisted of twenty-nine judges: twenty-two African Americans, one Hispanic, and six whites as of 1997.

Recorder's Court was an anachronism. Although technically a municipal court, Recorder's Court essentially functioned as a circuit court. Recorder's Court was the only municipal court in the state that handled criminal felonies, making it vastly different than the other municipal courts in the state, which generally handle traffic and ordinance violations. Further, Recorder's Court was the only municipal court that was funded by the state. Wayne County, therefore, was the only county in the state that effectively had two circuit courts prior to the merger: Recorder's Court handled most of the criminal felony cases occurring in Wayne County, and Wayne County Circuit Court primarily handled civil cases.

### D. Relationship of Wayne County Circuit Court and Recorder's Court Prior to the Merger

The prospect of merging Wayne County Circuit Court with Recorder's Court has been a topic of debate since the late 1970s. During this time period, Governor William Milliken called for "reorganization of the Third (Wayne County) Judicial Circuit and the circuit-court-related portion of Recorder's Court into a single functioning entity." [4] In 1979, the Detroit Association of Black Organizations (DABO) examined Governor Milliken's merger proposal to determine whether the merger should be supported by the black community. The DABO noted:

> As this inquiry got underway, it soon became most apparent that if the intrinsic interests of the black community were to be served in the resolution of this issue, it would be imperative that we separate out fact from supposition or fancy, however well-intentioned. The Steering Committee, therefore, in seeking to properly execute its responsibilities under the DABO House of Delegates' charge, has unremittingly sought to elicit the hard facts; hence, if the facts did not support a contention or allegation, the contention or allegation was given little or no weight.
>
> It is in this vein that we report, in the very outset, that at no time during the many, many hours of debate and testimony from a wide range of experts on this question was any credible evidence presented, whatsoever, that would support the anti-black conspiracy theory: "Its simply a move (Wayne County Court Reorganization) to deprive blacks of their hardearned gains in the Detroit courts." Now, please note carefully, we are not saying an anti-black conspiracy does not exist. "All we are saying is the facts to support it were never disclosed—though we zealously sought them—and that the stakes for the black community are far too high for its decision in this matter to be based on what seems to be, rather than what is[.]" [5]

Various actions beginning in 1980 slightly blurred the line between Recorder's Court and Wayne County Circuit Court. As will be explained in detail below, in 1980 the state assumed the funding responsibilities for *994 many of the operational expenses of Wayne County Circuit Court, Recorder's Court, and the 36th District Court, and their employees, other than the judges, became employees of the State Judicial Council. Wayne County Circuit Court also administratively merged with Recorder's Court in 1981.

Further, on October 2, 1986, the Michigan Supreme Court consolidated the criminal dockets of Wayne County Circuit Court and Recorder's Court pursuant to Administrative Order 1986–1, which stated in part:

> On order of the Court, the Court having approved a joint local court rule and a joint local administrative order consolidating the criminal dockets of the Third Judicial Circuit and the Recorder's Court of the City of Detroit,
>
> IT IS ORDERED pursuant to Const 1963, art 6, §§ 1, 4, 5, and 23, that, effective October 13, 1986, all judges of the Third Judicial Circuit be temporarily assigned as visiting judges of the Recorder's Court of the City of Detroit and that all judges of the Recorder's Court of the city of Detroit be temporarily assigned as visiting judges of the Third Judicial Circuit.
>
> Further, acknowledging MCR 8.110(G)(3) and M.C.L.A. § 600.564(4); MSA 27A.564(4), IT IS ORDERED that the visiting judges temporarily assigned pursuant to this administrative order shall exercise the powers of the court to which they are assigned; provided, however, that they shall exercise those powers only in cases assigned to them pursuant to the joint local administrative order and joint local court rules consolidating the criminal dockets of the Third Judicial Circuit and the Recorder's Court of the City of Detroit.

*See* 426 Mich. lxviii (1986). Under Administrative Order 1986–1, all Wayne County felony cases were tried in Recorder's Court, and five of the thirty-five Wayne County Circuit Judges rotated every three months to hear felony cases in Recorder's Court. The jury structure, however, remained the same: a defendant charged with a crime in Detroit faced jurors from Detroit, and a defendant charged with a crime outside Detroit faced jurors from the entire Wayne County area. Administrative Order 1986–1 was rescinded pursuant to Supreme Court Administrative Order 1995–5, effective October 10, 1995. *See* 450 Mich. cxxii (1995).

### E. Funding of the Michigan Courts

The Michigan Supreme Court has observed that "[t]here is no public environment in the state of Michigan more complex than the trial court component of the state's 'one court of justice.' " *Judicial Attorneys Ass'n v. State of Michigan*, 459 Mich. 291, 298, 586 N.W.2d 894 (1998). This complexity stems at least in part from the battle over the funding of Michigan's trial courts since the 1980s. An historical overview as to how Michigan's trial courts have been funded over the years is therefore necessary to place the merger in context. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 65 L.Ed. 963 (1921) (Holmes, J.).

It is important to distinguish initially between funding for judges' salaries and funding for operational expenses of the courts. Judges' salaries have primarily been funded by the state since 1980. In contrast, local funding units, such as the counties, cities, townships, and villages, historically paid the operational expenses of the courts situated within their geographical limits.

Public Acts 438 through 442 of 1980 created a limited exception to the rule of local funding for operational expenses by providing state funding for a substantial portion of the operational expenses of Wayne County Circuit Court, Recorder's Court, and 36th District Court in Detroit.[6] This exception, ***995** however, was intended to be temporary because Public Act 438 of 1980 also set the following timetable under which the state aspired to fully fund all of its trial courts by 1988:

> The legislature shall appropriate sufficient funds in order to fund:
>
> (a) At least 20% of all court operational expenses in the state fiscal year beginning October 1, 1983.
>
> (b) At least 40% of all court operational expenses in the state fiscal year beginning October 1, 1984.
>
> (c) At least 60% of all court operational expenses in the state fiscal year beginning October 1, 1985.
>
> (d) At least 80% of all court operational expenses in the state fiscal year beginning October 1, 1986.
>
> (e) At least 100% of all court operational expenses in the state fiscal year beginning October 1, 1988.

The Act also provided that if the timetable was not followed, other funding under the statute—i.e., funding

for Wayne County Circuit Court, Recorder's Court, and 36th District Court—would terminate.[7]

Both the governor and the legislature balked at the timetable. The governor did not include funding for the operational expenses of the out-state courts in the budget or general appropriations bills, and the legislature did not pass an appropriations bill in this regard. *See Grand Traverse County v. State of Michigan*, 450 Mich. 457, 461, 538 N.W.2d 1 (1995). Nevertheless, the state continued to fund Wayne County Circuit Court, Recorder's Court, and the 36th District Court. Thus the upshot of Public Acts 438 through 442 of 1980: Wayne County Circuit Court, Recorder's Court, and the 36th District Court received a large subsidy from the state, while the rest of the trial courts received very limited funding from the state.[8]

As a result, in 1988, seventy-six counties, forty-six cities, eleven townships, and one village filed a class action against the state claiming, among other things, that the state violated its obligation under Public Act 438 of 1980 to fund trial-court operational expenses.[9] *See Grand Traverse County*, 450 Mich. at 461, 538 N.W.2d 1. The plaintiffs sought a money judgment reimbursing them for expenses paid in 1986. The case went to the Michigan Supreme Court, which rejected the plaintiffs claim for a money judgment on the grounds that a plain reading of the statute precluded a private cause of action as a ***996** remedy for the state's failure to follow the statute. *Id.* at 466, 538 N.W.2d 1. The supreme court opined that the only remedy provided under the statute was termination of all funding for trial court operational expenses, even though the legislature did not do so.[10]

The Michigan Supreme Court also noted that the wording of the statute at issue reflected that it was the result of a compromise in the legislature. *Id.* As such, "[t]he funding of Michigan trial courts has proven to be a difficult task because of the diverse interests at stake in each locality." *Id.* The supreme court concluded its opinion in *Grand Traverse County* with the following admonition:

> Until the Legislature, the counties, and the courts arrive at a plan for more efficient and effective court funding, difficulties like that presented in this case will arise. Indeed, the numerous cases addressing conflicts about court funding, and the controversy surrounding the instant case, demonstrate the need for continuing efforts by the judicial, legislative, and executive branches to reform the state's system of court funding.

*Id.* at 478, 538 N.W.2d 1.[11]

F. The Merger

Public Act 374 of 1996 merged Recorder's Court with Wayne County Circuit Court and created a new system for state funding of the trial courts. Effective October 1, 1997, Recorder's Court and Wayne County Circuit Court merged pursuant to the following provision:

> The recorder's court of the city of Detroit is abolished and merged with the third judicial circuit of the circuit court effective October 1, 1997. The incumbent judges of the recorder's court of the city of Detroit on September 30, 1997 shall become judges of the third judicial circuit of the circuit court on October 1, 1997, and shall serve as circuit judges until January 1 of the year in which their terms as judges of the recorder's court of the city of Detroit would normally have expired. Effective October 1, 1997, each incumbent judge of the recorder's court of the city of Detroit who was appointed to that office by the governor after the filing deadline for the August primary preceding the general election of 1996 shall become a judge of the third circuit of the circuit court and shall serve as a circuit judge until January 1 next succeeding the first general election held after the vacancy to which he or she was appointed occurs, at which election a successor shall be elected for the remainder of the unexpired term which the predecessor incumbent of the recorder's court would have

> served had that incumbent remained in office until his or her term would normally have expired. In seeking election to the third circuit of the circuit court after October 1, 1997, a judge of the recorder's court becoming a judge of the third circuit of the circuit court pursuant to this subsection may file an affidavit of candidacy in like manner as other incumbent judges of the circuit court, and shall be entitled to designation on the ballot as a judge of the circuit court.

Mich. Comp. Laws Ann. § 600.9931(1).

With respect to funding, the Act provides that every county is to receive funding for its trial courts under a new formula based on the caseload of each county, and that trial judges' salaries are to be paid in full by the state. The Act also created a "hold harmless" fund for five years, which is to be used to make payments to the counties or cities that receive less under the new funding formula ***997** than they received from the state in fiscal year 1995–96. *See* Mich. Comp. Laws Ann. §§ 600.151a, 600.151b.

In anticipation of challenges to Public Act 374 of 1996, the legislature gave the county board of commissioners authority to create election districts if the merger violates the Voting Rights Act. Under Mich. Comp. Laws Ann. § 600.9948:

> If the state constitution of 1963 permits the creation of election districts in a county for countywide judicial office, or if, by a final nonreviewable judgment, a court determines that the federal voting rights act requires election districts rather than at-large election for countywide judicial office, the county board of commissioners has authority to create election districts to conform with those requirements.

G. Effects of the Merger

Because the incumbent judges of the Recorder's Court became Wayne County Circuit judges, Wayne County Circuit Court consisted of sixty-four judges immediately after the merger: thirty-six whites, twenty-eight African Americans, and one Hispanic.[12] The former Recorder's Court judges became Wayne County Circuit judges until the first of January of the year in which their term on the Recorder's Court would have expired. Other than the number of seats available, the rules and qualifications for the postmerger elections for Wayne County Circuit Court are identical.

As a result of the merger, the former Recorder's Court judges must run in county-wide races to be reelected. Plaintiffs assert that it will be difficult for African–American candidates for Wayne County Circuit Court to be elected due to the demographics of the county. According to the 1990 census, Wayne County had a population of 2,111,687, comprised of fifty-seven percent whites and forty percent African Americans. Of the 849,109 African Americans who lived in Wayne County, almost ninety-two percent lived in the City of Detroit.[13] The 1990 census also revealed that the total voting age population in Wayne County was 1,541,050, and the total African–American voting age population was 579,871, or thirty-six percent of the total voting age population in Wayne County.

H. Legislative Analysis

Plaintiffs proffer of proof to support the claim of intentional discrimination[14] is limited to a legislative analysis of House Bill 5158,[15] which became Public Act 374 of 1996. The analysis was prepared by the House Legislative Analysis Section, which is comprised of "nonpartisan House staff," and the analysis indicates it is "for use by House members in their deliberations."[16] The analysis, dated July 29, 1996, contains several arguments "for" and "against" the bill. Plaintiffs cite some of these arguments as ***998** evidence that the legislation was passed because of the discriminatory effects on African–Americans.

An argument for the bill was that it would correct the inequity in the state providing special funding to Wayne County Circuit Court, Recorder's Court, and 36th District Court, because the bill would provide state

funding for all trial courts under a formula based on their caseloads. Although the merger was part of the bill, the analysis indicates that "the bill actually is not a court reorganization bill but rather a court funding bill." [17] Another argument for the bill was that it would standardize the state court system. Prior to the merger, Wayne County was an anomaly among the circuit courts in that its jurisdiction was divided between two courts, with Recorder's Court handling most of the criminal felonies and Wayne County Circuit Court handling primarily civil and divorce cases. The bill would therefore unite the criminal and civil cases in one court, bringing Wayne County in line with the state's other counties. [18]

Further, the analysis notes that the number of African–American judges and the jury pool would be diluted because judges would run county-wide, and jurors would be drawn from the entire county rather than just the City of Detroit. Several arguments "for" and "against" the bill stem from this aspect of the merger. First, the judges trying criminal felony cases would be accountable to all voters in Wayne County. Second, the merger would ensure "an equal opportunity for justice in Wayne County." According to the analysis, critics of Recorder's Court argued that Recorder's Court judges and juries were either too lenient or too harsh on defendants in some high-profile cases involving victims and defendants of different races. [19] Third, the number of African–American judges in the county would potentially be reduced due to the demographics of Wayne County. Former judges of the Recorder's Court had an almost eighty-percent African–American electoral base; in contrast, Wayne County has a forty-percent African–American electorate. Presumably, it will be more difficult to elect African–Americans in the county-wide races.

I. Other Challenges to the Merger

There has been other litigation in connection with the merger raising various issues, none of which are determinative here. The following cases have been decided in the Michigan courts: *Kuhn v. Secretary of State,* 228 Mich.App. 319, 579 N.W.2d 101 (1998), ***leave to appeal denied,*** 457 Mich. 884, 586 N.W.2d 926 (1998), in which a group of plaintiffs, including Oakland County Circuit Judge Richard Kuhn, unsuccessfully challenged the merger on the grounds that "the transfer of judges from a legislatively created court, the Recorder's Court, to a constitutionally created court, the Wayne Circuit Court, violates [Mich.] Const.1963, art. 6, §§ 1 and 11, and that art. 6, § 23 is violated because new ***999** judgeships in the Wayne Circuit Court must be filled by election," *id.* at 323, 579 N.W.2d 101; *Judicial Attorneys Ass'n v. State of Michigan,* 459 Mich. 291, 586 N.W.2d 894 (1998), where the provision of Public Act 374 of 1996 in which Wayne County Circuit Court personnel became employees of a either the county or county judicial council rather than the State Judicial Council was found to violate the separation of powers clause, art. 3, § 2 of the Michigan Constitution of 1963; and *Mayor of Detroit v. State of Michigan,* 228 Mich.App. 386, 579 N.W.2d 378 (1998), ***leave to appeal granted,*** 457 Mich. 882, 586 N.W.2d 925 (1998), where the Michigan Court of Appeals held that Public Act 374 of 1996 does not violate the Headlee Amendment, art. 9, § 29 of the Michigan Constitution of 1963.

This Court has previously dismissed two cases filed as challenges to the merger. The Court dismissed *Williams v. State of Michigan,* No. 97–75103, filed by two individuals proceeding *pro se,* for failure to comply with pleading requirements. In *Kuhn v. Miller,* No. 98–70771, Oakland County Circuit Judge Richard Kuhn, among others, once again challenged the merger. The plaintiffs argued that the transfer of the Recorder's Court judges to the Wayne County Circuit Court violated the "one person, one vote" doctrine because an effect of the merger was that voters residing in the City of Detroit alone elected twenty-nine of the Wayne County Circuit judges. The Court granted the defendant's motion to dismiss on the grounds that the "one person, one vote" doctrine is inapplicable in this context. *See, e.g., Wells v. Edwards,* 347 F.Supp. 453 (M.D.La.1972), ***summarily aff'd,*** 409 U.S. 1095, 93 S.Ct. 904, 34 L.Ed.2d 679 (1973). The decisions in *Williams* and *Kuhn* were appealed and are now pending before the Court of Appeals for the Sixth Circuit.

**III. Election Analyses**

Plaintiffs claim the merger violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of

> any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (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.

Section 2 of the Voting Rights Act applies to judicial elections. *See Chisom v. Roemer*, 501 U.S. 380, 395–96, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).

In support of their contentions regarding whether the merger violates § 2, the parties proffer analyses of expert witnesses that purport to demonstrate the voting behavior of registered voters in Wayne County. The analyses are based on data garnered from the voting results in Wayne County Circuit Court races in general elections from 1986 to 1996.[20] To place the analyses in context, a brief overview of *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), is pertinent.

### A. *Gingles*

In *Gingles*, the Supreme Court enunciated the "necessary preconditions for multimember ***1000** districts to operate to impair minority voters' ability to elect representatives of their choice." *Id.* at 50, 106 S.Ct. 2752. The three preconditions are:

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

*Id.* at 50–51, 106 S.Ct. 2752. Plaintiffs must prove the existence of the preconditions before the Court considers the "totality of the circumstances" to determine whether § 2 is violated. If the preconditions are not satisfied, the claim under § 2 of the Voting Rights Act fails. *See, e.g., Cousin v. McWherter*, 46 F.3d 568, 573 (6th Cir.1995); *Gingles*, 478 U.S. at 42–46, 106 S.Ct. 2752.

The parties agree that the first precondition is satisfied: the African–American population is sufficiently large and geographically compact to constitute a single-member district. In fact, over ninety percent of the African Americans in Wayne County live within a legally and politically defined jurisdiction: the City of Detroit. It is the second and third preconditions, as stated by the Court of Appeals for the Sixth Circuit, that "require a court to consider the voting behavior of different races." *Cousin v. Sundquist*, 145 F.3d 818, 823 (6th Cir.1998).

### B. Pildes Report

In an Order dated April 3, 1998, the Court appointed Richard Pildes, Professor of Law at the University of Michigan, to serve as an independent expert pursuant to Fed.R.Evid. 706. The Court directed Professor Pildes to consider the evidence proffered to indicate the voting behavior of the different races, including the reports of the parties' experts. Particularly, the Court instructed Professor Pildes to "express an opinion in the form of a written report as to whether there is a genuine issue as to any material fact with respect to the plaintiffs' claim that the merger of the Recorder's Court and the Wayne County Circuit Court, and the resulting at-large election of judges to the Circuit Court of Wayne County, violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973."[21]

Professor Pildes lodged an extensive report and a summary of the report with the Court (Pildes Report). Professor Pildes concluded:

• Every African–American judicial candidate who ran in general elections but one was a "candidate of choice" of the African–American community.

• With respect to incumbent African–American judicial candidates in general elections, voting was not racially polarized to a level of legal significance.

• With respect to non-incumbent judicial candidates in general elections, "plaintiffs have not established that voting is racially polarized in the legally significant sense. Minority-preferred judicial candidates are not 'generally' or 'usually' or 'normally' defeated within the legal meaning of those terms."

C. Expert Reports

Plaintiffs proffered a report of Dr. Wilbur Rich (Dr. Rich), a professor of political science at Wellesley College and a former professor of political science at Wayne State University. Dr. Rich represents that he has studied Detroit politics for some seventeen years. Among other things, Dr. Rich opines in his report:

> Given the possibility of increased white polarized voting and the dilution of black voting strength, it would be a mistake to abolish the Detroit Recorder's Court. The merger with Wayne County Circuit Court will afford black residents of Detroit less opportunity than their suburban white counterparts to elect judges of their choice. It is a delusionary mechanism designed to discriminate against the black residents of Detroit.

Dr. Rich concludes: "I believe the consolidation of Recorder's Court with Wayne County ***1001** Circuit Court will dilute the voting strength of the residents of Detroit."

Dr. Rich's report is insightful. From plaintiffs' perspective, however, Dr. Rich's report is problematic in that it is not tailored to the *Gingles* preconditions. In particular, Dr. Rich, a self-described "qualitative political scientist" who conducted much of his research "based on interviews, observations and archival materials," does not provide a statistical analysis of election results. He does not identify candidates of choice in the African–American community and does not provide an analysis of whether voting patterns are racially polarized in specific elections. In short, Dr. Rich's report does not materially assist plaintiffs in opposing the state's motion for summary judgment.

Unlike Dr. Rich's report, the reports of plaintiffs' expert Dr. Diane Brown (Dr. Brown) and defendant's expert Dr. Harold Stanley (Dr. Stanley) analyzed election-result data and addressed the *Gingles* factors. As noted in the Pildes Report, however, there are several problems with their analyses, ranging from the statistical methods used to questionable interpretations of the Voting Rights Act.

Moreover, it is important to point out that Dr. Brown did not establish which candidates were the preferred candidates of the African–American community. Dr. Brown assumed that the African–American candidates were the preferred candidates in the African–American community. This is improper as a matter of law. "The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose." *Sundquist*, 145 F.3d at 825. Professor Pildes noted that "[d]etermining who the candidates of choice of the black community are requires specific analysis."

Although plaintiffs have not provided the Court with the relevant data regarding the candidates of choice, Professor Pildes opined, using Dr. Stanley's data, that "[b]ased on statistical analyses of voting patterns in the record, every black judicial candidate who ran in the general elections but one [between 1986 and 1996] meets the standard and should be considered a candidate of choice." For purposes of the motion for summary judgment, the Court makes an inference in plaintiffs' favor that all of the African–American judicial candidates who ran in the general elections were the candidates of choice of the African–American community.

D. Findings

Despite the problems with the reports of Dr. Brown and Dr. Stanley, Professor Pildes scrutinized the relevant data and constructed several tables highlighting "what the data reveal about candidates of choice among the

black community and the extent of legally significant white bloc voting."[22] Neither plaintiffs nor defendant objected to Professor Pildes' analysis; plaintiffs observe that "the evidence used by Pildes from Dr. Stanley [ ] reached essentially the same result as Dr. Brown." Given the absence of objections, the Court adopts Professor Pildes's analysis of the election-result data in all respects, and his conclusions in this regard are adopted as the Court's findings.[23] In particular:

1. *Candidates of Choice of the African–American Community.* From 1986 to 1996, each African–American judicial candidate for the Wayne County Circuit Court elections but one can be considered the candidate of choice of the African–American community.

2. *Polarized Voting.* Voting was polarized in the elections for the Wayne County Circuit bench. The white electorate often had markedly different voting preferences than the black electorate. For example, in the 1996 general election on the incumbent ballot, nineteen candidates vied for twelve judgeships. The African–American candidates who were the candidates of choice of the African–American community ranked second, fourth, fifth, and seventh within the African–American electorate. In contrast, the white electorate ranked the same candidates seventh, ninth, sixteenth, and nineteenth (last).

***1002** 3. *Success of Incumbent Candidates of Choice of the African–American Community.* Making all reasonable inferences in favor of plaintiffs, the Court will accept Dr. Brown's classifications in this regard. As such, eleven of eleven incumbent African–American candidates who were candidates of choice of the African–American community were successfully elected. Success rate: 100%.[24]

4. *Success of Non–Incumbent Candidates of Choice of the African–American Community.* Making all reasonable inferences in favor of plaintiffs, the Court will accept Dr. Brown's classifications in this regard. Accordingly, four of eight candidates of choice of the African–American community were successfully elected.[25] Success rate: 50%.[26]

## IV. The Motion for Summary Judgment

With respect to the constitutional claims, defendant argues that plaintiffs do not have standing, and plaintiffs have not established a genuine issue over a material fact as to whether the two courts were merged due to a discriminatory purpose. With regard to the claims under the Voting Rights Act, defendant argues, among other things, that plaintiffs have not satisfied the *Gingles* preconditions. Plaintiffs oppose the motion on the grounds that genuine issues of material fact preclude summary judgment. Plaintiffs also assert that they have satisfied the *Gingles* preconditions.

[1] "Whether an electoral system has diluted the voting power of a minority group is a factual question, as is whether such a system was adopted with racially discriminatory intent." *Clarke v. Cincinnati*, 40 F.3d 807, 810 (6th Cir.1994). Nonetheless, summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *In re Dollar Corp.*, 25 F.3d 1320, 1323 (6th Cir.1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In so doing, the Court views the evidence in the light most favorable to plaintiffs. ***See*** *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98, 101 (6th Cir.1995).

## V. Constitutional Claims

### A. Standing

[2] [3] Defendants argue that plaintiffs do not have standing to bring the constitutional claims. The individual plaintiffs must satisfy three elements to have standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted). The organizational plaintiffs—NAACP, NCBL, NBA and Legal Aid Defender Association—must demonstrate:

> ***1003** (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). To establish that they have standing at this stage of the litigation, both the individual and organizational plaintiffs must at a minimum make out a question of material fact as to each element. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ("Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.").

[4] In a conclusory fashion, plaintiffs state that they "base their claim of standing on the assertion that they or their members are registered voters in Detroit and are aggrieved on account of their race or the race of their members" due to the merger. In response to defendant's motion for summary judgment, plaintiffs argue that the purported racial impetus for the merger in and of itself confers them standing. According to plaintiffs, "[s]aying that there is a constitutional violation, but that there is no relief, is absurd and cannot prevail in this case."

Plaintiffs do not articulate how they are *particularly* harmed as a result of the merger, and the record is devoid of evidence of a concrete and particularized injury to either the individual or organizational plaintiffs. Though plaintiffs are or have members that are registered voters residing in the City of Detroit, plaintiffs proffer no evidence that any of them ran unsuccessfully for the Wayne County Circuit Court in any past election, plan to run for the Wayne County Circuit Court in any future election, have a criminal jury trial pending in Wayne County Circuit Court, or even that they have supported an unsuccessful candidate for the Wayne County Circuit Court in the past. Further, neither the individual nor the organizational plaintiffs seem to be the object of the government action. *See Lujan*, 504 U.S. at 562, 112 S.Ct. 2130 ("when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish") (quoting *Allen v. Wright*, 468 U.S. 737, 758, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). Rather, the legislation plaintiffs challenge is arguably an attempt to keep African–American judges off the bench and an effort to dilute the presence of African–American jurors in criminal cases that, before the merger, would have been tried in the Recorder's Court. Indeed, plaintiffs acknowledge that African–American judges are a principal object of the legislation in asserting that "the impetus for the abolition of Recorder's Court is to insure that African American judges, such as Dalton Roberson, are not allowed to make determinations in relation to crimes allegedly committed by African–Americans against white suburbanites within the City of Detroit."

In sum, plaintiffs have not established that they or their members have a sufficient personal stake in the outcome of the Wayne County Circuit Court races to have standing. Plaintiffs' argument for standing is essentially that the merger is unfair because it was motivated by a racial animus in the majority of the Michigan legislators who voted in favor of Public Act 374 of 1996, and presumably the governor who signed it. Plaintiffs' injuries are conjectural rather than concrete and particularized; it is unclear what actual harm the plaintiffs have suffered merely as registered voters residing in the City of Detroit. *See Miyazawa v. City of Cincinnati*, 45 F.3d 126, 128 (6th

Cir.1995) ("Miyazawa has suffered no harm, nor will she suffer any greater harm than that of any other voter in the City of Cincinnati, that would provide her standing herein"). Plaintiffs' generalized complaint is insufficient to establish a question of fact. Because the "irreducible constitutional minimum of standing" is lacking, *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, the constitutional claims must be dismissed.

B. Constitutional Arguments

[5] Although the Court's decision to dismiss the constitutional claims rests on plaintiffs' ***1004** lack of standing, a brief review of the constitutional claims as plaintiffs have presented them reveals that they have serious shortcomings. In *NAACP v. Austin*, 857 F.Supp. 560 (E.D.Mich.1994), this Court stated that the "totality of the relevant facts" must be evaluated in determining whether the State intentionally discriminated against plaintiffs on the basis of race.

> This evaluation may include consideration of the following elements: (1) the impact of the official action on members of different racial groups; (2) the foreseeable effects of the action; (3) the historical background of the decision to act, including legislative or administrative history; (4) the specific sequence of events leading to the action; and (5) substantive and procedural departures from the decision-making routine.

*Id.* at 572 (citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). To establish a discriminatory purpose in the legislation, plaintiffs must show that the merger went forward "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* (quoting *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)). Such a showing "implies more than intent as volition or intent as awareness of consequences." *Id.* (quoting *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282).

To be sure, plaintiffs have proffered evidence that the Michigan Legislature had notice of the potentially adverse consequences of the merger on the African–American judges of the Recorder's Court, as well as the jury pool. The historical background, however, reveals that the merger was part of a larger effort to equitably fund the state's trial courts in response to the "difficulty" created by Public Acts 438 through 442 of 1980. *See, e.g.*, *Grand Traverse County*, 450 Mich. at 466, 538 N.W.2d 1. The merger also corrected the anomaly existing in Wayne County, which was the only county in the state that in effect had two circuit courts. Further, plaintiffs point to nothing remarkable regarding the sequence of events leading to the merger, and there is nothing to indicate the existence of substantive and procedural departures from the decision-making routine.

A reading of the record compiled by the parties reveals that the merger went forward because of a desire to standardize and equitably fund the trial courts of the state, and only in spite of the potentially adverse effects on African Americans. Plaintiffs have not proffered any relevant evidence to indicate that the courts were merged with the adverse effects as the motivating force.[27] Accordingly, the constitutional claims as plaintiffs have presented them lack merit.

## VI. Voting Rights Act

As noted, the parties agree that the first *Gingles* precondition is satisfied because African Americans are a sufficiently large and geographically compact group to constitute a majority in a single-member district. Over ninety percent of the African Americans in Wayne County live within a legally and politically defined jurisdiction: the City of Detroit. Also, the parties apparently concede the existence of the second precondition, which essentially "asks merely whether voters of the same race tend to vote alike." *Sundquist*, 145 F.3d at 823. The Court has found that the white electorate often had markedly different voting preferences than the black electorate in the elections from 1986 to 1996. As Professor Pildes noted: "Using Dr. Brown's classifications, only one of seven minority preferred non-incumbents would have been elected among just the white electorate." It is therefore fair to state that the second precondition is satisfied for purposes of this motion.

***1005** [6] The parties dispute whether the third precondition is satisfied. To defeat defendant's motion, plaintiffs at a minimum must establish a question of fact regarding whether "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. 2752. "Racial bloc" or "racially polarized" voting "exists where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes,' or to put it differently, where 'black voters and white voters vote differently.' " *Id.* at 53 n. 21, 106 S.Ct. 2752. The Supreme Court has not expanded on what is meant by the phrase "usually to defeat the minority's preferred candidate," although in a concurring opinion, Justice O'Connor suggested that a court

> should be required to find more than simply that the minority group does not usually attain an undiluted measure of electoral success. The court must find that even substantial minority success will be highly infrequent under the challenged plan before it may conclude, on this basis alone, that the plan operates "to cancel out or minimize the voting strength of [the] racial grou [p]."

*Id.* at 99–100, 106 S.Ct. 2752 (quoting *White v. Regester*, 412 U.S. 755, 765, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)) (O'Connor, J., concurring). Thus, there are no bright-line rules for determining whether the preferred candidates are "usually" defeated. The Court of Appeals for the Sixth Circuit has held, however, that a forty-seven percent electoral success rate for minority-preferred candidates did not satisfy the third precondition in a challenge to Cincinnati's city council elections. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 814 (6th Cir.1994).

A. Incumbent Candidates

Plaintiffs acknowledge that the third precondition is not satisfied with regard to the African–American incumbent candidates. The Court agrees with Professor Pildes that, although there was polarized voting with respect to the incumbent candidates, it was not "legally significant" so as to trigger § 2 liability. Professor Pildes stated:

> [P]olarized voting in and of itself is not of ultimate legal significance. The question is whether white bloc voting is powerful enough to "normally," "generally," or "usually" defeat the minority-preferred candidates. Using Dr. Brown's ... classifications, ... every one of the minority-preferred incumbent candidates was in fact elected—11 of 11. Thus, with respect to incumbent elections, the data is quite powerful and not in any significant sense disputed that there is not *legally significant* white bloc voting, whatever the level of polarized voting patterns.

(Emphasis in original). Put another way, a "special circumstance"—incumbency—may explain the success of the incumbent candidates of choice of the African–American community. *See Gingles*, 478 U.S. at 57, 106 S.Ct. 2752. ***But see*** *Clarke*, 40 F.3d at 813 ("to qualify as a 'special' circumstance ... incumbency must play an unusually important role in the election at issue").

B. Non-incumbent Candidates

[7] As the Court has found, voting was polarized in the elections for the Wayne County Circuit bench. The Court also found that four of eight candidates of choice of the African–American community were successfully elected, for a success rate of fifty percent. The question here is whether this rate of success is sufficient to trigger § 2 liability. In other words, does a fifty-percent success rate establish that the white voting bloc has "usually" defeated the candidates of choice of the African–American community?

The Sixth Circuit's decision in *Clarke* is instructive. In *Clarke*, the plaintiffs challenged the city council elections for the City of Cincinnati. The nine councilmembers were elected at large, and each voter could cast one vote for up to nine individual candidates. The parties agreed that the first and second preconditions were satisfied. With regard to the third precondition, the record established that forty-seven percent of the African–American's preferred candidates were elected. With this success rate, the Sixth Circuit rejected out of hand the plaintiffs' argument that the third precondition was satisfied:

> ***1006** This [forty-seven percent] success rate gives us no reason to

> find that blacks' preferred black candidates have "usually" been defeated. We therefore conclude that white bloc voting has not been targeted against blacks' preferred candidates in the city council elections[.]

*Clarke*, 40 F.3d at 812–13.

Plaintiffs have not distinguished *Clarke*. Rather, plaintiffs argue that the successes of the four victorious non-incumbent candidates from 1986 to 1996—John Murphy, Denise Page Hood, William Lucas, and Deborah Thomas—were due to "special circumstances," and thus their candidacies should be discounted in determining whether the third precondition is satisfied. In *Gingles*, the Court recognized that "the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." *Gingles*, 478 U.S. at 57, 106 S.Ct. 2752.[28] Although the Supreme Court has not described what and when a particular circumstance may be a "special circumstance," the Sixth Circuit has warned not to "confuse the ordinary with the special, and thus make practically every American election a special circumstance." *Clarke*, 40 F.3d at 813–14 (quoting *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir.1989) (Chapman, J., dissenting)) (internal quotation marks omitted).

Plaintiffs' bare assertion that the successful candidacies of John Murphy, Denise Page Hood, William Lucas, and Deborah Thomas were due to "special circumstances" lacks merit. First of all, plaintiffs have buttressed this assertion only with the following unsubstantiated opinion of Dr. Brown that there were "unique circumstances" in each of the races in which they won:

> When John Murphy ran in 1986 and won, he was 36th District Court judge and did not put his picture on campaign literature. Denise Page Hood ran in 1992 and won; however, she is a member of a political family with wide Wayne County-based name recognition. Similarly, Bill Lucas had county-wide name recognition when he ran in 1996 and won; he had previously been Wayne County Sheriff, Wayne County Executive, Recorder's Court Judge and had run for Governor. Finally, Deborah Thomas ran in 1994 and won. However, Deborah Thomas' election success was an outlier. As a lawyer in private practice, Deborah Thomas ran an effective campaign under circumstances in which there were multiple non-incumbent African American candidates.[29]

But more importantly, obtaining name recognition and professional success prior to a candidacy are not "special circumstances"; they are ordinary and necessary components of a successful candidacy. Indeed, if the successful candidacies of Judges Murphy, Hood, Lucas, and Thomas were considered "special circumstances," virtually every successful candidacy would be explained by "special circumstances." *See, e.g.*, *Clarke*, 40 F.3d at 813–14.

In sum, plaintiffs have not established a genuine issue over a material fact regarding the third *Gingles* precondition. The successes of the four non-incumbent candidates were not due to "special circumstances," and hence the Court must reject plaintiffs' invitation to discount their candidacies in determining whether plaintiffs have satisfied the third precondition. A fifty-percent rate of success for the candidates of choice of the African-American community does not "clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice." *Gingles*, 478 U.S. at 60, 106 S.Ct. 2752. Because plaintiffs have not satisfied the third precondition, summary judgment for defendant is appropriate.

### VII. Conclusion

For the foregoing reasons, none of the plaintiffs has standing to bring the constitutional claims, and plaintiffs claim under § 2 ***1007** of the Voting Rights Act fails because the *Gingles* preconditions have not been satisfied. It is important to point out, however, that the record in no way reflects how the merger will ultimately affect

the composition of Wayne County Circuit Court. The pre-merger data gathered is relatively limited, and the analysis here turns on a fairly small number of candidates. If after a series of elections it becomes apparent that the merger enables a white voting bloc "usually" to defeat the candidates of choice of the African–American community, however, plaintiffs certainly would be entitled to bring another claim under the Voting Rights Act. Indeed, "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57, 106 S.Ct. 2752. On the record now before the Court, however, it cannot be said that the preferred non-incumbent candidates of the African–American community for the Wayne County Circuit bench are "usually" defeated within the meaning of *Gingles* and its progeny.

Accordingly, defendant's motion for summary judgment is **GRANTED**, and this case is **DISMISSED**.

**SO ORDERED.**

## APPENDIX

### Table I

### GENERAL ELECTIONS 1986–1996

### WAYNE COUNTY CIRCUIT COURT

### BLACK CANDIDATES

### STANLEY DATA

| Election | V=Votes to Cast<br>N=Number of Candidates | Rank Among<br>Black Voters | Rank Among<br>White Voters | Elected? |
|---|---|---|---|---|
| 1996: I | V=12 | | | |
| *Lucas* | N=19 | 2 | 7 | Y |
| Thomas | | 4 | 9 | Y |
| *Manning* | | 7 | 16 | N |
| *Coleman* | | 5 | 19 (last) | N |
| *Humphries* | | 16 | 17 | N |
| 1996: NI | V=2 | | | |
| Hylton | N=4 | 2 | 4 (last) | N |
| 1994: I | V=10 | | | |
| Stephens | N=13 | 1 | 5 | Y |
| *Thomas* | | 2 | 12 | Y |

  

| | | | | |
|---|---|---|---|---|
| 1994: NI | V=1 | | | |
| None | N=2 | | | |
| 1992: I | V=9 | | | |
| Murphy | N=9 | 4 | 4 | Y |
| Simmons | | 2 | 9 (last) | Y |
| Morcom | | 7 | 7 | Y |
| 1992: NI | V=3 | | | |
| Hood | N=6 | 1 | 6(last) | Y |
| 1990: I | V=11 | | | Y |
| Turner | N=11 | 2 | 8 | Y |
| Thomas | | 7 | 7 | |
| 1990: Vacancy | V=1 | | | |
| None | N=3 | | | |
| 1988: I | V=11 | | | |
| Stephens | N=12 | 1 | 5 | Y |
| 1986: Vacancy | V=2 | | | |
| Stephens | N=2 | 1 | 1 | Y |
| 1986: I | V=9 | | | |
| Watts | N=9 | 1 | 7 | Y |
| Simmons | | 3 | 8 | Y |
| Morcom | | 7 | 9 (last) | Y |
| 1986: NI | V=3 | | | |
| Murphy | N=6 | 1 | 5 | Y |

I = Incumbent ballot. NI = Non-incumbent ballot.

  

Note: Candidates in italics are those for whom a discrepancy exists between Dr. Brown and Dr. Stanley regarding incumbency status. Dr. Brown classifies all the candidates in italics as non-incumbents.

**Table II**

**GENERAL ELECTIONS 1986–1996**

**BLACK CANDIDATES**

**STANLEY DATA**

| | # Black Candidates Who Would Have Been Elected Among Just Black Electorate | # Black Candidates Who Would have Been Elected Among Just White Electorate | # Black Candidates Actually Elected |
|---|---|---|---|
| 1996: | | | |
| I | 4 | 2 | 2 |
| NI | 1 | 0 | 0 |
| 1994: | | | |
| I | 2 | 1 | 2 |
| NI | — | — | — |
| 1992: | | | |
| I | 3* | 3* | 3* |
| NI | 1 | 0 | 1 |
| 1990: | | | |
| I | 2* | 2* | 2* |
| V | — | 0 | — |
| 1988: | | | |
| I | 1 | 1 | 1 |
| 1986: | | | |
| I | 3* | 3* | 3* |

  

| | | | |
|---|---|---|---|
| NI | 1 | 0 | 1 |
| V | 1* | 1* | 1* |

* = Races where # Candidates Running in General Election Equaled # Seats to be Filled

**Table III**

**TOTAL FOR ALL GENERAL ELECTIONS 1986–1996**

| | | | | |
|---|---|---|---|---|
| A) | I | 15 | 12 | 13 |
| | NI | 3 | 0 | 2 |
| | V | 1 | 1 | 1 |
| B)** | I | 7 | 4 | 5 |
| | NI | 3 | 0 | 2 |
| | V | 0 | 0 | 0 |
| C) | I | 11 | 11 | 11 |
| | NI | 7 | 1 | 4 |
| | V | 1 | 1 | 1 |

A = Based on Stanley classifications

B** = Leaving out races where V = N

C = Based on Brown classifications

**Table IV**

**PRIMARY ELECTIONS 1986, 1992, 1994**

**BLACK CANDIDATES**

**STANLEY DATA**

| Election | V=Votes to Cast<br>N=Number of Candidates | Rank Among<br>Black Voters | Rank Among<br>White Voters | Succeed? |
|---|---|---|---|---|
| 1994: NI | — | | | |
| 1992: NI | | | | |

| | | | | |
|---|---|---|---|---|
| Hood | V=3 | 1 | 10 | Y |
| Thomas | N=12 | 2 | 7 | N |
| 1986: NI | | | | |
| Murphy | V=3 | 1 | 9 | Y |
| Baltimore | N=17 | 2 | 17(last) | N |

## Table V

## PRIMARY ELECTIONS 1986, 1992, 1994

## AGGREGATE DATA

| | # Black Candidates Who Would have Advanced to General Election Among Just Black Electorate Only | # Black Candidates Who Did Advance to General Election |
|---|---|---|
| I | — | — |
| NI | 4 | 2 |

**All Citations**

35 F.Supp.2d 989

Footnotes

1 Because plaintiffs seek only injunctive relief, there are no Eleventh Amendment issues. *See Edelman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

2 Article 6, Section 11 provides:

> The state shall be divided into judicial circuits along county lines in each of which there shall be elected one or more circuit judges as provided by law. Sessions of the circuit court shall be held at least four times in each year in every county organized for judicial purposes. Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by rules of the supreme court. The number of judges may be changed and circuits may be created, altered and discontinued by law and the number of judges shall be changed and circuits shall be created, altered and discontinued on recommendation of the supreme court to reflect changes in judicial activity. No change in the number of judges or alteration or discontinuance of a circuit shall have the effect of removing a judge from office during his term.

Wayne County Circuit Court is also known as the Third Judicial Circuit of Michigan.

3 *See generally* Mich. Comp. Laws Ann. §§ 168.411–426 (describing the qualifications, nomination, election, terms, and removal of circuit court judges).

4 *See Letter from Governor Milliken to Basil Brown, Chairman of the Senate Judiciary Committee, and Dennis Hertel, Co–Chairman of the House Judiciary Committee, dated February 13, 1980* (defendant's Exhibit F).

5 *Letter from Horace Sheffield, Vice President of DABO, to Governor Milliken, dated August 29, 1979* (defendant's Exhibit G).

6 The reasons for the 1980 legislation have been articulated as follows:

> The need for state government to streamline the operations and assume the costs of the state's judicial system has been recognized for some time now. The increase in case backlogs throughout the state and the lessened ability of local units of government to meet the costs of court operation point toward the desirability of such an approach. However, nowhere is the need for court reorganization and state assumption of the costs of court operations more urgent than in the Detroit–Wayne County area. The existence of several different court establishments has led to inefficiency in the administration of justice and duplication in court services and functions, as well as redundancy in the taxation of city and county residents. At the same time, the financial straits in which Wayne County finds itself make it increasingly difficult for the county to sufficiently fund its share of court operations. To address these problems, some feel that the courts in Detroit and Wayne County should be reorganized with the help of much-needed state funding, to improve the efficiency of these courts in this area and bring the court structure more into line with the rest of the state. Moreover, they see such a move as serving as a first step toward total state funding for the operations of all state courts in Michigan.

Susan Ekstrom, *Court Organization and Funding in Michigan* (July 1996), at pp. 2–3 (quoting a House Legislative Analysis Section analysis of Senate Bill 1106, which became Public Act 438 of 1980, dated September 22, 1980) (plaintiffs' Exhibit F). Ms. Ekstrom's paper is a publication of the House Legislative Analysis Section.

7 This section, formerly Mich. Comp. Laws Ann. § 600.9947(2), read:

> If the legislature does not appropriate sufficient funds to comply with subsection (1) for any fiscal year, the funds which are necessary for the continued implementation of sections 304, 555, 563, 564, 592, 593, 594, 595, 821, 8121a, 8202, 8272, 8273, 8275, 9104, 9943, and sections 13, 31, 32, 34, and 35 of Act No. 369 of the Public Acts of 1919, as amended, being sections 725.13, 725.31, 725.32, 725.34, and 725.35 of the Michigan Compiled Laws, shall terminate on September 30 of the fiscal year immediately preceding the fiscal year for which sufficient funds have not been appropriated.

8 Although the state fully funded the salaries of the employees of Wayne County Circuit Court, Recorder's Court, and 36th District Court, the state did not fund all of the expenses of these courts. Further, the other trial courts in the state did receive limited funding from the state for operational expenses.

9 The plaintiffs also claimed that the state had a duty under various provisions of the Michigan Constitution of 1963, including Article 6, Section 1, to fund the operational expenses of the trial courts. The Michigan Supreme Court rejected these arguments. *See Grand Traverse County*, 450 Mich. at 469–477, 538 N.W.2d 1.

10 "While we readily concede that this remedy was not sought or implemented and that the Legislature thus failed to follow through on its announced intention, that does not change the status of a private cause of action for money judgment—the remedy provision clearly indicates an intent to preclude an action for money damages." *Grand Traverse County*, 450 Mich. at 466, 538 N.W.2d 1 (footnote omitted).

11 In Public Act 189 of 1993, the state committed to fund 31.5 percent of the trial court expenses of the entire state. The commitment of funds, however, was offset by the court revenues collected by the county or district control unit, among other things. As such, only twenty-four of the state's eighty-two other counties received funds under this provision. *See* Susan Ekstrom, *Court Organization and Funding in Michigan* (July 1996), at p. 5.

12 Neither side has proffered the results of the 1998 election, and their experts' analyses were not revised after the 1998 election. Thus, the parties apparently agree to having this case decided without the 1998 election results as part of the record.

13 As stated in the 1990 census, the City of Detroit had a population of 1,027,974, of which seventy-six percent were African American and twenty-two percent were white.

14 In a letter dated August 13, 1998, the Court instructed plaintiffs "to identify the papers, or portions thereof, which articulate their constitutional claim(s) as distinguished from their claim under the Voting Rights Act" because it was unclear from the papers "precisely where and to what extent plaintiffs' constitutional claim(s) are articulated." In response plaintiffs submitted a letter citing to portions of the record that they say supports their constitutional claims. Specifically, plaintiffs cite to a deposition of a state senator as well as excerpts from the *Journal of the Senate* in which statements of individual state senators regarding the merger are compiled. Ostensibly, plaintiffs are inviting the Court to review the motives of the individual legislators in voting for the legislation. "But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 93 L.Ed. 632 (1949). Accordingly, the Court declines plaintiffs' invitation.

15 *See* plaintiffs' Exhibit H (hereinafter referred to as *Legislative Analysis* ).

16 The *Legislative Analysis,* however, "does not constitute an official statement of legislative intent."

17 *Legislative Analysis* at 20.

18 The analysis also responds to this argument:

> The bill would abolish the Detroit Recorder's Court ... apparently simply on the grounds of "standardization." ... [S]ome people question ... the "standardization" argument, pointing out that the bill would eliminate only one "special court"—the predominantly African American recorder's court—and would leave in its place the existing suburban—and overwhelmingly white—municipal courts in Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Shores, Grosse Pointe Woods, and Eastpointe.... So if recorder's court is to be eliminated in the interests of "standardization," why doesn't the bill propose these municipal courts' elimination as well? Some people believe that the difference in the bill's treatment of these courts is racially based: they point out that the majority of recorder's court judges are African American (currently, 22 of the 29 judges), as is the jury pool for the court drawn from the City of Detroit, while none of the suburban municipal judges is African American and their jury pools are overwhelmingly white. In addition, some people point out that recorder's court has operated as a unique and separate court for over 150 years, and that no one proposed eliminating the court when its racial makeup was predominantly white and served a predominantly white population.
>
> *Legislative Analysis* at 19.

19 "In particular, as a May 1996 *Detroit Free Press* article suggests, the move to abolish Detroit Recorder's court 'appears to partake of an element of payback for the conviction in Recorder's Court of [white] former Detroit police officers Walter Budzyn and Larry Nevers for the murder of [black Detroiter] Malice Green.' " *Legislative Analysis* at 19.

20 Apparently racial composition data for election precincts in Wayne County is not available for elections prior to 1986.

21 Professor Pildes was not instructed to address plaintiffs' constitutional claims.

22 The tables are attached as an appendix to this opinion.

23 The relevant portions of the Pildes Report in this regard are incorporated by reference.

24 Dr. Stanley concluded that thirteen of fifteen African–American candidates of choice were successfully elected.

25 Dr. Brown considered Isabel Torres, an Hispanic candidate, a candidate of choice.

26 Dr. Stanley concluded that two of three candidates of choice of the African–American community were successfully elected.

27 In other words, there is nothing in the record to indicate that the circumstances upon passage of the legislation were any different than when, after examining aspects of the merger of Recorder's Court and Wayne County Circuit Court in 1979, the DABO stated: "[A]t no time during the many, many hours of debate and testimony from a wide range of experts on this question was any credible evidence presented, whatsoever, that would support the anti-black conspiracy theory.... [T]he facts to support [the antiblack conspiracy theory] were never disclosed—though we zealously sought them[.]"

28 "This list of special circumstances is illustrative, not exhaustive." *Gingles,* 478 U.S. at 57 n. 26, 106 S.Ct. 2752.

29 There is nothing in the record to support any of Dr. Brown's opinions in this regard.

145 F.3d 818
United States Court of Appeals,
Sixth Circuit.

Maxine B. COUSIN, et al., Plaintiffs–Appellees,
v.
Don SUNDQUIST; State Election Commission; Brook Thompson; Hamilton County Election Commission; Carolyn Jackson, Defendants–Appellants.

No. 96–6028.
|
Argued Dec. 4, 1997.
|
Decided June 1, 1998.
|
Rehearing and Suggestion for Rehearing En Banc Denied July 10, 1998.

**Synopsis**
African-American voters brought action against Governor, state and county election commissions, and others, alleging that county's at-large method of electing judges violated Voting Rights Act. The United States District Court for the Eastern District of Tennessee, Thomas Gray Hull, J., 840 F.Supp. 1210, found Act violation. Defendants appealed. The Court of Appeals, 46 F.3d 568, vacated and remanded. The District Court, 904 F.Supp. 686, again ruled in voters' favor. Defendants appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) adoption of analysis of voters' expert to support finding that voters satisfied third *Gingles* precondition was error; (2) voters failed to meet third *Gingles* precondition for claim alleging Act violation; (3) claim based on impairment of minority's ability to influence outcome of election is not permitted under Act; (4) cumulative voting is inappropriate remedy for Act violation; and (5) totality of the circumstances did not establish Act violation.

Reversed and vacated.

West Headnotes (13)

[1] **Federal Courts**
Elections, voting, and political rights

District court's factual findings regarding violations of Voting Rights Act's prohibition against race-based denial or abridgement of right to vote and the determination of whether vote dilution has occurred are ordinarily reviewed for clear error. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

Cases that cite this headnote

[2] **Federal Courts**
Findings

Rule establishing standard of review for district court's factual findings 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. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

Cases that cite this headnote

[3] **Election Law**
Vote Dilution

To meet their burden of production with regard to alleged violation of Voting Rights Act's prohibition against race-based denial or abridgement of right to vote, plaintiff must satisfy three preconditions: (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be able to show that it is politically cohesive, and (3) the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

  

15 Cases that cite this headnote

[4] **Election Law**

Dilution of voting power in general

Claim arising under Voting Rights Act's prohibition against race-based denial or abridgement of right to vote cannot proceed unless all three *Gingles* preconditions are satisfied. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

Cases that cite this headnote

[5] **Federal Courts**

Elections, voting, and political rights

On appeal from order finding violation of Voting Rights Act's prohibition against raced-based denial or abridgement of right to vote, Court of Appeals would review the district court's factual findings concerning racial bloc voting for clear error, and its legal conclusion that the third *Gingles* precondition for Act violation was met de novo. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

1 Cases that cite this headnote

[6] **Election Law**

Weight and sufficiency

Adoption of analysis of voters' expert to support finding that voters satisfied third *Gingles* precondition, which required showing that white majority voted so as usually to defeat minority's preferred candidate, was error in action alleging that at-large county judicial elections violated Voting Rights Act, given that several of expert's data belied his conclusions and that opposing expert's study, which included elections involving only white candidates, was more relevant. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

5 Cases that cite this headnote

[7] **Election Law**

Weight and sufficiency

District court erred in relying on tabular data from unrelated voters' rights case to determine that voters challenging county's judicial election process under Voting Rights Act made required showing of *Gingles* precondition that white majority typically voted to defeat minority's preferred candidate; data did not support such conclusion. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

5 Cases that cite this headnote

[8] **Election Law**

Weight and sufficiency

African-American voters challenging county's at-large judicial election process failed to show that minority-preferred candidates were unable to prevail in countywide elections, and thus failed to meet third *Gingles* precondition for claim alleging violation of Voting Rights Act's prohibition against race-based denial or abridgement of right to vote. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

Cases that cite this headnote

[9] **Election Law**

Vote Dilution

Division of county into single-member districts was inappropriate remedy for any vote-dilution violation of Voting Rights Act arising from county's at-large method of electing judges, inasmuch as such plan was at odds with important state interest in linkage, which ensured that judge served entire jurisdiction from which he or she was elected, and that entire electorate subject to judge's jurisdiction had opportunity to hold judge accountable at the polls. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

1 Cases that cite this headnote

[10] **Election Law**

  

Dilution of voting power in general

Claim based on impairment of minority voters' ability to influence outcome of election, rather than to determine it, is not permitted under Voting Rights Act. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

6 Cases that cite this headnote

[11] Election Law

Cumulative voting

Cumulative voting is an inappropriate remedy for violation of Voting Rights Act's prohibition against race-based denial or abridgement of right to vote, especially when imposed on election of state court judges. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

2 Cases that cite this headnote

[12] Federal Courts

Elections, voting, and political rights

Court of Appeals would review de novo district court's analysis of totality of the circumstances and its legal conclusion that the totality of the circumstances indicated vote dilution resulting from county's at-large judicial election process, in violation of Voting Rights Act. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

Cases that cite this headnote

[13] Election Law

Vote Dilution

Even if voters challenging county's at-large judicial election process satisfied *Gingles* preconditions for claim under Voting Rights Act's prohibition against race-based denial or abridgement of right to vote, totality of the circumstances did not establish violation; process was not prextext for diluting minority voting rights, county did not comprise unusually and impermissibly large electoral district for judicial offices at issue, minority candidates enjoyed success in running for office in county, county judges were responsive to needs of minority citizens, and state had significant linkage interest in electing judicial offices on at-large basis. Voting Rights Act of 1965, § 2(b), as amended, 42 U.S.C.A. § 1973(b).

Cases that cite this headnote

**Attorneys and Law Firms**

***820** Michael W. Catalano, Deputy Attorney General (argued and briefed), Office of the Attorney General, General Civil Division, Nashville, TN, for Defendants–Appellants.

Laughlin McDonald (argued and briefed), American Civil Liberties Union Foundation, Atlanta, GA, Richard H. Dinkins (briefed), Williams & Dinkins, Nashville, TN, Myron Bernard McClary, Chattanooga, TN, Margaret Carey, Center for Constitutional Rights, Greenville, MS, for Plaintiffs–Appellees.

Edward Still (briefed), Lawyers' Committee for Civil Rights Under Law, Washington, DC, for Amicus Curiae Center for Voting and Democracy.

Before: WELLFORD, NORRIS, and BATCHELDER, Circuit Judges.

## OPINION

WELLFORD, Circuit Judge.

The defendants appeal the district court's finding that the conduct of judicial elections for positions on the Circuit Court, Criminal Court, Chancery Court, and General Sessions Court in Hamilton County, Tennessee, violates Section 2 of the Voting Rights Act. *See* 42 U.S.C. § 1973(b) (1994) (hereinafter "Section 2"). Specifically, the district court held that the black plaintiffs made out a case of vote dilution under the three part "results" test enunciated by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), and also under the totality of the circumstances test drawn from the nine factors identified in the Senate Report accompanying the 1982 Amendments to the Act. *See* S.Rep. No. 417, 97th Cong., 2nd Sess. 28–29 (1982) (hereinafter "Senate Report"). For the reasons indicated, we **REVERSE.**

### *I. BACKGROUND*

At the time this lawsuit was filed, the Hamilton County judiciary consisted of four Circuit Court judges, three Criminal Court judges, two Chancery Court judges, and three General Sessions Court judges. After the district court handed down its opinion in this case, the Tennessee legislature passed a measure expanding the General Sessions Court in Hamilton County to five judges, legislation which was subsequently signed by Governor Don Sundquist and approved in a countywide referendum by the voters of Hamilton County. All of these judicial offices are elected at-large by the qualified voters of Hamilton County, and the elected judges serve eight-year terms. Tenn. Const. art. VI, § 4; Tenn.Code Ann. § 17-1-103 (1994). Except for the elections for the two recently-added General Sessions judges, which are to be nonpartisan, Tenn. H.B. 3273 § 1(c), the elections for these positions are partisan. Candidates for Hamilton County judicial offices run for separately designated positions, with the candidate receiving the highest number of votes declared the winner. Tenn.Code Ann. § 2-8-110 (1997 Supp.). In addition, Hamilton County judges must be members of the Tennessee Bar. Tenn.Code Ann. § 17-1-106 (1994). Under the existing system, no black lawyer has ever run for a position on the Circuit Court, Criminal Court, Chancery Court, or General Sessions Court in Hamilton County. Neither has the Governor of Tennessee ever appointed a black judge to the Hamilton County bench ***821** under his authority to designate judges to fill vacancies in the positions at issue here.

We have previously had occasion to review the controversy underlying this case, and our opinion in that matter was reported *sub nom. Cousin v. McWherter* at 46 F.3d 568 (6th Cir.1995). In that case, as in this one, we considered the district court's finding of a Section 2 violation. We held that the district court had failed to provide us with sufficiently detailed bases for its reasoning. *Id.* at 574 (noting that "we require a particularly definite record for voting rights cases") (citing *Velasquez v. City of Abilene*, 725 F.2d 1017, 1020 (5th Cir.1984)). Specifically, we faulted the district court for analyzing the plaintiffs' claims under "an over-arching 'totality of the circumstances' " test and not clearly addressing the application of the *Gingles* pre-conditions to the claims. *Id.* at 575. We also found that the district court failed to weigh the state's interest in "linkage"—the identity of the jurisdictional and electoral bases of its judges—as a separate and legitimate factor to be considered as part of the totality of the circumstances, *id.* at 576, and erred in concluding that this interest was " 'nebulous at best.' " *Id.* at 577. We recognized that the state's interest was but one factor in the totality of the circumstances test, but held that the linkage interest was a substantial one. *Id.* (citing *League of United Latin Amer. Citizens v. Clements*, 999 F.2d 831 (5th Cir.1993) (en banc) (hereinafter "*LULAC* ")). *See also Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419, 426-27, 111 S.Ct. 2376, 115 L.Ed.2d 379 (1991) (finding a state's linkage interest to be a "legitimate factor" among the totality of the circumstances). Accordingly, we directed that, on remand, "the plaintiffs must produce evidence supporting the dilution claim sufficient to carry their burden of outweighing the state's interest." 46 F.3d at 577. We expressed no opinion on the merits of the case, but vacated the district court's decision and remanded for more specific findings:

> On remand, the district court is to determine the presence or absence of the three *Gingles* pre-conditions which plaintiffs must necessarily prove in order to establish their vote dilution claim; and if the court finds those preconditions do exist, to consider the totality of the circumstances in order to determine whether, in the context of all those circumstances, a Section 2 violation has occurred.
>
> *Id.*

The district court's opinion on remand is now before us. *See Cousin v. McWherter*, 904 F.Supp. 686 (E.D.Tenn.1995). The district court found that the plaintiffs had met the *Gingles* pre-conditions, and that the totality of the circumstances weighed in favor of finding Section 2 liability. The district court ordered the State of Tennessee to submit a new plan for electing Hamilton County judges within 90 days of December 27, 1995, the date its opinion was rendered. This deadline was subsequently extended twice. Though bills attempting to designate a remedy were proposed in both the Tennessee House and Senate in January of 1996, and passed by the Judiciary Committee of the respective houses in April,

1996, neither bill gained the approval of the full body. Since the Legislature failed to propose an appropriate remedy, the district court solicited the parties' suggestions in May, 1996. In response to this invitation, the State "[took] no position as to the remedy that this Court should impose...."

The district court ultimately rejected the plaintiffs' proposed remedy—the creation of single-member districts within Hamilton County—and ordered a scheme of countywide cumulative voting for Hamilton County judgeships. Thus, under the district court's order, beginning with the August, 1998, regular election, judges for the Circuit Court, Criminal Court, Chancery Court, and General Sessions Court in Hamilton County would run in elections in which each voter is given the number of votes corresponding to the number of seats to be filled and allowed to allocate those votes among the eligible candidates as he or she sees fit. Because the district court's order encompassed any additional judgeships created in the relevant courts before the August, 1998, election, it would therefore also apply to the two newly-created General Sessions Court judgeships.

We find that the district court erred in its analysis of the *Gingles* pre-conditions. Indeed, ***822** our conclusion that the plaintiffs did not meet the third pre-condition would justify our reversal of this case. Even if we had found that the plaintiffs had successfully carried their *Gingles* burden, however, we also find that the district court erred in its application of the totality of the circumstances test. Finally, we disagree with the propriety and rationale of the plaintiffs' and the district court's proposed remedies in this case. As the district court properly recognized, single-member districting would violate Tennessee's important and substantial linkage interest. In addition, two of the three districting plans presented by the plaintiffs present additional deficiencies such that we could not approve them even if we ignored the state's linkage interest. Moreover, we consider cumulative voting a mechanism for achieving proportional representation among the judges in Hamilton County, a purpose for which Section 2 of the Voting Rights Act was not intended, and find it a particularly inappropriate remedy when applied to the election of state court judges. All three reasons underlie the result we reach in this case.

Our treatment of these issues is consistent with the latest opinions from other Courts of Appeals dealing with Voting Rights Act challenges to the conduct of judicial elections. *See Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir.1997) (involving a challenge to the election of circuit court and state appellate court judges in Milwaukee County), *cert. denied*, 522 U.S. 1076, 118 S.Ct. 853, 139 L.Ed.2d 753 (1998); *White v. Alabama*, 74 F.3d 1058 (11th Cir.1996) (involving a challenge to the method of electing judges to Alabama's civil and criminal appellate courts); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994) (en banc) (involving a challenge to Florida's method of electing judges to the state's Fourth Judicial Circuit); *LULAC*, 999 F.2d 831 (involving a challenge to Texas' system of electing state court judges). Each appellate court found special problems, as we do in this case, in dealing with Voting Rights Act challenges to judicial elections and with proposed remedies such as single-member districting, cumulative voting, and court expansion. *See Milwaukee Branch*, 116 F.3d at 1200–01 (discussing single-member districting); *White*, 74 F.3d at 1070–75 (reversing the imposition of a remedy increasing the size of the state appellate courts and creating a nominating commission to appoint the additional judges); *Nipper*, 39 F.3d at 1542–47 (addressing the possible remedies of single-member districting, cumulative voting, and the creation of a new Judicial Circuit); *LULAC*, 999 F.2d at 872–76 (rejecting single-member districting and limited and cumulative voting). In addition, this case involves claims substantially similar to those presented in a recent case challenging the election of Ohio state judges under the Voting Rights Act before a district court within our own Circuit. *See Mallory v. State of Ohio*, Case No. C–2–95–831 (S.D.Ohio) (Oct. 20, 1997).

Although this case is similar in some respects to these recent cases, it also presents a completely novel feature: the imposed remedy of cumulative voting in judicial elections. The plaintiffs conceded at oral argument that they knew of no federal case imposing this remedy in this electoral context. In fact, our research has revealed only one federal case that has ordered cumulative voting in any electoral context, and that in a case where the plaintiffs challenged the selection of a county *legislature*. *Cane v. Worcester County, Maryland*, 847 F.Supp. 369 (D.Md.1994), *aff'd in part and rev'd in part*, 35 F.3d 921, 928 (4th Cir.1994) (reversing the district court's imposition of cumulative voting because the district court did not adequately "give effect to the legislative policy judgments underlying the current legislative scheme"). We find it significant that the Fourth Circuit reversed the district court's imposition of

cumulative voting in *Cane*, leaving us with no example in federal case law in which cumulative voting has been ordered and approved for elections to any office. Neither are we aware of any jurisdiction that has elected state trial judges by means of cumulative voting.

### *II. STANDARD OF REVIEW*

[1] [2] "A district court's factual findings regarding Section 2 violations and the determination of whether vote dilution has occurred are ordinarily reviewed for clear error." *Cousin*, 46 F.3d at 574 (citing ***823** Fed. R. Civ. Pro. 52(a) and *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752). However, "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." *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752 (internal quotation marks omitted).

### *III. THE GINGLES PRE–CONDITIONS*

[3] To meet their burden of production in an alleged Section 2 violation, the plaintiffs must satisfy three pre-conditions, enunciated by the Supreme Court in *Gingles*. Those conditions are:

> [1] the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district .... [2] the minority group must be able to show that it is politically cohesive .... [and 3] the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.

*Id.* at 50–51, 106 S.Ct. 2752. Both the second and third *Gingles* pre-conditions thus require a court to consider the voting behavior of different races. However, the inquiry in the second pre-condition differs from that involved in the third: the former asks merely whether voters of the same race tend to vote alike, and the latter evaluates whether "a bloc-voting majority can routinely outvote" the minority, thereby "impair[ing] the ability of a protected class to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1007, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (internal citations and quotation marks omitted).

[4] [5] The state concedes, and uncontroverted evidence at trial showed, that blacks in Hamilton County vote sufficiently cohesively to satisfy the second *Gingles* pre-condition. The district court's finding to this effect is not clearly erroneous. However, we do find clear error in the district court's analysis of and conclusion concerning the third pre-condition, the extent of racial bloc voting. Since we conclude that the plaintiffs failed to meet the third pre-condition, we need not conduct a detailed inquiry into the first factor, the geographic compactness of blacks in Hamilton County, for a Section 2 claim cannot proceed unless all three *Gingles* pre-conditions are satisfied. *See Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (disposing of the plaintiffs' Section 2 claim without analyzing the first *Gingles* pre-condition, since the Court found that the plaintiffs had failed to meet the third pre-condition). *See generally Gingles*, 478 U.S. at 50, 106 S.Ct. 2752 (explaining that the circumstances contemplated by the three pre-conditions must necessarily exist "for multimember districts to operate to impair minority voters' ability to elect members of their choice"). We will review the district court's factual findings concerning racial bloc voting for clear error, and its legal conclusion that the third pre-condition has been met *de novo*. *Cousin*, 46 F.3d at 574; *Gingles*, 478 U.S. at 79, 106 S.Ct. 2752.

[6] The third *Gingles* pre-condition requires a Section 2 plaintiff to show that the white majority votes in a manner usually to defeat the black minority's preferred candidate. 478 U.S. at 51, 106 S.Ct. 2752. Both parties in this case presented expert testimony concerning the existence and extent of racial bloc voting in Hamilton County. The district court relied heavily on the testimony of the plaintiffs' expert, Dr. Cole, *see Cousin*, 904 F.Supp. at 691–99 (quoting Dr. Cole at length), and on tabular data from Chattanooga City elections prepared for another case, *see id.* at 700–04 (reproducing Appendices A, B, and C from *Brown v. Board of Comm'rs of the City of Chattanooga*, 722 F.Supp. 380, 400–04 (E.D.Tenn.1989) (evaluating an unrelated Section 2 challenge to Chattanooga's practice of electing City Commissioners at-large)), in holding that the plaintiffs had met the third *Gingles* pre-condition. We hold

that the district court erred in its reliance on both these bases and in the legal conclusions it drew from this data.

In his analysis of the issue of racial bloc voting, Dr. Cole examined elections pitting a white candidate against a black candidate. He considered black/white contests for judicial positions most relevant to this litigation, and he found five such contests: four elections ***824** for Chattanooga city judgeships between 1969 and 1991, and the 1980 Tennessee Supreme Court election. Because of the dearth of especially relevant contests, Cole also considered black/white contests for other elected positions, of which he found 29 examples between 1966 and 1993. Those additional contests included Democratic Presidential primaries; Democratic primaries for Hamilton County Council, Registrar, Public Defender, Juvenile Court Clerk, Quarterly County Court, and the Tennessee State House of Representatives; general elections for Hamilton County Trustee, Public Defender, Justice of the Peace, Constable, Quarterly County Court, and Tennessee State House of Representatives; and general elections for Chattanooga Mayor, City Council and School Board. For each election, Dr. Cole calculated the percentage of whites voting for the white candidate and the percentage of blacks voting for the black candidate, a figure said to represent racial "cohesion" in that election. Dr. Cole then averaged the cohesion figures, concluding that, for the five black/white judicial contests, the average black cohesion was 76% and the average white cohesion 80%; and for the 29 other black/white contests, the average black cohesion was 80% and the average white cohesion 88%. Dr. Cole used these averages in connection with black/white voter turnout information, determining that, in order to succeed in a Hamilton County election, a black candidate would need a number of white crossover votes exceeding the 20% average crossover suggested by his white cohesion figure. Thus, Dr. Cole concluded, a black candidate would usually lose a countywide election in Hamilton County. In addition, Dr. Cole extrapolated these figures to predict results in hypothetical elections. For example, he testified that Walter F. Williams, a black candidate who defeated a white opponent to win election to a city judgeship in 1991, would not have won the election had it been held on a countywide basis.

The methodology of the defense expert, Dr. Taebel, differed significantly from that employed by his counterpart. Dr. Taebel considered elections presenting voters with a racial choice as well as elections involving only white candidates. Dr. Taebel chose his group of elections according to: 1) their "recency," under which criterion he limited his inquiry to elections taking place in the last ten years; 2) their relevance, by which he limited himself to elections that were countywide and partisan, as are elections for the Hamilton County judgeships at issue here; and 3) their "contestedness," by which he eliminated elections in which the losing candidate received less than 15% of the vote. Using these criteria, Dr. Taebel identified 32 elections between 1982 and 1992, of which 12 involved offices requiring the winner to be a lawyer. These "lawyer-qualified" offices included the Tennessee Supreme Court; Hamilton County Circuit, Criminal, Chancery, General Sessions, and Juvenile Courts; Hamilton County District Attorney General; and Hamilton County Public Defender. The other 20 elections, termed "exogenous" elections by Dr. Taebel, involved offices such as Hamilton County Sheriff, County Executive, and Public Service Commissioner; Governor of Tennessee; and United States Senator and Representative.

Dr. Taebel tabulated the percentage of white and black votes received by each candidate in these 32 elections, a calculation which enabled him to identify the minority's preferred candidate in each. Dr. Taebel's analysis indicated that the minority's preferred candidate prevailed in seven of the 12 lawyer-qualified elections and in 16 of the 20 exogenous elections. Dr. Taebel's figures also showed that in four of the minority-preferred candidate's seven victories in the lawyer-qualified elections, and in nine of the minority-preferred candidate's 16 victories in the exogenous elections, that candidate defeated the preferred candidate of the white majority. Furthermore, those numbers also indicated that in three of the seven lawyer-qualified elections, and in seven of the 16 exogenous elections, won by the minority's preferred candidate, that candidate was also the preferred candidate of white voters. Given these conclusions, Dr. Taebel opined that the white majority did not regularly vote in such a way as to deprive black voters in Hamilton County of the opportunity to elect their preferred candidate.

***825** We conclude that the district court's slavish adoption of Dr. Cole's analysis to support a finding that the plaintiffs met the third *Gingles* pre-condition was error. We reach this conclusion not merely because we disagree with Dr. Cole's methodology, but also because we find Dr. Taebel's study more relevant, and because several

  

of Dr. Cole's data belie his conclusions. While Dr. Cole testified that, in his opinion, elections pitting two white candidates against each other offered little information for a racial bloc voting analysis, we, like Dr. Taebel, agree with the Eleventh Circuit that such elections do offer relevant information in this inquiry:

> [W]e do not foreclose the consideration of electoral races involving only white candidates where the record indicates that one of the candidates was strongly preferred by black voters.... Where black voters have a genuine candidate of choice in an election involving only white candidates, then the results will be relevant to the question of whether racial bloc voting enables the white majority usually to defeat the minority's preferred candidate.

*Nipper*, 39 F.3d at 1540 (footnote omitted). *See also DeGrandy*, 512 U.S. at 1020, 114 S.Ct. 2647 (recognizing that minority voters' candidate of choice may not always share their race, but will share "common political ground" even if such a candidate does not "represent perfection to every minority voter"). Dr. Cole's limiting his analysis to black/white elections thus focuses his inquiry too narrowly. The proper inquiry is not whether white candidates do or do not usually defeat black candidates, but whether minority-preferred candidates, whatever their race, usually lose. A close look at Dr. Cole's data confirms that, even in the universe of elections he analyzed, this result does not usually occur. Black candidates won two of Dr. Cole's five black/white judicial elections, an especially impressive success rate when one considers that Timberlake, the losing black candidate in two of the three elections won by whites, was not qualified to hold the office since he was not a lawyer. In addition, blacks won 9 of Dr. Cole's 29 non-judicial black/white elections. In four of those elections—the 1974 Democratic Primary for Tennessee House District 28, the 1984 Democratic Presidential Primary, the 1990 runoff election for City Council District 7, and the 1990 general election for School Board District 7—the black candidate prevailed despite unanimous or near-unanimous white cohesion.

Moreover, the data from certain of Dr. Cole's elections reflect significant levels of white support for black candidates. For example, George Brown, the losing candidate in the 1980 election for the Tennessee Supreme Court, won 36% of the Hamilton County precincts with a voting age population that was 90% or more *white*. Similarly, City Judge Walter Williams won 25% of the precincts with more than 90% white voting age population in his 1991 election. Strong black candidates also occasionally attracted significant numbers of white crossover votes. As early as 1969, Bennie Harris had 31% white crossover support in his election to the position of City Judge. And Ardena Garth, the Hamilton County Public Defender, enjoyed 48% white crossover support in her 1990 election.

We reiterate that we point to these examples of black candidates' success only to show that Dr. Cole's conclusion—that black candidates in Hamilton County will usually lose for lack of sufficient white crossover support—is not borne out even by his own data. By indicating instances where black candidates have enjoyed white crossover support, we do not mean to suggest that we believe, or even that it has been shown, that black candidates are necessarily the preferred candidates of black voters. Rather, *Gingles* teaches that the success of minority-preferred candidates is the standard of evaluation for purposes of the third pre-condition. 478 U.S. at 51, 106 S.Ct. 2752. ***But cf.*** *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir.1994) (holding that "a candidate's race can be relevant to a [Section] 2 inquiry"). Mindful of the *Gingles* standard, we find it significant, for example, that in three of Dr. Cole's 29 elections—the 1966 general election for Justice of the Peace, the 1968 general election for Hamilton County Trustee, and the 1972 Democratic Primary for Tennessee House District 28—the winning white candidate was also the preferred candidate ***826** of blacks. This standard also underlies our holding that the district court improperly ignored Dr. Taebel's statistics, which accurately reflected the potentiality that the minority's preferred candidate might be a white person. *See Johnson*, 512 U.S. at 1020, 114 S.Ct. 2647.

[7] The district court also based its holding that the plaintiffs had met the third *Gingles* pre-condition on tabular data in Appendices A, B, and C of the opinion in the *Brown* case. *See Cousin*, 904 F.Supp. at 700–04 (quoting *Brown*, 722 F.Supp. at 400–404). In *Brown*, the plaintiffs successfully challenged Chattanooga's practice of electing City Commission members from the city at-

large. The factual circumstances of *Brown* thus differ significantly from the instant case: *Brown* involved citywide, not countywide elections; the elected body at issue was legislative, not judicial; and the elections studied were nonpartisan, not partisan. *See* 722 F.Supp. at 382. These differences counsel us to review extremely carefully any conclusions reached in the *Brown* case. However, since the *Brown* Appendices formed at least a partial basis for the court's finding regarding the third pre-condition, we will review them for any light they will shed on our analysis.

These tables collected data from quadrennial Chattanooga City Commission elections from 1971 to 1987 (Appendix A), Chattanooga City judge contests from 1969 to 1987 (Appendix B), and other elections and referenda from 1970 to 1988 (Appendix C); separated the percentages of the white and black vote for each candidate; and designated each election as "Racially Polarized" or "Not Racially Polarized." *See id.* The *Brown* court found the majority of the elections in the Appendices "Racially Polarized." To the extent that the district court here relied on this designation in reaching its conclusion regarding the third *Gingles* pre-condition in this case, it committed clear error. The designation given the elections by the *Brown* court is relevant to this litigation, if at all, only in an analysis of the second *Gingles* pre-condition —the extent of political cohesion—a factor that is not in dispute. Viewing the *Brown* data through the proper perspective for an analysis of the third pre-condition, we find no basis for a finding that the white majority usually votes in a manner that denies victory to the minority's preferred candidate. In 15 of the 31 City Commission elections, and in five of the eight City Judge contests, the candidate garnering the largest percentage of the black vote also won the election. Moreover, the position supported by a majority of black voters in the 1978 referendum on the repeal of Tennessee's constitutional ban on interracial marriage, the 1978 referendum on the elected school board, and the 1984 referendum on the Metro Charter prevailed in each election. In short, the district court erred when it found the *Brown* data supported its finding that the plaintiffs here met the third *Gingles* pre-condition.

[8] We find considerable methodological deficiency in Dr. Cole's analysis, and we also believe that neither Dr. Cole's statistics nor the election data from *Brown* support the district court's position. Furthermore, we believe Dr. Taebel's analysis shows that minority-preferred candidates can and do win countywide elections in Hamilton County. We therefore hold that the plaintiffs have failed to meet the third *Gingles* pre-condition, and accordingly we **REVERSE** the district court's holding to the contrary.

Because the third pre-condition is not satisfied, the plaintiffs' vote dilution claim in this case must fail. Since the claim has not passed even the initial hurdles, the plaintiffs are clearly not entitled to any remedy at all. We could, therefore, stop our inquiry, reverse the judgment, and vacate the district court's order at this point. However, mindful of the potentiality that there may be future challenges to the conduct of other lawyer-qualified elections in Hamilton County, we find it proper, and perhaps necessary, to express our views concerning the two alternative remedies proposed in this case: single-member districting, as the plaintiffs' proposed, and cumulative voting, as the district court ultimately ordered. *See Milwaukee Branch*, 116 F.3d at 1199 (continuing its analysis of the alleged Section 2 violation under similar circumstances).

***827** [9] The plaintiffs submitted three plans for dividing Hamilton County into single-member districts corresponding to the number of judgeships on a particular court: a proposed four district plan for the Circuit Court, a three district plan for the Criminal and General Sessions Courts, and a two district plan for the Chancery Court. The four district plan reflected a maximum deviation in population between the districts of 4.74%, and included one district where the black voting age population constituted a 60% majority. The three district plan had a maximum deviation in population between the districts of 10.98%, and achieved one district with a bare 50.3% majority black voting age population. Under the two district plan, blacks made up an "influence district" of 34% in one of the two districts. The districts in all three plans are contiguous and do not appear irregularly drawn; in addition, the districting plans were achieved without dividing any existing precinct. *Cousin*, 904 F.Supp. at 688–89.

Even if we had held plaintiffs' vote dilution claim valid, we would not have affirmed a remedy such as they proposed in this case because it is at odds with the important state interest in "linkage." Proper adherence to the principle of linkage ensures that a state court judge serves the

entire jurisdiction from which he or she is elected, and that the entire electorate which will be subject to that judge's jurisdiction has the opportunity to hold him or her accountable at the polls. Single-member districts, as several courts have noted, eliminate the identity between the electoral and jurisdictional bases of its judges, thereby violating the state's significant linkage interest. *Milwaukee Branch*, 116 F.3d at 1201; *Nipper*, 39 F.3d at 1542–46; *LULAC*, 999 F.2d at 868–76. This linkage interest is also important because it lies at the heart of philosophical decisions about the role of judging in our system of government, a concern eloquently expressed by the Fifth Circuit in *LULAC*:

> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. The collective voice of generations by their unswerving adherence to the principle of linkage through times of extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes. Tradition speaks to us about its defining role—imparting its deep running sense that this is what judging is about.

*LULAC*, 999 F.2d at 872. In addition to such traditional concerns, the *LULAC* court correctly noted that maintaining linkage and shunning single-member districting actually favors minorities who may be concerned that their particular interests are not represented on the bench:

> the subdistricting remedy sought by plaintiffs provides most judges with the same opportunity to ignore minority voters' interests without fear of political reprisal they would possess if elections were in fact dominated by racial bloc voting.
>
> * * * * * *
>
> After subdistricting, a handful of judges would be elected from subdistricts with a majority of minority voters. Creating safe districts would leave all but a few subdistricts stripped of nearly all minority members. The great majority of judges would be elected entirely by white voters. Minority litigants would not necessarily have their cases assigned to one of the few judges elected by minority voters. Rather the overwhelming probability would be that the minority litigant would appear before a judge who has little direct political interest in being responsive to minority concerns.

999 F.2d at 859, 873 (internal quotation marks omitted). *See also Nipper*, 39 F.3d at 1535 n. 79, 1543 (quoting *LULAC* with approval). We agree with the reasoning of the *LULAC* court. Similar notions motivated our holding in the previous *Cousin* opinion ***828** that the state's linkage interest was "legitimate" and "substantial." 46 F.3d at 577.

[10] In addition to our philosophical aversion to the implementation of single-member districting in judicial elections, we note that the particular single-member districting plans proposed in this case present additional deficiencies. We find the plaintiffs' two district plan, which includes a district with a maximum 34% black voting age population, particularly lacking because it is based on the premise that the Section 2 violation in this case consists of an impairment of the minority's ability to *influence* the outcome of the election, rather than to *determine* it. *Cousin*, 904 F.Supp. at 713. As the following analysis will indicate, we would reverse any decision to allow such a claim to proceed since we do not feel that an "influence" claim is permitted under the Voting Rights Act.

The district court allowed this "influence" claim to proceed because it interpreted the legislative history of the 1982 Amendments to the Voting Rights Act to permit, without explicitly creating, such a claim. This legislative history consisted of the Senate Report's indication that the "totality of the circumstances" statutory language directs an inquiry as to whether the minority's voting strength has been " 'minimized or cancelled out,' " and the fact that

the Report did not include the geographic compactness requirement, later enunciated by the *Gingles* Court. *Cousin*, 904 F.Supp. at 713 (quoting Senate Report). The district court also drew support for its position from the fact that the *Gingles* Court, albeit in a footnote, did not preclude an influence claim. *Id.* at 712–13 (citing *Gingles*, 478 U.S. at 46 n. 12, 106 S.Ct. 2752 n. 12).

The Supreme Court has yet to decide squarely whether Section 2 permits an influence claim. Our reading of *Gingles* ' footnote 12, in contrast to the district court's interpretation, reveals a Court concerned with limiting its holding, not authorizing its expansive use:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections.
>
> We also note that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

478 U.S. at 46 n. 12, 106 S.Ct. 2752 n. 12 (emphasis in original). Later, the Court addressed a Section 2 claim alleging injury in that minority black voters lacked even a sufficient minority to influence elections, denying them the ability to elect candidates of their choice by attracting white crossover votes. *Voinovich*, 507 U.S. at 158, 113 S.Ct. 1149. In addressing the claim, the *Voinovich* Court assumed, without deciding, that an influence claim essentially similar to the one described in paragraph two of *Gingles* footnote 12 was actionable under Section 2. *Id.* at 154, 113 S.Ct. 1149. The Court recognized that *if* such a claim were actionable, the analysis of *Gingles* ' first pre-condition "would have to be modified or eliminated," but the Court did not have to take this step because it found that the plaintiffs had not satisfied the third *Gingles* pre-condition. *Id.* at 158, 113 S.Ct. 1149.

We believe the district court erred in assuming from the *Gingles* footnote and the Senate Report that an influence claim is actionable under Section 2. The Supreme Court's reluctance in *Voinovich* to state that Section 2 authorizes such a claim, when the ***829** Court was squarely presented with factual circumstances favorable to so holding, suggests that the existence of an influence cause of action should not be inferred from the *Gingles* footnote, which describes a case the Court has never decided, and legislative history that supports the district court's position only by suggestion. We therefore view the plaintiffs' Chancery Court-related claim as an impermissible "influence" claim, wrongly asserted under Section 2 of the Voting Rights Act. *Accord McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947–48 (7th Cir.1988) (concluding that "influence" claims undermine the purpose the *Gingles* pre-conditions and refusing to consider such claims). For this reason, we believe the plaintiffs proposed two district system is particularly ill-conceived.

We also find the plaintiffs' proposed three district plan deficient. Even in the one district where blacks constitute a voting age population majority, their 50.3% margin is so razor-thin that it does not meet the "safe district" standards of courts that have approved race-conscious realignments in other electoral contexts. *See Latino Political Action Comm. v. City of Boston*, 784 F.2d 409, 414 (1st Cir.1986) (holding that a "65 percent [majority of the general population] ... is a generally accepted threshold" where voting is racially polarized) (Breyer, J.); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 163–64, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977) (finding it reasonable to conclude that at 65% minority population in a district is required to yield a majority of minority voting age population). *Cf. McGhee v. Granville County, North Carolina*, 860 F.2d 110, 113 (4th Cir.1988) (acknowledging the plaintiffs' objection to a proposed remedial plan containing a district with a 51.8% black voting age population majority since such a slim margin would give "no better than a fighting change" for a black candidate to win, but holding that the plan complied with relevant standards). In addition,

the fact that the three districts exceed the permissible maximum deviation in population lends further support to the notion that this plan is particularly inappropriate as a remedy. *See Brown v. Thomson*, 462 U.S. 835, 842–43, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (stating that a maximum deviation in population of more than 10% among legislative districts would make out a prima facie case of invidious discrimination under the Fourteenth Amendment).

We do not mean to suggest by these additional criticisms of the plaintiffs' two and three district plans that we would have approved a two or three district plan that achieved a more substantial black voting age population majority while complying with the maximum deviation figure. Nor do we wish to suggest, with respect to the three district plan, that we believe a district with a higher majority of black voting age population would necessarily elect a black candidate. We would not have approved any such a districting plan, as preceding paragraphs suggest, both because we find no vote dilution in Hamilton County judicial elections and because we disapprove of single-member districting as a remedy for judicial elections even where they violate the Voting Rights Act.

**[11]** Similarly, we feel that cumulative voting, the remedy ordered by the district court in this case, is an inappropriate remedy for a Section 2 claim, and especially so when imposed on the election of state court judges.

Section 2 of the Voting Rights Act specifically precludes its use to achieve proportional representation. *See* 42 U.S.C. § 1973(b) ("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."). *See also White v. Alabama*, 74 F.3d 1058, 1071–3 (11th Cir.1996) (holding that the Voting Rights Act cannot be used as a vehicle for achieving proportional representation in Alabama's appellate courts). Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy. *See* Lani Guinier, The Tyranny of the Majority 14–5 (1994); Pamela Karlan, Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L.Rev. 173, 231–6 (1989). The imposition of cumulative voting is thus meant to achieve an end not contemplated in the Voting Rights Act. As we indicated earlier, ***830** we have discovered only one other district court, in a case involving not judicial elections but apportionment of the county legislature, that has ordered this remedy for a Section 2 violation, a disposition subsequently reversed by the Court of Appeals. *See Cane v. Worcester County, Maryland*, 847 F.Supp. 369 (D.Md.1994), *aff'd in part and rev'd in part*, 35 F.3d 921.

The ultimate irony in this case is that even under the district court's mandated system of cumulative voting, proportional representation on the Hamilton County bench, which we believe may be the unstated goal of both the plaintiffs and the district court, is not assured. Political science teaches that the "threshold of exclusion"—the percentage of the vote necessary to guarantee the voting minority a seat—in cumulative voting equals 1 ÷ (1 + number of seats). Karlan at 222, 232. Applying that formula to the offices at issue here, we note that the threshold of exclusion (20% for Circuit Court, 25% for Criminal Court, 33% for Chancery Court, and 16.7% for General Sessions Court) exceeds the black voting age population in Hamilton County (17%) for all the relevant offices except for the newly-created five-judge General Sessions Court. *See Cousin*, 904 F.Supp. at 695 (quoting Dr. Cole's testimony that the black voting age population in Hamilton County was 17% in 1990).

Cumulative voting is particularly inappropriate in judicial elections. In Hamilton County, the practical effect of this remedy would require judicial colleagues who previously ran for designated positions on the Circuit, Criminal, Chancery, and General Sessions Courts, to run against each other. This result would, predictably, undermine the treasured institution of judicial collegiality, potentially complicating the disposition of administrative matters in the Eleventh Judicial Circuit and the General Sessions Court in Hamilton County. *See Nipper*, 39 F.3d at 1546. In addition, forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the potential that the election would unseat some of the hardest-working and most efficient judges in the state of Tennessee. *See* Annual Report of the Tennessee Judiciary 1996–97 (indicating that Hamilton County Circuit and Chancery Court judges shoulder among the highest workloads in Tennessee in terms of filings and dispositions per judge). Not only would cumulative voting undermine judicial collegiality, independence, and quality, the Eleventh Circuit has explained, but

> a cumulative voting system, like a subdistricting system, would encourage racial bloc voting. That, in turn, would necessarily fuel the notion that judges were influenced by race when administering justice.
>
> The only benefit black voters could legitimately expect from a court order implementing one of the appellants' proposed remedies, which would enable them to elect black judges of their choice, is the *perception* that the challenged circuit and county judicial systems are colorblind....
>
> By altering the current electoral schemes for the express purpose of electing more black judges, the federal court in fashioning the alteration, and the state courts in implementing it, would be proclaiming that race matters in the administration of justice.... Like other race-conscious remedies, this tends to entrench the very practices and stereotypes the Equal Protection Clause is set against. The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal. In the eyes of the public and litigants, at least, justice would not remain colorblind.

*Nipper*, 39 F.3d at 1546 (citations, internal quotation marks, and footnote omitted). Finally, in addition to these perception concerns, "cumulative voting raises the spectre of other organized interest groups seizing control of a fraction of the state judiciary. This concern alone should caution against heralding limited and cumulative voting as panaceas for the contradictions inherent in applying section 2 to judicial elections." Mary Thrower Wickham, Note, Mapping the Morass: ***831** Application of Section 2 of the Voting Rights Act to Judicial Elections, 33 Wm. & Mary L.Rev. 1251, 1284 (1992). We share these concerns.

Even more than these concerns about perception and the prospect of a judicial branch riven by faction, we are troubled by the political theory represented in the plaintiffs' claim and the district court's opinion: that the absence of black judges on the Hamilton County bench automatically indicates a dilution of blacks' right to vote and calls for a remedy—whether single member districting, as the plaintiffs would have it, or at-large cumulative voting, as the district court ordered—that will increase the possibility of electing a black judge to a Circuit, Criminal, Chancery, or General Sessions judgeship. *See Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1196 (7th Cir.1997) ("The possibility of increasing minority representation does not compel a jurisdiction to achieve that outcome, unless the three [*Gingles* ] conditions have been met and the judge is satisfied that minority voters have lacked an equal opportunity to participate in the political process."). Justice Thomas, in his eloquent concurrence in *Holder v. Hall*, has criticized the notion

> that the purpose of the vote—or of the fully "effective" vote—is controlling seats. In other words, in an effort to develop standards for assessing claims of dilution, the Court has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body. Under this theory, votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Such conclusions, of course, depend upon a certain theory of the "effective" vote, a theory that is not inherent in the concept of representative democracy itself.

512 U.S. 874, 899, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring) (citation omitted). Justice Thomas correctly points out that "the proper apportionment of political power in a representative democracy" constitutes a "[matter] of political theory ... beyond the ordinary sphere of federal judges." *Id.* at 901, 114 S.Ct. 2581. Like Justice Thomas, we fear that cumulative voting is a step in the evolution of the current strategy of creating majority-minority districts to produce proportional results: "In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race." *Id.* at 912, 114 S.Ct. 2581.

*Holder* principally addressed the concept of proportional representation as it affected legislative offices. For all the reasons stated above, we find cumulative voting to be even more inappropriate when applied to judicial elections than to legislative contests. We cannot reconcile such a voting practice with the goal of the blind administration of justice, particularly since judges are not representatives who can or should solicit votes to further their political aims. Therefore, even if we found that the plaintiffs' showing met the *Gingles* pre-conditions or satisfied the totality of the circumstances test, we would not approve the imposition of such a remedy.

## *IV. THE TOTALITY OF THE CIRCUMSTANCES TEST*

As mentioned earlier, our conclusion that the third *Gingles* hurdle is not met would justify our reversal of this case. However, we also find error in the legal conclusions the district court drew from its analysis of the "totality of the circumstances" test, derived from the Senate Report accompanying the Voting Rights Act and quoted in *Gingles*. *See* Senate Report at 28–29, *quoted in Gingles*, 478 U.S. at 36–37, 106 S.Ct. 2752. The Senate Report lists several "typical factors" that will be relevant in evaluating the totality of the circumstances in a Section 2 claim although, as the *Gingles* Court recognized, that list "is neither comprehensive nor exclusive," nor is it to be applied with mathematical precision. 478 U.S. at 45, 106 S.Ct. 2752 (quoting the Senate Report) (internal quotation marks and citations omitted).

[12] [13] We disagree with the district court's conclusion that the totality of the ***832** circumstances indicated a finding of vote dilution. *Cousin*, 904 F.Supp. at 712. The district court's application of this test involved a mixed question of law and fact. We therefore undertake *de novo* review of the district court's analysis of the totality of the circumstances, assessing each of the Senate Report's typical factors in turn, and of the district court's legal conclusion that the totality of the circumstances indicated a Section 2 violation. *See Gingles*, 478 U.S. at 79, 106 S.Ct. 2752 (recognizing appellate courts' power to correct errors of law infecting mixed questions of law and fact).

### 1. History of Discriminatory Efforts to Limit Black Voting

That Hamilton County, as part of the post-Reconstruction South, was not immune to the passage of Jim Crow laws and overt racism in the late 19th and early 20th century, as the district court found, cannot be a surprise. However, more relevant to this litigation, in our opinion, is the history behind the particular voting practice challenged here. On that score, the district court found "no proof that the establishment and maintenance of the present judicial system in Hamilton County was in any way a pretext for diluting minority voting rights." *Cousin*, 904 F.Supp. at 712.

Since we accept the district court's finding with respect to the origin and maintenance of at-large judicial elections in Hamilton County, we do not believe that the inglorious history of past discrimination against blacks voting rights cuts as clearly in favor of a finding of vote dilution as the district court would have it. In making this determination, we do not mean to belittle the pain caused, and the Constitutional violations represented, by the history the district court recounted. *See id.* at 705–06. We merely differ as to the legal significance of that history in making out a vote dilution claim in the 1990s. If anything, the record in this case suggests that the past 30 years have been marked by a complete absence of official discrimination against blacks' voting rights in Hamilton County and, as voter registration and turnout data indicate, by vigorous black participation in the democratic process.

### 2. Extent of Racially Polarized Elections

Since the state concedes that voting is racially polarized in Hamilton County, we do not disturb the district court's finding to that effect. *See id.* at 706–07. As our analysis in section III indicated, however, the outcome of even a racially polarized election does not always disfavor minority voters, a result which does not support a claim of vote dilution.

### 3. Suspect Electoral Practices or Procedures

The district court's analysis of this factor implied that Hamilton County comprises an unusually and

impermissibly large electoral district for the judicial offices at issue here, and that the size of the district enhances the opportunity for discrimination against blacks. We disagree with this premise. Hamilton County is not unusually large in comparison to other judicial districts in Tennessee. Eight other judicial districts in Tennessee are comprised of a single county, *see* Tenn.Code Ann. § 16-2-506 (1997 Supp.), and in every district the Circuit, Criminal, Chancery, and General Sessions Courts are elected at-large, as mandated by the Tennessee Constitution and by state statute. Tenn. Const. art. VI, § 4; Tenn.Code Ann. §§ 17-1-103 (1994). In fact, both Shelby and Davidson Counties comprise single-county judicial districts, and both counties far exceed Hamilton County in population. Apart from Hamilton County's size, there is no even allegedly discriminatory mechanism to limit or discourage black voting in Hamilton County. To the extent that the district court found that this factor indicated a Section 2 violation, therefore, we believe the court erred.

#### 4. Denial of Opportunity to Run for Office

The parties agree that there is no slating process for judicial elections in Hamilton County, and there is no allegation that minorities have been denied the opportunity to run for these offices. We note only that the lack of a slating process or other obstacle to *833 candidacy cuts against a finding of vote dilution.

#### 5. Effects of Past Discrimination on Political Participation

We do not disturb the district court's conclusion that, as a group, blacks in Hamilton County "have been isolated from the economic and political main stream .... [and] remain a socioeconomically depressed minority with a limited ability to fund and mount political campaigns." *Cousin*, 904 F.Supp. at 710.

#### 6. Overt or Subtle Racial Appeals in Political Campaigns

Although the district court made no factual finding with respect to this factor, only very isolated anecdotal evidence in record suggested that racial appeals played any part in Hamilton County's political life. Indeed, as the *Brown* court noted, "Chattanooga has for the most part been spared both overt and subtle racial appeals in elections." 722 F.Supp. at 396.

#### 7. Extent to Which Blacks Have Been Elected

Although the district court concluded that very few blacks hold office in Hamilton County, we consider more relevant the extent to which blacks win when they run for office. Again, we refer to our analysis of racial bloc voting in section III, which showed that blacks in Hamilton County can and do get elected to public office.

With respect to the particular offices at issue in this litigation, the district court accurately stated that, though there are qualified blacks in Hamilton County, "no black has ever won a majority of the votes in a county-wide judicial contest." *Cousin*, 904 F.Supp. at 711. This assertion, however, overlooks two additional important facts. First, no black has ever *run* for a county judgeship, a phenomenon surely attributable at least in part to the perception that it is very difficult for a black candidate to win a countywide election. That political success is difficult, however, does not mean it is unmanageable, as the testimony of Chattanooga City Judge Walter Williams regarding the possibility of a black candidate's election to a countywide judgeship indicated. Second, evidence at trial showed that only 27 black lawyers live in Hamilton County, and three of that number already hold "lawyer-qualified" offices—City Judges Williams and Bennie Harris, and Public Defender Garth. *See LULAC*, 999 F.2d at 865 ("A functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges that has resulted."). We do not agree that this factor clearly supports a finding of vote dilution under these circumstances.

#### 8. Responsiveness of Elected Officials to Minority Needs

The district court's finding with respect to this factor bears quoting at length:

> The Circuit Court, Chancery Court, Criminal Court and General Sessions Court Judges of Hamilton County are responsive to the particularized needs of the black community in Hamilton County inasmuch as

> these judges are fair and impartial in the disposition of matters before them.
>
> Specifically, there is no proof that any of the present judges have discriminated against any African-Americans who have been involved in the judicial process as plaintiffs, defendants, attorneys, jurors, or witnesses.

*Cousin*, 904 F.Supp. at 711. We agree with the district court's findings regarding the responsiveness of the individual judges who currently hold Hamilton County judgeships. Indeed, we regard these findings as especially significant, for the unstated proposition underlying a claim of vote dilution is that the minority's failure to gain racial representation in the relevant office has somehow prejudiced that group. The district court's findings of fact illustrate, to the contrary, that the Hamilton County bench currently performs as the judicial branch in our system of government was meant to function.

**9. Tennessee's Interest in Maintaining At-Large Elections**

The district court concluded "that under the totality of the circumstances ... Tennessee's ***834** state interest in at-large elections will not suffice to overcome a violation of Section 2, because it is overcome by the substantial dilution of black voting strength that it produces in Hamilton County." *Id.* at 712. As the preceding subsections indicate, our analysis of the totality of the circumstances in Hamilton County does not convince us that a Section 2 violation has even occurred, much less that it is of such severity that it will overcome a state interest we still consider to be legitimate and substantial. *See Cousin*, 46 F.3d at 577. *See also supra* Section III of this opinion and cases cited therein.

We find that the district court's application of the totality of the circumstances test was clearly erroneous. We consider only the effects of past discrimination on blacks' political participation, the fifth "typical" Senate factor, to cut clearly in favor of a finding of vote dilution. However, this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing the offices at issue here on an at-large basis. Therefore, even if we had considered the plaintiffs' showing sufficient to meet the three *Gingles* pre-conditions, we would not have found a Section 2 violation under the totality of the circumstances.

## *V. CONCLUSION*

We hold that the plaintiffs failed to show that the white majority in Hamilton County votes in such a way as usually to defeat the minority's preferred candidate, and that the plaintiffs thus failed to establish the existence of the third *Gingles* pre-condition. To the contrary, we believe the evidence showed that minority-preferred candidates can and do win election to office in Hamilton County, though no black candidate has ever run for one of the judgeships at issue here. This holding is sufficient to mandate our reversal of this case, even though we also find clear error in the district court's application of the totality of the circumstances test. Accordingly, we would reverse even if we had found that the plaintiffs had met the *Gingles* pre-conditions. Finally, we view both single-member districting and cumulative voting as inappropriate remedies in the context of judicial elections even where a Section 2 violation has been shown. Single-member districting destroys the state's substantial linkage interest in maintaining the coterminous jurisdictional and electoral boundaries of its judges. Cumulative voting, on the other hand, while it preserves the state's linkage interest, is impermissible both because it is designed to achieve purposes in conflict with the spirit of Section 2 of the Voting Rights Act and because it is a particularly inappropriate method for electing members of the judiciary. For all of these reasons, we **REVERSE** the district court's holdings to the contrary and **VACATE** its order imposing cumulative voting in the upcoming elections for Circuit Court, Criminal Court, Chancery Court, and General Sessions Court judges in Hamilton County.

**All Citations**

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