IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

NOTICE OF SUPPLEMENTAL EXHIBIT

The United States hereby provides the Court with a copy of the Report of Court-Appointed Expert Dr. Richard Pildes in *Anthony v. Michigan*, No. 96-74626 (E.D. Mich. June 30, 1998) (Docket No. 66), which the United States recently obtained from the Federal Records Center. This document is relevant to both Defendants' Motion to Exclude BISG Evidence (ECF No. 25) and Defendants' Motion for Summary Judgment (ECF No. 26). The United States was unable to obtain this document from the Federal Records Center prior to filing its briefs in opposition to Defendants' motions.

Pages 32 to 47 of the Report are relevant to the limited purpose of resolving the dispute between the parties in the recent motions briefing in this case, *see* U.S. Br. Opp. Br. 22 (ECF No. 38); Defs. Reply Br. 15-16 (ECF No. 41), concerning the meaning of the finding by the court in

Anthony that 50% of minority-preferred non-incumbent candidates in elections at issue in that case had been elected. 35 F. Supp. 2d 989, 1002 (E.D. Mich. 1999). The Report focuses on the success of "black candidates who . . . were candidates of choice of the black community," Pildes Rep. 43-44, and does not address "white candidates who might be [black] candidates of choice," Pildes Rep. 35. In total, seven non-incumbent black candidates had been candidates of choice of the black community, and four had been elected. Pildes Rep. 43-44. Professor Pildes then added an unsuccessful black-preferred Hispanic candidate to his analysis, to address the evidence in the light most favorable to Plaintiffs. Pildes Rep. 35, 39. Thus, Professor Pildes opined that four of eight black-preferred minority candidates had been elected. Pildes Rep. 39. *Anthony* echoes this expert opinion. *See* 35 F. Supp. at 1002 & n.25.

Dated: May 31, 2018

Respectfully submitted,

MATTHEW SCHNEIDER
United States Attorney
Eastern District of Michigan

/s/ Luttrell D. Levingston
LUTTRELL D. LEVINGSTON
Assistant United States Attorney
United States Attorney's Office
Eastern District of Michigan
Civil Rights Unit
211 W. Fort Street, Suite 2001
Detroit, MI 48226

JOHN M. GORE
Acting Assistant Attorney General
Civil Rights Division

/s/ Daniel J. Freeman
T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
DANIEL J. FREEMAN
JASMYN G. RICHARDSON
GEORGE E. EPPSTEINER
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7123 NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2018, a true and correct copy of the foregoing document was served via the Court's ECF system to all counsel of record.

/s/ Daniel J. Freeman
DANIEL J. FREEMAN
Attorney, Voting Section
Civil Rights Division
Department of Justice
Room 7123 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

WENDELL ANTHONY, et al., v. STATE OF MICHIGAN
Civil No. 96-74626

REPORT OF COURT-APPOINTED EXPERT
PROFESSOR RICHARD H. PILDES
UNIVERSITY OF MICHIGAN LAW SCHOOL

This report is filed pursuant to the Court's order dated April 3, 1998. That report requires me to express an opinion as to whether plaintiffs have established any genuine issues of material fact with respect to whether the merger of Recorder's Court and the Wayne County Circuit Court violates §2 of the Voting Rights Act (VRA), 42 U.S.C. §1973. Specifically, the order requires me to address whether disputed material facts exist as to the presence of the three Gingles factors, Thornburg v. Gingles, 478 U.S. 30 (1987). If so, I am required to further address whether plaintiffs have established genuine issues of material fact as to whether, under the "totality of circumstances," the merger would deny African-Americans an equal opportunity to participate in the political process and to elect judicial representatives of their choice within the meaning of § 2. The defendant has filed a motion for summary judgment, and the plaintiff has filed papers opposing the motion. Both parties have accompanied their motions with the reports of several expert witnesses.

This report is limited to the issues identified in the Court's order. Therefore, this report does not address plaintiffs' claim that the merger violates the Fourteenth Amendment to the United States Constitution due to the allegedly racially-discriminatory purpose behind the merger legislation. In addition, because the Court might not accept my analysis of any particular issue, this report attempts to address all the arguments the defendant raises on behalf of summary judgment. Where disputed issues of law, as opposed to fact, arise, this report identifies the dispute and expresses an opinion as to its appropriate resolution.

66

I. THE GINGLES FACTORS

Summary judgment is rare in voting-rights cases, given the frequently fact-intensive nature of issues involving vote dilution. As the Supreme Court stated in Gingles itself, the determination of vote dilution "is peculiarly dependent upon the facts of each case," and "requires 'an intensely local appraisal of the design and impact of the contested electoral mechanisms.'" 478 U.S., at 79 (citations omitted). But courts have found summary judgment appropriate on numerous occasions, including for state and local governmental defendants. See, e.g., Lewis v. Alamance County, 99 F.3d 600, 612 (4th Cir. 1996); African American Voting Rights Legal Defense Fund, Inc., v. Villa, 54 F.3d 1345 (8th Cir. 1995), cert. denied, Tyus v. Bosley, 516 U.S. 1113 (1996); Williams v. Orange County, 979 F.2d 1504 (11th Cir. 1992), cert. denied, Orange County Political Coalition v. Orange County, 509 U.S. 905 (1993). The parties agree that the first Gingles condition is present here, in that a geographically-compact, judicial-election district with an effective African-American voting majority in the City of Detroit could be drawn. Defendant's Supplemental Statement of Material Facts Not in Dispute, at ¶ 39. The dispute therefore centers on whether the second and third Gingles factors have been sufficiently established.

Here the State argues that the two crucial expert reports the plaintiffs have submitted are insufficient to establish the requisite disputed issues of material fact. With regard to Dr. Rich's report, the State argues that it is of no relevance to establishing the Gingles requirements because Dr. Rich assumes existence of the Gingles factors without offering evidence on them. With regard to Dr. Brown's report, the State and its experts argue that this report contains numerous methodological flaws that disable it from providing sufficient evidence to meet the plaintiffs' burden on summary judgment. The State goes on to offer its own detailed expert reports, including one

from Dr. Stanley, which both take issue with Dr. Brown's report and provide an independent analysis of election-return data.

In my judgment, the State is correct that the plaintiffs' expert reports, standing on their own, are insufficient to meet the plaintiff's burden of proof on summary judgment. But I also conclude that the data analysis in Dr. Stanley's report for the State rests on an incorrect understanding of the law under the Voting Rights Act. Yet because Dr. Stanley's report includes the kind of detailed, election-by-election and candidate-by-candidate breakdown of election results that Dr. Brown's report does not contain, the Court could choose to turn to Dr. Stanley's report even if the Court rejects, for reasons of law, his legal interpretation of that data.

Thus, there are questions of summary judgment practice, in addition to questions involving the VRA, that the Court must decide. I will not offer any opinion on the former. I will first analyze the reports of plaintiffs' experts, then identify the relevant issues regarding summary judgment practice, and finally turn to the report of the crucial expert for the State, Dr. Stanley.

A. Dr. Rich's Report.

Whether plaintiffs are offering Dr. Rich's report to establish the three Gingles factors or for other phases of the litigation is unclear. But with regard to the former, at least, my opinon is that the State is correct that Dr. Rich's report provides no assistance to the plaintiffs in their burden to establish the presence of disputed material facts. Under Gingles, the existence of legally significant polarized voting and minority-group political cohesion cannot be assumed, but must be proven in specific jurisdictions. 478 U.S., at 46. Dr. Rich's report contains no evidence on specific election results. It does not purport to provide any specific analysis of whether voting patterns are racially

polarized in specific elections. It does not identify candidates of choice of the black community through statistical analysis of voting patterns. The report does not cite the Gingles factors nor tie its analysis to them.

To the extent Dr. Rich's report refers at all to the Gingles factors, it offers only what amount to speculations unsupported by any accompanying factual support. Thus, Dr. Rich simply states that "[g]iven 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." Rich Report, at 22-23 (emphasis added). But under Gingles, plaintiffs must establish the existence of legally significant white bloc voting, rather than speculate about possibilities. And the legal question at issue is whether the post-merger, at-large elections for the Wayne County Circuit Court would violate the VRA, not whether the merger would be a "mistake". Similarly, Dr. Rich does not analyze election returns but states that "[i]n a county-wide election, a black candidate who is not preferred in the black community could win an election by getting a majority of white voters. For example, William Lucas, a black conservative and one of Governor Engler's appointees to Recorder's Court, was defeated in a reelection bid in Detroit but was later elected to Wayne County Circuit." Id., at 20. Yet analysis of actual election results from the Wayne County Circuit Court election at issue shows that Lucas ranked second among black voters in a field of nineteen, where twelve judges were to be elected, and seventh among white voters (the leading candidate among black voters, Susan Borman, who is white, was estimated to have received 39.6% of the votes cast by black voters otherwise at the polls while Lucas received an estimated 39.4%). Stanley Report, App.3, at 6.

For these reasons, the State is correct that Dr. Rich's report is "devoid of any statistical data or analyses and does not otherwise attempt to establish the Gingles preconditions." Defendant's

Revised Brief in Support of Motion to Dismiss and Alternatively for Summary Judgment, at 15. At least with respect to the Gingles factors, Dr. Rich's report is of no legal relevance and does not assist the plaintiffs in meeting their burden on summary judgment.

B. Dr. Brown's Report.

1. Data Aggregation.

Dr. Brown's report, unlike Dr. Rich's, does provide analysis of election-result data. The most significant challenge the State raises to the sufficiency of Dr. Brown's report is that it fails to engage in election-by-election and candidate-by-candidate analysis of specific contests. Instead, Dr. Brown aggregates data from six general elections from 1986 to 1996. Her ecological regression and homogenous precinct analysis both rest on this kind of aggregated analysis, rather than on election specific analysis. As part of this approach, Dr. Brown does not perform any analysis to identify which specific judicial candidates might have been "candidates of choice" of the minority community. In her ecological regressions, for example, she instead aggregates all votes for black candidates across this decade of elections and regresses them against aggregated black voting age population of the relevant precincts.

The State is correct that this approach does not meet the requirements of the VRA as they have been construed by the Supreme Court and the Courts of Appeals. In Gingles, the Supreme Court emphasized that vote-dilution claims must be pursued with a targeted focus. Thus, the Court stated that "the degree of bloc voting which constitutes the threshold of legal significance will vary from district to district," 478 U.S., at 56, and that the level of legally significant white bloc voting will vary based on particular factors that differentiate particular elections or electoral districts, such

as "in multimember districts, the number of seats open and the number of candidates in the field," id. These variations abound across the elections at issue in Dr. Brown's report. For example, the 1996 general election for incumbents included 19 candidates in a vote for 12 election; the 1992 general election for incumbents included only 9 candidates in a vote for 9 contest. See Table 1, infra. Moreover, the Court explicitly stated that "the language of § 2 and a functional understanding of the phenomenon of vote dilution mandate the conclusion that the race of the candidate *per se* is irrelevant to racial bloc voting analysis." Id., at 67. As the Court elaborated, "the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. 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. Racial bloc voting and the other elements of § 2 liability cannot be assumed; plaintiffs must prove them. Shaw v. Reno, 509 U.S. 630, 653 (1993). Plaintiffs are therefore required to identity candidates of choice with specificity, as well as to offer evidence of legally significant white bloc voting and minority group cohesion, in specific elections. Plaintiffs cannot simply assume that black candidates are also candidates of choice of the black community.

The lower courts have given more operational content to these principles by holding that "plaintiffs must establish on an election-by-election basis, by a preponderance of the evidence, which black candidates are minority-preferred." Jenkins v. Red Clay Consolidated Sch. Dist., 4 F.3d 1103, 1126 (3rd. Cir. 1993). Rather than inferring that minority candidates are candidates of choice of the minority community, "plaintiffs must introduce some additional evidence showing that the particular minority candidate is minority-preferred." Id. The cases routinely engage in detailed analysis of specific election returns to identify candidates of choice and whether polarized voting of legal

significance is taking place. See, e.g., Harvell v. Blytheville School District No. 5, 71 F.3d 1382, 1386 (8th Cir. 1995) (en banc) ("We do not categorically state that a candidate is the minority-preferred candidate simply because that candidate is a member of the minority. Such stereotyping runs afoul of the principles embodied in the Equal Protection Clause."); Lewis v. Alamance County, 99 F.3d 600, 612 (4th Cir. 1996) ("Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community."); see also Cousin v. Sundquist, 1998 U.S. App. LEXIS 10796 (6th Cir. June 1, 1998); Monroe v. City of Woodville, 881 F.2d 1327 (5th Cir. 1989), on reh'g, 897 F.2d 763 (5th Cir. 1990), cert. denied, 498 U.S. 822 (1990); NAACP v. City of Columbia, 850 F. Supp. 404 (D. S.C. 1993).

Given Dr. Brown's aggregation of all election results from 1986-1996, the State is correct that it is impossible to determine candidates of choice from her analysis in the specific way the law requires. This problem is particularly acute in multi-candidate elections, such as those here, because such elections do not present contests in which one white candidate is pitted head-to-head against one black candidate. In several elections at issue, multiple black candidates have run. Inferences about community preferences are even more hazardous here than in single-member district races. Determining who the candidates of choice of the black community are requires specific analysis. Furthermore, absent the identification of specific candidates of choice, it is impossible to know whether those who are candidates of choice, should they fail to be elected, fail as a result of legally significant white bloc voting. Dr. Brown purports to provide measures of racial polarization through regressions on her aggregated data, but the State is correct that these measures do not have meaning absent further analysis of whether the degree of polarization is legally significant in that it generally "minimizes or cancel[s] black voters' ability to elect representatives of their choice . . . ." Gingles,

478 U.S., at 56.

For this reason, in my judgment the State is correct that plaintiffs have failed to produce sufficient evidence as to establish genuine issues of disputed material fact regarding the presence of the relevant Gingles factors. That is not to say that judicial elections in Wayne County are not racially polarized. It is only to conclude that, on the basis of the record the plaintiffs have created at the summary judgment stage, the plaintiffs have failed to meet the burden the law imposes to establish with sufficient specificity disputed facts regarding Gingles.

In the event the Court rejects my conclusion on this point, I go on to address the State's additional objections.

2. Primary Elections.

The State also challenges Dr. Brown's report for excluding analysis of all primary elections. The State is correct that Dr. Brown fails to include primary elections, and Dr. Brown's explanations for failing to do so are difficult to decipher. But the State has failed to show that including primary elections would affect the Gingles analysis in any material way. The State offers no analysis purporting to show that racial voting patterns differ in judicial primaries, nor does the State even suggest how including primary-election data would alter the results generated from analysis of the general-election returns. If the Court concluds that plaintiffs have otherwise met their burden at this stage through relying only on general-election data, the failure to include primary elections would not, without more, be a basis for granting summary judgment to the State.

First, the State is correct that Dr. Brown's own explanation for ignoring primaries is unclear. On the one hand, her report states that "general elections provide a more reliable indicator of cohesion and bloc voting in judicial elections as they are less competitive than primary elections."

Brown Report, at App. A. But the report also states that "White support for Black candidates disappears as elections become more competitive." Id. Taking these statements as they read, then, one would infer that Dr. Brown herself believes primary elections would be *better* sites for bloc-voting analysis. Perhaps Dr. Brown meant to write that general elections are *more* competitive, not less, than primaries. Seeming to support this interpretation, her report does also assert that "[p]rimary elections also have minimally viable candidates for office." App. A. But I have found no place in the plaintiffs' subsequent filings that specifically states that Dr. Brown's initial report misstated her position on this question. Thus, it is difficult to be clear about Dr. Brown's arguments for excluding primary elections.

Nonetheless, on the merits plaintiffs' failure to analyze primary elections does not in itself seem a basis for granting the State summary judgment. Apart from merely asserting this failure, the only place at which the State attempts to provide some reason that this failure is legally significant is in Dr. Stanley's Affidavit. In ¶91, he states that in the Austin litigation, the plaintiff's expert, Dr. Lichtman, "stated that primary elections are the most relevant for examining black voting behavior." Even here, however, Dr. Stanley does not link this statement to any specific reasoning about how including primaries in *this* litigation might affect the analysis of Gingles. To begin with, Dr. Lichtman was analyzing legislative elections, not judicial elections, and the State makes no effort to show that the same considerations Lichtman advances would carry over to nonpartisan judicial elections. More importantly, it is difficult to construct the theory under which inclusion of primary-election data could, in principle, assist the State's case; typically, it is voting-rights plaintiffs, not defendants, who assert the importance of primary-election data. For example, if legally significant polarized voting patterns are present in the general elections, the absence of such polarized voting

in the primaries would not affect Voting Rights Act liability. But the converse is not true, which is why voting-rights plaintiffs typically are the party emphasizing the importance of primary-election data. If there are legally significant polarized voting patterns in the primaries, but not in the general elections, Voting Rights Act liability can still be triggered. See, e.g., NAACP v. Niagra Falls, 65 F.3d 1002, 1017 (2nd Cir. 1995) ("general elections are less probative determinants [than primary elections]of the success of the minority's preferred candidate in these circumstances"); White v. Alabama, 867 F. Supp. 1519, 1554 (M.D. Ala. 1994) (noting that potential black candidates in Alabama often do not reach the general election because they lose in the primaries). The minority community's candidates of choice might consistently be defeated in primary elections due to polarized voting. As the Fourth Circuit recently put it:

> . . . Gingles' third precondition can be satisfied by proof that, in either the primary or the general election, the minority-preferred candidate is usually defeated by white bloc voting. Not to separately consider primary and general elections risks masking regular defeat in one of these phases with repeated successes in the other, and thereby misperceiving a process that is palpably in violation of the Voting Rights Act, as not violative of the Act at all. Lewis v. Alamance County, 99 F.3d 600, 612, 616 (4th Cir. 1996).

Looking only at general elections in such contexts could then be misleading to VRA *plaintiffs*. Dr. Lichtman's report is not part of the record with which I have been provided, but if I am forced to speculate, I would hazard a guess his quoted statement reflected these kinds of considerations.

The Court can in any event turn to Dr. Stanley's own data to examine the possible relevance of primary-election data. That data includes returns for three primaries for the specific judicial elections at issue in Wayne County: 1986, 1992, 1994. Yet his affidavit does not indicate how including these results would alter the analysis generated by examining only the general-election

data. The dispute in this case centers on whether the general-election data establish the existence of the second and third Gingles factors. If that data do so, even the complete absence of polarized voting in the primaries, were that what the data showed, would not be of legal significance. The minority community would still be deprived through legally significant white bloc voting of the opportunity to elect candidates of its choice. For that very reason, it would also be inappropriate to lump together the primary and general election data. If the State has some theory in mind as to why including the primary-election data is necessary, and why doing so here would properly affect the Gingles analysis, it would have to develop that theory at trial. At this stage, the failure of the plaintiffs' expert to include primary-election data is not in and of itself a basis for granting summary judgment to the State.

3. Regression Analysis Disputes.

A. The State argues that Dr. Brown employs single-regression rather than double-regression analysis. Single-equation techniques regress percentage of actual votes for candidates in the relevant unit, such as precincts, against the black percentage among registrants or voting-age population in those electoral units. This technique measures the dependent and independent variables against different base numbers. Double-regression techniques employ the same denominators for both dependent and independent variables:

> This single-equation models implicitly assume that the rates of turnout as well as the proportion of voters at the polls who actually vote for the office in question are identical for both racial groups. Historically, whites, blacks, and Hispanics have differed in turnout and in the extent of votes cast, although the differences are now much narrowed. If fewer minority than white registrants turn out on election day and still fewer cast votes for a given office, this one-equation method will often find somewhat more white bloc voting and somewhat less black bloc voting than actually occurred, although errors in the reverse direction can also occur . . . . Bernard Grofman, Lisa Handley, and Richard G. Niemi, Minority Representation and the

Quest for Voting Equality 101 (1992).

Dr. Brown's purported failure to employ double regression is the basis for the State's argument that Dr. Brown "fails to utilize the dominant, prevailing methods accepted in VRA cases." Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 21.

The State is right that Dr. Brown's response to this charge is contradictory and confusing. Defendant's Reply to Plaintiffs' Response to Defendant's Motion to Dismiss and Alternatively, Motion for Summary Judgment, at 16. On the one hand, she defends the use of single-regression approaches and suggests that she indeed used that technique. On the other hand, in the same paragraph she asserts that Dr. Stanley is "incorrect" and, citing her original report, she asserts that she *did* use double-regression techniques. Plaintiffs' Response to Defendant's Motion to Dismiss and Alternatively, Motion for Summary Judgment, Exh.K, at ¶4. Doing my best to decipher Dr. Brown's response, I conclude that she fails to understand the criticism that Dr. Stanley raises.

Dr. Brown argues that she did use "the same" denominators in her analysis. But she compares the denominators she used in calculating the expected percentage votes for *white* and *black* candidates. See Brown Report, App. B and Brown Rebuttal Affidavit, ¶4. That is not the point at issue. Dr. Stanley's argument is that when one regresses actual vote, broken down by race, against expected vote, broken down by race, one cannot compare *actual voters who vote* -- which is what the VOTEGOT variable does that Dr. Brown employs -- against *voting-age population.* Given the possibility that whites and blacks might turn out in different percentages, and that they might also decline to vote for certain offices in different percentages -- particularly when rolloff figures are

high, such as in judicial elections -- it is misleading to regress actual votes against potential voters. Instead, a proper double-regression technique would define precinct populations not in terms of VAP, but in terms of actual voters, which requires discounting VAP by turnout and rolloff figures. One would then regress actual votes received for particular candidates by precinct with percentages of black and white voters voting by precinct.

But when one examines the formulas Dr. Brown employed, this is not what she did. In terms of her own variables, the denominator she uses is: BLK +WHI + NAT + ASI + OTH. See Brown Report, App. B and Brown Rebuttal Affidavit, ¶4. As she defines these terms, it is clear that they are Voter Age Population figures. For example, her report defines BLK as "Voter age black population in a certain city/district/precinct combination." Brown Report, at App.B. Thus, despite her disclaimers, Dr. Brown almost certainly *has* used a single-regression analysis as that term is used in the literature and in Dr. Stanley's affidavit. Similarly, in her report Dr. Brown explicitly states: "For an assessment of racial polarization, the two variables are: the African American percentage of the precinct's voting age population and the percentage of voters voting for African American candidates." Brown Report, at 6. This further confirms that Dr. Brown did employ single-regression analysis. Dr. Stanley's criticism on this point is therefore accurate.

The legal question is what significance the Court should attach to Dr. Brown's use of single rather than double regression. There is no convincing way of answering this question at this stage, in my view. As one of the leading texts concludes regarding the use of single rather than double regression, "[t]his problem may or may not be serious." Grofman, Handley, and Niemi, supra, at 101. That text also offers only one example, in which the differences in results under the two methods are *not* meaningful. Id. The caselaw is filled with examples of courts accepting single-

regression evidence; in part, the importance of using double-regression was not realized until voting-rights litigation in the post-Gingles era reached a later stage of development. For example, in a successful challenge to the Norfolk, Virginia, city council electoral structure, the testimony of recognized social-science experts, which the Court accepted, employed single-regression analysis. Collins v. City of Norfolk, 605 F. Supp. 377, 386-87 (E.D. Va. 1984) (lengthy subsequent history omitted, though case reversed on other grounds); see also Butts v. City of New York, 614 F. Supp. 1527, 1537 (S.D. N.Y. 1985) (employing single-regression analysis), rev'd on other grounds, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986). On the other hand, using single rather than double regression is most likely to cause significant error precisely in cases such as this one, where rolloff figures are high and might differ by race. As an illustration, consider the 1996 general election for Wayne County judicial elections. Dr. Stanley's affidavit provides separate regression analyses, one for VAP and one based on voters actually at the polls. The difference in the reliability of the regressions appears substantial; the R-squareds can vary significantly. Thus, the R-squared for incumbent William Bill Lucas, who was elected, was .06 when black votes were regressed against black VAP per precinct but a much more significant 0.39 when regressed against black voters actually at the polls per precinct. Stanley Report, App.3, at 6 (There is a third possible denominator at issue in this case as well: voters actually at the polls and casting votes for the judicial offices at issue in this litigation. Whether to use this baseline instead of either of the two Dr. Stanley uses is the legal dispute over whether voter rolloff is or is not legally relevant to the Gingles analysis. See infra.).

The upshot is that the legal significance of Dr. Brown's failure to use double regression cannot realistically be assessed at this stage. Her data are not in a form from which one could

transform them into a double-regression analysis. Nor are Dr. Stanley's data in a form from which one could obviously do so if the baseline to be used, unlike the one Dr. Stanley actually uses, includes only voters who actually voted in the judicial elections at issue. Dr. Brown's failure to understand the concept of double regression does undermine confidence in her report. But given that the problem "might or might not be serious," and given that no alternative analysis is available that performs double regression with the same baseline Dr. Brown uses, the precise significance of this failure must remain unclear at this stage. Thus, the State is correct that Dr. Brown fails to employ double regression but the significance of this failure -- standing alone -- must be considered a disputed issue of material fact.

B. The State raises a second objection to Dr. Brown's regression techniques. The State argues that Dr. Brown's "reliance on the correlation coefficient is misplaced." Stanley Report, at ¶87. Here it is unclear precisely what the State's objection is. At times, it appears the State is criticizing Dr. Brown for using correlation coefficients (R) rather than coefficients of determination (R-squared). But Dr. Brown does use R-squared values. At other times, it seems the State is criticizing Dr. Brown for focusing on R-squared values, rather than the more important slope and intercept values for her regressions. But Dr. Brown does provide measures of both. Moreover, to the extent the State or Dr. Stanley's challenge is to the values of R or R-squared in Dr. Brown's report, Dr. Stanley never argues, based on his own data, that the Rs or R-squareds are too low to be statistically significant. As a result, I do not find this particular challenge to Dr. Brown's regression techniques to be meaningful for purposes of summary judgment.

4. Excluded precincts.

Dr. Brown reports that where municipalities consolidated or renumbered precincts, between

1986 and the date of her report, she deleted these precincts from her analysis. Her report includes a detailed listing of these dropped precincts. App. A. The State argues that this data-management decision makes Brown's analysis "incomplete" and asserts that experts for both sides in the Austin litigation were able to use data from all Wayne County precincts. Stanley Report, at ¶ 92. In addition, Dr. Stanley apparently was able to use all precinct data; the Michigan Information Center, of the State's Department of Management and Budget, incorporated changes in precinct lines in the way it reported the data from 1986 onward to Dr. Stanley. Id., at ¶ 11.

Moreover, the State provides a detailed attempt to estimate the number of precincts apparently affected by Dr. Brown's choice to exclude various precincts. This requires trying to interpret the precise method Dr. Brown used to decide which precincts to drop. That method is not entirely clear from her report. For example, the City of Detroit apparently consolidated precincts between 1990 and 1992 to reduce the total number from 821 to 650. Swanson Affidavit, ¶4. According to Eric Swanson, Director of the Michigan Information Center, this reduction in 171 precincts "most likely affected over 300 of the original 1990 precincts." Id., at ¶ 5. Thus, the question arises whether in such circumstances Dr. Brown dropped 171 or more than 300 precincts. Using a "conservative" estimate which assumed the fewest number of precincts dropped each time Dr. Brown confronted a choice like this, Swanson estimates that Dr. Brown dropped at least 353 precincts for elections since 1986. Based on average VAP in 1992 precincts, this would translate into 413, 457 potential voting-age population voters not being folded into the aggregate 1986-1996 analysis. Id., at ¶6. The State does not translate this figure into a percentage of the total voting-age population eligible to vote in these elections between 1986-1996, which would be a helpful baseline for beginning to assess the possible significance of these dropped precincts in the overall analysis.

As a crude measure, I note that the 1990 Census provides a total VAP in Wayne County of 1,541, 050. Defendant's Supplemental Statement of Material Facts Not in Dispute, at ¶41. If we use this figure over the 6 general elections in question, it would generate an aggregate VAP over these elections of 9,246,300 (6 times 1,541,050). This would mean that, on the State's "conservative" estimate, Dr. Brown would have dropped 4.47% of the eligible VAP. In a rebuttal affidavit, Dr. Brown herself indicates that her method resulted in her dropping 25% of the precinct returns over the 1986-96 period. Plaintiffs' Response to Defendant's Motion to Dismiss and Alternatively, Motion for Summary Judgment, Exh.K, at ¶6.

The question is what legal significance this dispute has at the summary judgment stage. In my view, if the Court were otherwise inclined to credit Dr. Brown's report, this more minor dispute would not in and of itself be significant enough to justify summary judgment for the State. First, if the only data were that provided by Dr. Brown, the failure to include all precinct returns, where that failure was plausibly attributable to data collection difficulties, would not without more justify summary judgment. Here the State simply asserts that Dr. Brown's data is "incomplete," but the State does not argue at this stage that the excluded precincts systematically reflect distinct voting patterns that would undermine the conclusions Dr. Brown reaches from the included precincts. Nor does the State argue that the differences in Dr. Brown's conclusions and those of the State's expert, Dr. Stanley, are traceable to differences in the precincts included. Voting-rights litigation has always had to confront the practical difficulties of working within the constraints of data collection techniques available. As one of the leading texts in the field notes, "as precinct lines change over the course of the decade (or if one needs to match current precinct lines with those of earlier periods), it is likely that such problems will emerge." Grofman, Handley, and Niemi, supra, at 94.

Thus, for example, plaintiffs have sometimes been permitted to rely on the results of races for offices other than those at issue when returns from races for the actual offices at issue would, for some reason, be insufficient to permit sound judicial conclusions about patterns of polarized voting (the use of "exogenous" rather than "endogenous" elections). See, e.g., Westwego Citizens for Better Government v. City of Westwego, 946 F.2d 1109, 1119 n.15 (5th Cir. 1991). It is true, as the State asserts, that Dr. Brown's report would be more convincing had she explained in more detail why she believes the data she excluded do not skew her analysis. But the State has not offered any specific reason to conclude, as a matter of law, that this exclusion did skew the analysis in any particular direction, and Dr. Brown has offered plausible reasons at this stage of the litigation, rooted in the practical difficulties of tracking precinct data over a decade, for excluding the data.

At trial, there might well be a material dispute at trial over how to translate precinct boundaries and election-return data over time. There might be a material dispute over whether some precincts ought to be excluded. There might be a material dispute over how excluding or including particular precincts affects the Gingles analysis. But at this stage, if the Court were otherwise inclined to credit Dr. Brown's report, I do not believe the Court should conclude as a matter of law that the failure to include these disputed precincts would itself so undermine Dr. Brown's analysis as to justify summary judgment.

Second, at trial the Court might conclude that the State's data is more complete and provides a better starting point for analysis of voting patterns. Dr. Brown asserts that Dr. Stanley does not document how he adjusted for precinct changes, Plaintiffs' Response to Defendant's Motion to Dismiss and Alternatively, Motion for Summary Judgment, Exh. K, at ¶6, but in a responsive affidavit, Eric Swanson explains that his staff used local maps to do so. Defendant's Reply to

Plaintiffs' Response to Defendant's Motion to Dismiss and Alternatively, Motion for Summary Judgment, App. A, ¶4. In principle, this is a standard method of making these adjustments. See Grofman, Handley, and Niemi, supra, at 94. Conceivably, the plaintiffs might dispute at trial the specific adjustments Swanson made. But even were the Court ultimately to conclude that the State's data set is more complete and hence more reliable, the dispute between the parties appears to turn most crucially on the proper interpretation of that data and the legal conclusions to draw from it. At this stage, the dispute about excluded precincts does not appear to me, in and of itself, to be a basis for granting summary judgment to the State.

5. Misunderstanding of legal concepts in VRA litigation.

Finally, the State makes several general challenges to the quality of Dr. Brown's report. None are meant to support summary judgment directly, but they are offered to suggest that Dr. Brown's report is generally not credible because it fails to understand the relevant legal principles under the VRA. Of these, the most significant is the State's argument that Dr. Brown misunderstands the legal terms of art, exogenous and endogenous elections. On this point, the State is correct. Dr. Brown, responding to this criticism, restates her earlier understanding of exogenous elections as those "where the minorities preferred [an] African American candidate [who] received a higher number of voters from the minority community and a low number of votes from white or non-African American community." Brown Rebuttal Affidavit, at ¶11; see also Brown Report, App. A, at 4. Dr. Brown also describes endogenous elections as those "where the minorities [sic] preferred candidate is white." Brown Report, App.A, at 4. But as the courts use these terms, endogenous elections refer to those for the same office in question in the litigation, while exogenous elections refer to elections for other offices. See, e.g.,Cousin v. Sundquist, 1998 U.S. App. LEXIS

10796, *17 (6th Cir. June 1, 1998); Westwego Citizens for Better Government v. City of Westwego, 946 F.2d 1109, 1119 n.15 (5th Cir. 1991); Grofman, Handley, and Niemi, supra, at 75-80. As the State correctly argues, misunderstandings on basic points of VRA litigation such as this do undermine confidence more generally in Dr. Brown's report.

C. Summary Judgment Practice.

If on summary judgment this Court looks only to the record the plaintiffs have created, the Court could justifiably conclude that plaintiffs have not met their required burden of proof. But the record contains substantially more information and election-return data and analysis than provided only from the plaintiffs' side. The Court could turn to that additional information and reach conclusions about candidates of choice, polarized voting, legally significant polarized voting, and the ultimate legal conclusion of vote dilution under § 2.

Whether the Court should limit itself on summary judgment to the case the plaintiffs have marshaled, or whether the Court should consider itself free also to examine the full record available at this stage, is a question of summary judgment practice. I express no opinion on those questions, on which I have no distinct expertise. But because I have been appointed to express an opinion on the VRA issues underlying this litigation, and because this case involves important matters of public-law with wideranging consequences, I will analyze the full record available at this stage. Doing so enables me to render a complete opinion on whether there exist genuine issues of disputed material fact, based on the entire record, regarding the presence of the second and third Gingles factors. If the Court limits itself to the record the plaintiffs have produced, I will have expressed an opinion on that. If the Court considers the entire record available on summary judgment, I will have expressed

an opinion on that entire record.

D. Dr. Stanley's Report.

The one expert report for the State that contains detailed analysis of specific election returns is that of Dr. Stanley. He concludes that the black community, in virtually all the judicial races studied, lacked a "candidate of choice" within the meaning of the VRA. Thus, he concludes that plaintiffs' claims fail to meet the second and third prongs of Gingles; the black community is not "politically cohesive" in judicial elections, and white bloc voting is not legally significant enough to keep the black community from electing candidates of choice. If Dr. Stanley is right, the Court could dismiss plaintiffs' VRA claims on these grounds. Dr. Stanley's legal conclusions depend upon contestable interpretations of the VRA's requirements. I will explore those questions here and offer an opinion on them.

The relevance of voter rolloff

The significant dispute of law here is the relevance of voter rolloff, particularly in judicial elections where rolloff is characteristically high. The Wayne County Circuit Court elections exhibit this characteristic tendency of judicial elections. Dr. Stanley adequately defines the concept: "'Rolloff'" refers in part to the tendency of a voter at the polls to vote in the top-of-the-ticket contests but 'rolloff,' or not cast a valid vote, for contests lower down on the ballot." Stanley Report, at 6. The State argues that the high rolloff rates among black voters for Wayne County Circuit Court elections (also found among white voters) means both (1) that black voters are not sufficiently "cohesive" under Gingles and (2) that it is not white bloc voting that causes the defeat of any minority-preferred candidates, but rather the failure of those minority voters who are

otherwise present and voting for other offices -- such as gubernatorial races -- to vote in sufficient numbers in judicial elections. This is a legal question that the Court can resolve at the summary judgment stage.

The State argues that the black community does not demonstrate politically cohesive preferences in judicial elections because a low percentage of those black voters *already* at the polls actually vote for judicial candidates. For example, in the 1996 general elections, the three most popular candidates on the incumbent ballot among black voters, William Lucas, Donald Coleman, and Sheila Manning, still received only 39.4%, 35.7%, and 33.6%, respectively, of all the votes they could have received from those black voters who were at the polls and voting for top-of-the-ticket candidates. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 26. According to the State and its expert, Dr. Stanley, the failure of any black candidate to garner more than 40% of the potential black votes shows a lack of legally significant political cohesion. Similarly, this failure should also defeat arguments that white bloc voting is occurring at legally significant levels. Thus, Sheila Manning lost by only 7,557 votes; had more black voters voted for her (such as the same numbers that voted for William Lucas) she would have been able to win, notwithstanding the small number of white votes she received. According to the State, then, black voter rolloff at such high levels as occur in judicial elections negates the presence of political cohesion and polarized voting at legally significant levels. The plaintiffs and Dr. Brown respond by asserting that "An analysis of voter rolloff is not an essential part of Gingles," but they do not provide any analysis or case citation to underwrite and justify this assertion. Plaintiffs' Counter-Statement of Facts, at ¶46,47; Brown Rebuttal Affidavit, at ¶9.

Neither Gingles nor other Supreme Court authority can be viewed as directly addressing this

question. The relevance of voter rolloff was not put in issue in Gingles, which involved state legislative elections. Voter rolloff is most prevalent with low visibility elections, which are often bottom-of-the-ticket races -- judicial elections being the most prominent example. See generally League of United Latin Amer. Citizens v. Clements, 999 F.2d 831, 872-76 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994) (discussing low visibility of judicial elections and relevance for VRA litigation). Moreover, according to a witness for the State, rolloff increases for nonpartisan races (presumably, because voters cannot simply cast a straight-party vote and thus vote for all partisan seats) and when voting machines rather than paper ballots or punch cards are used. State's Exh. D.. Thus, in the 1996 general elections for judicial seats, the percentage of Wayne County votes actually cast that could have been cast by those voters already at the polls broke down as follows: (1) Detroit: Supreme Court -- 70.5%; Appeals Court -- 60.78%; Circuit Court (incumbent seats) -- 45.46%; Circuit Court (non-incumbent seats) -- 57.16%; Probate Court -- 54.76%, and (2) Out-County: Supreme Court -- 67.39%; Appeals Court -- 54.45%; Circuit Court (incumbent seats) -- 41.06%; Circuit Court (non-incumbent seats) -- 53.54%; Probate Court -- 46.94%. State's Exh. D.. The consistently higher rolloff rates in out-county Wayne are attributed to the greater use of voting machines there compared to Detroit. State's Exh. D.. Rolloff rates also appear to increase as the number of judicial offices at issue itself increases; thus, when only one seat was at issue in Wayne County Circuit Court elections, black and white rolloff rates were in the 30-43% range, whereas when 11-12 votes had to be cast to fill that number of judgeships, rolloff rates ranged from 650-789%. Stanley Report, ¶5. The caselaw on voting-rights challenges to judicial elections is still in the initial stages of development. See Chisom v. Roemer, 501 U.S. 380 (1991) (holding that § 2 of VRA applies to judicial elections). Other courts are therefore just beginning to address these

questions.

There is a strong form and a weak form of the rolloff argument. Both forms seem expressed in the State's arguments, though the State does not distinguish the two. In the strong form, the baseline for judging candidates of choice would be the number of black voters at the polls voting for at least one other office on the ballot. Thus, if only 30% of those voters vote for any particular judicial candidate, there is no candidate of choice among the black community. This strong form of the State's theory appears throughout Dr. Stanley's data analysis. The weak form would instead use as its baseline those black voters who cast at least one vote *for some judicial candidate* in the multi-candidate elections at issue. That is the form of the rolloff argument implicit in comparisons the State makes, such as that noted above, between the number of estimated black votes for judicial candidates such as Lucas compared to other candidates, such as Manning.

In my view, the better reasoned position would reject at least the strong form of this rolloff argument. As a general matter, I would conclude that voter rolloff should not be legally relevant in VRA challenges to judicial elections. The baseline for applying Gingles in judicial elections should be the pool of voters who actually vote, not the pool of voters who might have voted because they were at the polls voting for other offices. First, while courts have not dealt extensively with rolloff questions, the philosophy of the VRA as judicially applied has been to focus on actual voters, not on the unrealized voting potential minority voters might in theory be capable of wielding. In Gingles itself, for example, the Court assessed political cohesiveness and racial polarization with reference to those voters who actually voted -- not with reference to the eligible voting population in the relevant districts. See 478 U.S., at 59 ("black *voters'* support for black candidates was overwhelming in almost every election" (emphasis added); see also id., 478 U.S., at 80 App. A (data

organized around percentage of votes cast by black and white *voters*). Similarly, courts consistently focus on *effective voting equality* -- defined as the size of the minority population large enough to yield a bare majority of actual voters on election day -- when administering the VRA. See, e.g., Lewis v. Alamance County, 99 F.3d 600, 613 (4th Cir. 1996) ("we do not believe that the mere failure to achieve a threshold of 50% in a multi-candidate election necessarily means that a candidate cannot be viewed as a black-preferred candidate") (instead using test of whether candidate would have been elected had the election been held among only the black electorate); Jenkins v. Red Clay Consolidated Sch. Dist., 4 F.3d 1103, 1136 (3rd. Cir. 1993) (Gingles is concerned with "practical effects" and hence "whether the scheme might theoretically allow a victory for a minority-preferred candidate if factors were to coalesce properly is not the correct question"); see generally Samuel Issacharoff, Pamela Karlan, and Richard Pildes, The Law of Democracy: Legal Structure of the Political Process 473 (1998) (summarizing caselaw) ("While Gingles did not expressly hold that plaintiffs must show that blacks are a majority of the voting-age population [to make a remedial district appropriate], the lower courts have generally adopted this requirement."). As a leading text puts it, when courts seek to remedy VRA violations, four "key numbers" must be calculated in designing election districts to remedy VRA violations: (1) the proportion of noncitizens, (2) the proportion of the citizen population that is age eligible to vote (eighteen or older); (3) the proportion of the eligible population registered to vote, and (4) the proportion of those registered who actually vote." Grofman, Handley, and Niemi, supra, at 119. If mere potential to vote were sufficient, as the State's theory entails, there would be no reason to take actual registration rates into account, let alone actual turnout rates. In some contexts, the courts and the Department of Justice have required that VRA-required minority districts be as high as 65% minority in total population precisely to take

account of the actual rates of political participation among eligible black voters. See, e.g., United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977); Kirksey v. Board of Supervisors of Hinds County, 402 F. Supp. 658, 676 (S.D. Miss. 1975) (test of an effective majority is that share of the population required to provide minorities with "a realistic opportunity to elect officials of their choice. . . .") aff'd, 528 F.2d 536 (5th Cir. 1976), rev'd, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968, 54 L. Ed. 2d 454, 98 S. Ct. 512 (1977); Ketchum v. Byrne, 740 F. 2d 1398, 1414 (7th Cir. 1984) (overturning District Court's construction of minority districts with only voting-age majorities and requiring as well that such districts take registration and turnout rates into account).

The State might respond that lower registration and turnout rates in these other contexts could be claimed themselves to result from prior state discrimination with respect to the political rights of minority voters. See, e.g., Vecinos de Barrio Uno v. Holyoke, 72 F.3d 973, 987 (1st Cir. 1995) ("When low turnout results from the very problems that the Voting Rights Act is intended to ameliorate, it would be mindless for courts to ignore the evidence of minority cohesion that can be culled from actual ballot tallies."). In contrast, the plaintiffs do not argue here that black turnout and rolloff rates reflect a similar set of causes, nor does the State's evidence -- the only useful source of evidence on turnout and rolloff rates at this stage of the litigation -- suggest such an explanation. For example, in Recorder's Court elections from 1986-1996, in the City of Detroit, the black turnout rate exceeded the white turnout rate, the difference ranging from 4.9% to 15.1% higher. Stanley Report, at ¶19. In Wayne County Circuit Court contests, black turnout averaged less than white turnout from 1986-1996, with the average difference being 6%. Stanley Report, at ¶17. Black rolloff rates were generally higher than white rolloff rates for Wayne County elections, but not always so; for five

of the most recent contests, the white rolloff rate was higher. Id., at ¶25 (incumbents in 1994 and 1996; non-incumbents in 1992, 1994, and 1996). Without resolving the contested questions about Michigan's past practices with respect to racial discrimination and voting, it would seem that whatever those practices, they are unlikely to account for these particular, current, differential rolloff patterns among white and black voters. Nonetheless, the extensive case law whose focal point is establishing *effective voting equality* does not require proof in each case that the cause of differential turnout or participation is itself prior state discrimination. That case law instead seems best understood as reflecting an interpretation of the VRA that focuses on actual voting practices, rather than potential ones.

Second, the State's theory leads essentially to the odd conclusion that *no* group has any candidate of choice in judicial elections. This follows from the extremely high rolloff rates characteristic for judicial elections. The State's data for the 1996 general elections in Wayne County reveals that not a single candidate garnered even 40% of the votes of either those white or black voters who were at the polls. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 26. Thus, assuming a candidate of choice must garner at least a majority of these voters, as Dr. Stanley's theory implies, not a single candidate is the candidate of choice among a majority of either the white or black voters at the polls. On this view, no matter how racially polarized the voting patterns might be among those who actually vote, Gingles would never be violated, because the minority community -- like the majority community -- would be deemed not to have a candidate of choice. Indeed, given the consistently high levels of rolloff for which judicial elections are well-known, particularly when multiple seats are to be filled, the State's approach would essentially remove judicial elections from VRA coverage. Dr. Stanley's

data appear to reveal only one judicial candidate in the entire decade from 1986-96 who received a majority of votes from black voters who were at the polls and otherwise voting (Denise Hood, 1992) -- and *no* candidate who reached this level of support among white voters otherwise at the polls and voting. In 1996, with twelve votes to cast, a majority of votes among both black and white voters were simply not cast at all. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 26.

There are further problems with the State's theory. That theory requires ungrounded speculative judgments because it in effect requires courts to make assumptions about the voting behavior of voters who have not voted. Thus, the State argues that had more black voters who were at the polls voted for certain black judicial candidates, those candidates could have been elected despite the small number of white votes they received. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 28. But this assumes that higher black political mobilization and participation would take place while all other aspects of the election remained constant. In contrast, if voting is racially polarized among those actually voting, it is certainly possible that more visible black political mobilization would trigger more aggressive white political participation as well. If more voters participated in judicial elections, there is no reason to think whatever polarization, if any, is occurring would not be reproduced among that enlarged pool of voters. Once one leaves behind data concerning voting patterns among actual voters, for the court to speculate about how unrealized voting potential of either black or white voters might be manifested seems hazardous at best. Moreover, if the baseline for voting-rights analysis of key issues like political cohesion should be based on untapped voting potential, rather than actual voting, it is not clear why that analysis should stop where the State's argument would stop it, which is to

include those voters actually at the polls but not voting in low visibility elections. Why not include registered voters who do not turn out at all? Why not include eligible voters who are not registered? There might be responses to some of these questions, but in general they show the quagmire courts would be required to enter once analysis leaves the knowable world of actual voting behavior for uncharted and probably unchartable terrain. Judicial administrability of the VRA would therefore also argue against adopting at least the strong form of the State's approach to rolloff and candidates of choice.

Finally, the State's theory seems to single out black voters and hold them uniquely responsible for the relative lack of interest and knowledge all voters manifest in judicial elections, particularly those requiring multiple votes to be cast. Black voters do not fail to vote for judges at dramatically higher rates than white voters; indeed, in the 1996 general Wayne County elections, with 12 votes to cast, nearly 12% more whites than blacks cast blank ballots. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 26. But given the way the State would define "candidates of choice" for VRA purposes, black voters would have manifested no candidate of choice, no matter how cohesive the judicial preferences of those black voters who actually voted -- and no matter how racially polarized white voting patterns might have been. This does not seem the appropriate way to apply the VRA to judicial elections. Black voters should not be required to mobilize and participate at higher rates than white voters in elections for which all voters traditionally show a low level of interest.

The strong form of the State's theory also has the awkward consequence that whether judicial elections violate the VRA could be completely an artifact of whether those elections are held at the same time as more visible elections, such as gubernatorial races, or whether they are held separately.

Even if the exact same voters turn out and vote in exactly the same way for the judicial races, the State's theory could have the Act violated in the first context but not the second. That is because the first would draw many additional voters to the polls who did not vote in the judicial contests; but this larger pool at the polls would then be used to defeat the claim that any particular candidate was the preferred candidate of those black voters who voted for judges.

Conceivably, there might be particular contexts in which a convincing argument could be made that candidates of choice should be defined with reference to voters at the polls but not actually voting. The most compelling contexts would likely be those involving the weak form of this theory, not the strong form. That is the form in which the theory was accepted in the only case the State cites that supports its position, from a Federal District Court in South Carolina, NAACP v. Columbia, 850 F. Supp. 404 (D.S.C. 1993), aff'd per curiam 1994 U.S. App. Lexis 22726 (4th Cir. 1994). There plaintiffs challenged two at-large seats for the Columbia city council, in a system in which four other city council members were elected from single-member districts (the mayor, also elected at-large, was the final member of the city council but there was no challenge to this seat). Dr. Stanley, also testifying as a defense expert there, offered a similar theory to that which he and the State offer here. He argued that the black community was not politically cohesive in the relevant sense because black turnout and voting were low for city council contests, even when black candidates ran. Had more of the eligible black electorate voted, black candidates who had been defeated could have been elected.

Whether NAACP v. Columbia is viewed as right on the merits, the context there differs from that here in important ways. There Dr. Stanley compared black voting for city-council candidates in races in which black candidates lost to black voting in the same type of race in question, that is,

other city council contests in other years. Thus, the Court pointed to the "demonstrated ability of blacks to turn out, even in city elections [the very elections at issue]," as evidence that "the failure of blacks to participate in these contests [the particular city council elections at issue] must be attributed to lack of enthusiasm for the candidates offering for election." Id., at 419. This is the weak form of the rolloff theory, not the strong form that underlies much of Dr. Stanley's analysis in this case. In addition, the Court noted that in those city council elections in which black turnout had been high, black cohesiveness had actually dropped. Id., at 418. Thus, the Court concluded that Dr. Stanley's use of non-participation among eligible voters to show lack of political cohesion was "well within the demonstrated ability of blacks both to turn out and to vote cohesively." Id., at 419. The Court of Appeals affirmed without discussing this analysis. Whether one accepts the South Carolina District Court's analysis or not, the case differs in important ways from that here. See also Vecinos de Barrio Uno v. Holyoke, 72 F.3d 973 (1st Cir. 1995) (noting the cause of low minority-voter turnout "is often difficult to detect," and suggesting that in some cases low turnout might prove that factors other than white bloc voting should be held responsible for the minority community's inability to elect candidates of choice, but concluding that minority community was politically cohesive despite low turnout).

For all these reasons, I would conclude that, as a matter of law, the State's relatively novel theory of how to define candidates of choice should be rejected, at least in what I have called the strong form. The baseline for assessing candidates of choice and political cohesion ought to be actual voters, not potential voters. That still leaves open the question whether Dr. Stanley's theory should be accepted in the weaker form, that is, by using a candidate-of-choice baseline centered on black voters who actually cast at least one vote in the relevant judicial elections. This weak form

of the rolloff theory seems to me to raise difficult questions not yet explored in detail in the caselaw. I will not address this theory in any more detail until I complete an analysis of candidates of choice and legally significant polarized voting. Until that analysis is complete, it is not clear how much if anything turns on the Court's acceptance or rejection of this theory.

E. Candidates of Choice.

1. Winning candidates among the black electorate.

Although plaintiffs experts do not present data in a form that enables the Court to identify candidates of choice, the Court can do through use of Dr. Stanley's data. That is possible even if the Court accepts my opinion that the strong form of the State's rolloff theory should be rejected. In multi-candidate elections, the use of some absolute percentage of votes cast as necessary to establish candidates of choice is fraught with difficulty. An accepted way of doing so, instead, is to identify which candidates would have been elected had the election been conducted just among the black electorate. See, e.g., Lewis v. Alamance County, 99 F.3d 600, 614 (4th Cir. 1996) (in multi-seat elections, "[c]andidates who receive less than 50% of the minority vote, but who would have been elected had the election been held only among black voters, are presumed also to be minority-preferred candidates, although an individualized assessment should be made in order to confirm that such a candidate may appropriately be so considered."); see also Grofman, Handley, and Niemi, supra, at 97-98 ("In multimember elections without a numbered place system there may be more than one candidate who is a minority candidate of choice. Here one looks to see whether minority-supported candidates would be elected if only nonminority voters were voting."); Grofman, Migalski, and Noviello, The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of

the Voting Rights Act: A Social Science Perspective, 7 Law & Policy 199, 207-08 (1985) (discussing racial polarization analysis in multimember races without numbered places). Dr. Stanley also accepts this definition: "Another way to determine who was a candidate of choice of black voters (other than the 50 percent support bright line test) in a multi-vote election is to ask who would have been elected had only black votes counted." Stanley Report, at ¶47. Note that this measure focuses on the votes actually cast in the relevant judicial elections.

For each general election, Dr. Stanley's data estimate the percentage of votes each candidate received from black voters. I have constructed several Tables that highlight what that data reveal about candidates of choice among the black community and the extent of legally significant white bloc voting. The Tables can be found at the end of this report. In this section, I will use them to analyze candidates of choice. In the next section, I will explore patterns of polarized voting and their significance.

Using Dr. Stanley's data, Table I indicates that, with one exception, every black judicial candidate who ran in either the general elections from 1986-1996 or in those three primaries for which Dr. Stanley provides data (1986, 1992, 1994) would have been elected or survived the primary had the election been limited to black voters. The single exception is Paula Humphries in 1996. Thus, it would appear that each black judicial candidate for the Wayne County Circuit Court elections other than Humphries can be considered the candidate of choice of the black community. See also Stanley Report, at ¶49 ("The remaining black nonincumbent candidates [other than Humphries] could be considered candidates of choice of black voters but the levels of black voter support varied . . . .). Note that this result, available through Dr. Stanley's data, would now justify the implicit assumption in Dr. Brown's aggregated report that virtually all black candidates were

candidates of choice. In theory, there can be circumstances that disqualify a black candidate who would have been elected had only black votes counted from being considered a candidate of choice. But neither side identifies any such possible circumstances here.

One might worry about limiting the candidate-of-choice inquiry to only black candidates. The question of whether white candidates can be candidates of choice of the minority community, and in what circumstances, has plagued and divided the lower courts. Most have given greatest weight to races pitting black candidates against white candidates, although the Supreme Court has not yet reached agreement on defining "representatives of choice" or the "minority's preferred candidate." See, e.g., NAACP v. Niagra Falls, 65 F.3d 1002, 1016 (2nd Cir. 1995) ("Several courts instead have held, in various formulations, that elections in which a black candidate runs are more probative on the question of white bloc voting than are white-white elections."); Clarke v. City of Cincinnati, 40 F.3d 807, 812 (6th Cir. 1994); Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1128 (3d Cir. 1993); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 502 (5th Cir. 1987) (white-versus-white contests are not probative because it is "virtually unavoidable that certain white candidates would be supported by a large percentage of . . . black voters."); see also Grofman, Handley, and Niemi, supra, at 79 ("implicit in the Gingles holding is the notion that black voters' preferences are determined from elections that offer the choice of a black candidate"). Other courts have concluded that whites can be candidates of choice in some circumstances. See, e.g., Lewis v. Alamance County, 99 F.3d 600, 612 (4th Cir. 1996); Sanchez v. Bond, 875 F.2d 1488 (10th Cir. 1989).

These complex questions need not be confronted here. The plaintiffs only focus on black candidates as potential candidates of choice, with the one exception of the Hispanic candidate,

Isidore Torres. The plaintiffs argue that vote dilution exists with respect to black candidates, not white candidates who might be candidates of choice. The State defends by also focusing exclusively on black candidates. The State does not argue that whatever vote dilution might exist with respect to black candidates is outweighed by, for example, the lack of vote dilution with respect to white candidates of choice among the black community. Given the focus of the parties on only black candidates as both candidates of choice and possible targets of polarized voting, it seems appropriate for the Court to limit its inquiry in the same way (The only exception on the plaintiffs' side is Torres, a Hispanic candidate in the 1996 general election. Based on the fact that she ranked ninth among black voters in a race where 12 were to be elected, she can be considered a candidate of choice of the black community. In subsequent analyses, I will present data both with and without her candidacy.) I should also note that, in multimember contests, the question of whether white candidates might also be considered candidates of choice of the black community and how to take into account racially-differentiated preferences for different white candidates would be even more complicated than in head-to-head contests, where it has been more explored in the cases thus far.

2. Discrepancies in Classifying Black Judicial Candidates.

Before turning to the analysis of whether legally significant polarized voting is present, it is important to note data discrepancies between the parties. One difference between how Dr. Stanley and Dr. Brown classify the black judicial candidates is of particular potential significance. First, Dr. Brown classifies as non-incumbents several black judicial candidates whom Dr. Stanley classifies as incumbents. In the 1996 general elections, Dr. Stanley's data treats Lucas, Manning, Coleman, and Humphries as incumbents; Dr. Brown treats all as non-incumbents. Compare Stanley Report App.3, at 6 with Brown Report, App.C. Similarly, in the 1994 general elections, Stanley lists

D. Thomas as an incumbent while Brown lists her as a non-incumbent. Id. (Brown also lists Torres as a non-incumbent, while Stanley classifies her as an incumbent). Neither side appears to notice this discrepancy and thus neither offers an explanation for it. But the State does submit an exhibit on Vote Statistic Information compiled for this litigation by George H. Herstek, Jr., who was employed with the state Bureau of Elections, including as its Director. The general election data he compiles is consistent with Dr. Brown's, not Dr. Stanley's, classifications of these candidates. See State's Exhibit A (1996 and 1994 general election data, listing all these candidates as non-incumbents). On the other hand, the State's Exhibit Q is a copy of the 1996 general election ballot; on that ballot, it is clear that Lucas, Manning, Coleman, and Humphries are listed as running for incumbent positions -- although none are identified as currently sitting judges.

There is thus a disputed issue of fact as to how to classify these candidates. The dispute is potentially meaningful because I will conclude that the crucial Gingles issues will focus on non-incumbent candidates of choice. Under Dr. Stanley's listings, only three black non-incumbent candidates would have been elected between 1986-1996 if just the black electorate were voting, while this number would more than double, to seven black candidates, under Dr. Brown's classifications. In addition, in Dr. Stanley's scheme, two of these three candidates were actually elected, while in Dr. Brown's, four of seven were. The former yields a black success rate among non-incumbents of 66% over the decade, while the latter yields a rate of 57%. Thus, the difference in election success rate is not large, but the numbers of non-incumbent candidates are so small that the correct resolution of the factual dispute could double the number of relevant data points.

Another data discrepancy arises from Dr. Brown's listing as black judicial candidates several individuals who do not appear anywhere in Dr. Stanley's data. She includes Burton as an incumbent

in 1988 and 1992; Hatcher as running for a vacant seat in 1992 and as an incumbent in 1994; and McClinton as a non-incumbent in 1996. Again, this difference is not noted by the parties, but the explanation seemed likely to be found in the Herstek Exhibit. In most of these cases listed by Dr. Brown, the candidate was running for the Wayne County Probate Court, not the Circuit Court (the Herstek Exhibit provides no information about Burton in 1992 or Hatcher in 1992). Because Dr. Brown's data is too aggregated to be legally useful, and because Dr. Stanley does not include results of these exogenous elections, I do not include them in my analysis.

3. Legally Significant Polarized Voting.

Polarized voting is differential voting patterns among white and black voters with respect to candidates of choice among the VRA-protected minority community. Legally significant polarized voting is a level of white bloc voting that is "usually," or "normally," or "generally" strong enough to defeat the minority-preferred candidate. Gingles, 478 U.S., at 49, 51, 56. The Supreme Court has not given greater specificity to the standard of legal significance, although Justice O'Connor has suggested that "usually defeated" means that the courts "must find that even substantial minority success will be highly infrequent," where "substantial" means something less than proportional representation. Id., at 99-100 (O'Connor, J., concurring). Voting can of course be racially polarized without that polarization reaching a level of legal significance for purposes of VRA § 2.

In the context of multi-candidate elections, and with the kind of data available here, the polarized voting inquiry is best begun by focusing on the same approach used to identify candidates of choice, that is, by examining the preferences among just the white electorate and comparing those with the preferences among just the black electorate. Table 1 reveals that fairly clear patterns of polarized voting characterize Wayne County Circuit Court elections. Using Dr. Stanley's

classifications on incumbency, in the 1996 general elections, black candidates of choice in the incumbent election ranked 2, 4, 5, and 7 among black voters. Those same candidates fared considerably worse among white voters; they were ranked 7, 9, 19 (last), and 16 in the 19 candidate field. On the non-incumbent ballot, in a vote-for-two contest, the minority-preferred black candidate ranked 2 among the black electorate but 4 (last) among the white electorate. These results make the 1996 general election one characterized by polarized voting patterns.

But polarized 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 minority-preferred candidates. Table II provides the relevant information on an election-by-election basis, while Table III aggregates this data for all the general elections at issue. Using Dr. Stanley's classifications, Table III reveals that 13 of the 15 black incumbent judicial candidates who would have been elected among just the black electorate were indeed elected. Using Dr. Brown's slightly different classifications, Table III reveals that every one of the minority-preferred incumbent judicial 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. With respect to vacant seats, the result is the same, although there is only one race involving a minority-preferred candidate. Under either Dr. Brown's or Dr. Stanley's classification, the one minority-preferred candidate who ran for a vacant seat was in fact elected. Hence, there is not legally significant white bloc voting with respect to either races for vacant seats or for races involving incumbent candidates.

The Gingles dispute in this case therefore distills down only to non-incumbent elections. Here, white and black preferences do differ in even more striking ways: using Dr. Stanley's

classifications, of the three black non-incumbents who were minority preferred, none would have been elected among just the white electorate. Using Dr. Brown's classifications, only one of seven minority-preferred non-incumbents would have been elected among just the white electorate. But the legal significance of white bloc voting in non-incumbent races is more complicated to sort out, for white resistance did not stand in the way of many of these candidates' electoral success. Thus, using Dr. Stanley's classifications, two of the three minority-preferred non-incumbents were indeed elected, despite weak white support. Using Dr. Brown's classifications, the picture is more mixed: four of seven non-incumbents preferred by the black community were elected. If we treat the Hispanic candidate Torres as also a non-incumbent candidate of choice, as plaintiffs would do, the figures fall to four of eight elected. In addition, Dr. Stanley's data on primary elections, presented in Tables IV and V, show that among non-incumbent black candidates, two of four minority-preferred contenders advanced to the general election (both of whom prevailed in the general election).

Taking the evidence in the light most favorable to plaintiffs, I will use Dr. Brown's classifications. White bloc voting is then significant enough in 50% of the electoral contests -- both general and primary -- to defeat minority-preferred candidates of choice. Put the other way around, non-incumbent black candidates of choice are elected 50% of the time despite patterns of polarized voting. The legal question is whether this level of success -- or failure -- amounts to white bloc voting "usually," or "normally" leading to the defeat of minority-preferred candidates.

There is no bright-line rule that provides a definitive answer. In many voting-rights cases, particularly in Southern jurisdictions, no black candidates had been elected to the relevant offices since Reconstruction; when failure was total, there was little need to specify precisely what level of

failure the VRA required. See, e.g, Shaw v. Reno, 509 U.S. 573 (1993); City of Mobile v. Bolden, 446 U.S. 55 (1980). But Gingles does provide some guidance that might be relevant. The Court there stated that "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." 478 U.S., at 57. The Court also held that the data there "clearly show that black voters have enjoyed only minimal and sporadic success in electing representatives of their choice." Id., at 60.

Here in incumbent elections black-preferred candidates have enjoyed nearly complete success. And absent a finding of special circumstances to discount the electoral successes of non-incumbent minority-preferred candidates, see infra, the fact that such candidates have won 50% of the time would seem to make it difficult to conclude that their success has been only "minimal and sporadic." Moreover all three of the non-incumbent minority-preferred candidates who lost, using Dr. Brown's classifications (and all four, if one counts the Hispanic candidate, Torres), lost in the most recent elections, in 1996. That might suggest that even if a success level of 50% can establish legally significant white bloc voting, the fact that all of these losses have occurred only in the most recent election means that plaintiffs have not established a pattern, with respect to non-incumbent candidates, "that extends over a period of time."

Apart from the application of Gingles, Sixth Circuit precedent would run against a finding that the 50% success rate here of non-incumbents is tantamount to legally significant white bloc voting. In Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994), the facts established that 47% of black candidates who were minority-preferred were actually elected. Id., at 810. In response to plaintiffs' arguments that some of these city council candidates were incumbents who had first been

appointed to the city council, the court noted that "over one-third -- or 3 of 8 -- of the successful black candidates for city council were first elected as challengers." Id., at 814. The court held that neither of these rates was sufficient to meet the Gingles requirement that bloc voting be sufficient to "usually defeat" minority-community candidates of choice. If neither a 37% success rate (3 of 8) nor a 47% success rate is sufficient, the 50% success rate here would similarly appear not to be strong enough evidence to make out a case of legally significant white bloc voting.

It is still true that the absolute level of black representation on the Wayne County Circuit Court before merger was lower than the county's black voting-age population. Plaintiffs' figures are that, prior to merger, this court had 35 judges, 7 of whom were black, meaning black elected judges were 20% of the bench in a county whose black voting-age population, as of 1990, was 37.6%. Plaintiffs' Counter-Statement of Facts, at ¶ 13 and ¶ 40 (in the immediate aftermath of the merger, the black percentage on this court was 43.75% because sitting Recorder's Court judges were grandfathered in for a specified time. Id., at ¶ 15). But this underrepresentation does not seem to trace significantly to white bloc voting in elections as much as to the relatively small number of black candidates who sought office. Yet the parties agree that there are no disputed issues of material fact concerning the candidate slating process for these judicial elections. Defendant's Supplemental Statement of Material Facts Not in Dispute, ¶ 132; Plaintiffs' Counter-Statement of Facts, ¶ 132. Absent challenges to the slating process, and with at best ambiguous evidence, limited only to non-incumbent races, of vote dilution in judicial elections, it is difficult to conclude that the pre-merger underrepresentation can legally be attributed to a violation of the Gingles factors. It is somewhat troubling that, with respect to non-incumbent candidacies, the analysis must turn on a relatively small number of candidates. Plaintiffs might have turned to exogenous elections to

attempt to show a more significant pattern of vote dilution in the relevant geographic region regarding non-incumbents, to the extent plaintiffs could establish the relevance of these elections. Given the well-recognized different electoral dynamics of legislative and judicial elections, presumably the most probative exogenous elections would be judicial ones for courts other than the Wayne County Circuit Court. But plaintiffs do not offer such evidence. Somewhat mysteriously, Dr. Brown appears to list as African-American judicial candidates a few who ran for Probate Court, see supra (on data discrepancies), but it is unclear what role these races play in her analysis -- whether she folded these few Probate Court races into her aggregated analysis or whether the analysis, which she says included only Wayne County Circuit Court elections, see, e.g., Brown Report, at App. B, ignored them. Whatever the answer, Dr. Brown does not provide an independent analysis of polarization patterns in Probate Court races or other exogenous elections.

The parties speculate about the possible effects on the Gingles factors in the post-merger environment in which Recorder's Court will be abolished. There is no data yet on actual elections in the post-merger system. The State argues that the success rate of black judicial candidates, including non-incumbents, is likely to increase on the theory that many of the strongest black candidates previously ran for Recorder's Court. Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at 29. If candidates of this sort now run for Wayne County Circuit Court instead, both the size and the strength of the black-candidate pool, including non-incumbents, will be enhanced. While there is plausibility to this view, it is necessarily speculative. Contrary effects might also be speculated about. For example, as more black judicial candidates run in Wayne County, it is possible race will become more salient to voters and that legally significant white bloc voting and minority-group political cohesion might both increase.

These various possible effects are too speculative to be taken into account as part of the vote dilution inquiry today. But whatever rulings the Court makes on the basis of the record in the pre-merged system, that should not preclude consideration of the patterns of polarized voting that emerge in the post-merger system once sufficient electoral experience has been accumulated that makes possible an evaluation of that system on its own record.

The final consideration the parties raise regarding vote dilution in non-incumbent races is whether "special circumstances," within the meaning of Gingles, should lead the Court to discount the electoral success of those black non-incumbent candidates who have won.

4. Whether Special Circumstances Explain Electoral Success of Non-Incumbent Black Candidates of Choice.

Plaintiffs appear to argue that the elected black non-incumbent candidates benefitted from special circumstances that should lead the Court to discount the significance of these victories in determining whether legally significant polarized voting is occurring. The most recognized example of a special circumstance, one which indicates the way in which this concept is most directly tied to the purposes of the VRA, is when a minority candidate is elected during the pendency of VRA litigation -- as a possible means to undermine the litigation. See, e.g., Collins v. City of Norfolk, 883 F.2d 1232, 1241 (4th Cir. 1988), cert. denied, 498 U.S. 938 (1990); Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973), aff'd sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). But that is not the kind of special circumstance plaintiffs offer here. The plaintiffs' argument thus raises legal questions concerning the appropriate legal concept of an electoral "special circumstance."

Of the seven non-incumbent black candidates who ran for Wayne County Circuit Court from

1986-1996 and were candidates of choice of the black community, four were elected. Plaintiffs assert that each context, however, involved special circumstances. Plaintiffs' Counter-Statement of Facts, at ¶83. In two cases, plaintiffs assert that the candidates had Wayne County-wide name recognition (Hood, 1992, and Lucas, 1996). In a third, plaintiffs assert that the candidate "ran an effective campaign in a field of non-incumbent African Americans" (Thomas, 1994). In the fourth, plaintiffs state that the candidate was already a 36th District Court judge and that he did not include a photograph on his campaign literature. The State does not appear to dispute these factual assertions but does reject the purported legal significance of these facts.

With respect to Thomas, surely the fact that a candidate "ran an effective campaign" cannot be the kind of special circumstance that Gingles contemplates. Whether having name recognition should count as a special circumstance is less certain. The parties cite no cases on this specific point, and I have found none. Name recognition might cut both ways, particularly in low-visibility judicial elections; to the extent the candidate is more well known in the white community, if voting is racially polarized, then name recognition could facilitate the polarized voting process. Perhaps a candidate might have significant name recognition in the black community but not the white. Plaintiffs do not, however, state their argument in these terms. Moreover, if certain candidates of choice have greater name recognition that enables their election in contexts that otherwise involve legally significant white bloc voting, the Court might still consider evidence necessary on whether this kind of recognition is not achievable by other black candidates who build political careers in similar ways.

Every candidate and race, of course, involves special circumstances in some sense. The question must be the legal relevance of the asserted circumstances here. The Sixth Circuit has held that "special circumstances" must involve an "unusually important role [for some factor] in the

election at issue; a contrary rule would confuse the ordinary with the special, and thus 'make practically every American election a "special circumstance."'" Clarke v. City of Cincinnati, 40 F.3d 807, 813-14 (6th Cir. 1994); accord, Lewis v. Alamance County, 99 F.3d 600, 612, 617 (4th Cir. 1996). Here, the possible relevance of the special circumstances asserted also seems less likely when one looks at the actual election data. Special circumstances would be particularly relevant were they to suggest that white voters, who typically bloc vote in polarized patterns, do not do so in specific races for special reasons that the Court cannot infer will be present in most contests. But it does not seem that white voters played a uniquely supportive role in at least two and maybe all three of these remaining examples. Whatever the benefits of Hood's name recognition in the white community, she finished first in the black electorate and last in the white electorate in a field of six candidates. Overall, she finished second (by 4,407 votes). Stanley Report, App.3, at 4. Hood's election would seem to owe more to the level of support she had in the black community, rather than to an unusual circumstance of high white crossover-voting -- although conceivably her absolute vote total in the white community could have been even lower and perhaps sufficient to deny her the seat. Similarly, Murphy finished first in the black electorate but fifth out of sixth in the white electorate. Id. Again, if his campaign strategy is alleged to have produced more white crossover-voting than would typically occur, the results would not seem to bear out such a claim -- although it is difficult to say whether Murphy might have gotten even fewer white votes in the absence of the special circumstances the plaintiffs allege. Finally, Lucas was a strong candidate among both white and black voters even though voting was to some extent polarized. He finished second among the black electorate and seventh among the white in a field of 19 where 12 were being elected. Whether the white-black gap in his race is significantly different from that for other black candidates in the same

1996 race is not easy to assess. Thomas, for example, ranked fourth among black voters and ninth among whites. This gap is similar to that for Lucas and argues against there being any legally relevant special circumstance that makes Lucas's race a unique event. On the other hand, Manning was seventh among black voters and sixteenth among white voters, and even more dramatic polarization was shown in voting on Coleman, who finished fifth among blacks but nineteenth (last) among whites. Neither Manning nor Coleman were elected (the State argues that Manning's defeat cannot be laid at the feet of white bloc voting, because had she received as many black votes as Lucas, she would have been elected -- on the State's view, Manning's defeat was due to insufficient interest and support among black voters). Thus, compared to some black candidates in the same race, voting for Lucas was about as polarized, but compared to others, it was less so. Whether Lucas's election should be treated as a "special circumstance," based on his prior name recognition, is thus ambiguous.

If the Court were to conclude that polarized voting for non-incumbents were not otherwise legally significant, the question of possible "special circumstances" that account for the successful black non-incumbent candidacies could become significant. If all the electoral successes are discounted, as plaintiffs would have it, then polarized voting patterns look starker. Even if the Court rejects this argument in the case of Thomas, as I would conclude, there is still scope for judgment about the remaining cases.

The Court has several options. It could conclude there are material disputes of fact relevant to this question and that such disputes require further development of the record or trial on this particular question. Alternatively, it could conclude that even at this stage plaintiffs bear a more substantial burden to offer evidence demonstrating a material dispute on these issues. The Court

could also conclude as a matter of law that generalized assertions of high name recognition are not the kind of special circumstance Gingles contemplates, in which case at most one instance of a possible special circumstance, Murphy, would still be a live dispute.

II. TOTALITY OF CIRCUMSTANCES

This Court's order requires me to express an opinion as to, if the Gingles preconditions have been established with sufficient evidence at this stage, whether plaintiffs have further established genuine issues of material fact with regard to the legally relevant "totality of the circumstances." Because the Court might accept or reject my analysis of the Gingles issues, I will address these further issues.

The Supreme Court has recently reemphasized the importance of this inquiry even when the Gingles factors have been established, particularly in cases challenging the distribution of districts in a single-member districting plan. Johnson v. DeGrandy, 512 U.S. 997 (1994). In the cases, the most important factor in this revived "totality" inquiry has been whether the challenged electoral system already realizes approximate proportional representation for the minority community. The state defense of approximate proportionality was the dispositive consideration in DeGrandy, as it was in NAACP v. Austin, 857 F. Supp. 560 (E.D. Mi. 1994).

Here there is no State defense of proportionality offered. The State does not claim that the percentage of elected judges on the Wayne County Circuit Court is roughly proportional to the size of the black voting-age population or total population, nor could the State do so on this record. Some of the other "totality" factors, such as racially-polarized voting and minority electoral success, repeat the analysis in Part I of the Gingles factors and do not need to be reviewed here. Of the other

"totality" factors, one that could be of particular importance in cases of the sort here does not in this particular case involve any dispute of material fact. Both parties agree that issues of candidate slating for the judicial elections at issue are not "relevant to this case." Plaintiffs' Counter-Statement of Facts, at ¶132; Defendant's Revised Brief in Support of Motion to Dismiss and Alternatively, for Summary Judgment, at p.37. With regard to certain other of the "totality" factors, the parties do dispute the underlying material facts. I do not believe, however, that resolution of this case is likely to turn on how the Court resolves those differences. That is, even taking as true the plaintiffs version of the facts in dispute with regard to the other "totality" factors, my judgment is that the dispositive issues here -- with one exception -- turn on whether the plaintiffs can make out the required case of vote dilution under Gingles. The exception is the State's asserted interest in linking the electorate for the judicial offices in question to the jurisdiction those judges possess. This "linkage" interest is a sufficiently important issue, either as one "totality" factor or as a more general defense available to states in VRA challenges to judicial elections, as to warrant separate treatment.

Linkage Interest

The State asserts that even if plaintiffs establish the three Gingles factors, their § 2 claim cannot, as a matter of law, prevail. With respect to judicial elections, the State asserts a substantial interest in linking the electorates of trial judges to the jurisdiction they exercise. All the Courts of Appeals that have addressed this question have concluded that states do possess a substantial interest in such linkage, an interest that is strong enough to override even proof of vote dilution, at least where the extent of dilution is not extreme. Milwaukee Branch of the N.A.A.C.P. v. Thompson, 116 F.3d 1194, 1200-01 (7th Cir. 1997), cert. denied, 139 L. Ed. 2d 753, 118 S. Ct. 853 (1998); White v. Alabama, 74 F.3d 1058, 1070-75 (11th Cir. 1996); Nipper v. Smith, 39 F.3d 1494, 1542-4

(11th Cir. 1994) (en banc); League of United Latin Amer. Citizens v. Clements, 999 F.2d 831, 872-76 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994). Very recently, the Court of Appeals for the Sixth Circuit has adopted a particularly strong form of this position in Cousin v. Sundquist, 1998 U.S. App. LEXIS 10796 (6th Cir. June 1, 1998).

Cousin involved a VRA challenge to the structures for various judicial elections in Hamilton County, Tennessee. In reversing a district finding that these structures caused impermissible vote dilution, the Sixth Circuit rested on alternative grounds. First, that court ruled that plaintiffs had failed to prove the Gingles factors. But the court also went on to conclude that even had the plaintiffs proven vote dilution, the state's interest in "linkage" was substantial enough to preclude the kind of remedy plaintiffs sought there and seek here. At several points, the court made clear its judgment that:

> 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 (citations omitted). 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 . . . . Id., at 10796, *27-28 [citations omitted].

In another passage, the Sixth Circuit wrote:

> 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. Id., at 10796, *35.

And yet again, in expressing its legal conclusions, the Sixth Circuit held:

> 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. Id., at 10796, *53.

This recent Sixth Circuit decision is a formidable obstacle to plaintiffs' claims, even were they able to prove vote dilution at trial. Read literally, it would appear to impose a per se rule against the remedy plaintiffs seek (or perhaps any conceivable remedy at all) in this kind of litigation. The other Courts of Appeals cited above can be read to take a somewhat more moderate form of this position. Those courts have held that, at least where the vote dilution is not extreme, this linkage interest is substantial enough to override proof of the Gingles factors. But under either the per se reading of the Sixth Circuit or this more moderate view of other Courts of Appeals, the plaintiffs vote dilution claim -- which at best might arguably show some vote dilution in non-incumbent judicial elections but not an extreme case -- would seem destined to fail as a matter of law.

The one argument against this conclusion, which plaintiffs do not appear to make, would point to the provision in the statute abolishing Recorder's Court, P.A. 1996, No. 374, that purports to permit the county board of commissioner to draw election districts for judicial races that would otherwise be countywide. MCL 600.9948 provides:

> Sec. 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.

Arguments about the significance of this provision to the State's asserted "linkage interest" have not been made in the briefs, and therefore I do not express any conclusion about them. But I will identify the possible issues this provision raises. Plaintiffs might argue that this provision constitutes an acknowledgment by Michigan public officials that, whatever the strength of the linkage interest for other states, this interest is not substantial in Michigan. Thus, if vote dilution is proven, the State has already indicated a minimal stake in linkage. In response, the State might assert that this provision is conditional, and it first requires a federal court to find a VRA violation. The State should not be viewed as confessing to a weak interest linkage, but only as acknowledging the reality of potential federal court power. That is, if the State would not be liable in the absence of this statute, the State should not become liable simply because it has had the foresight to authorize a structure for dealing with any potential violations. The State might also argue that this provision still requires the court first to find a voting rights violation; given the structure of the doctrine, the linkage interest is part of the "totality of the circumstances" that must be examined before a finding of a § 2 violation can be made. Because the Michigan statute first requires a finding of violation to be triggered, perhaps there simply is no violation here, under Cousin, to be remedied. Finally, the State might argue that the state constitution requires judicial elections to be countywide; it is not clear whether legislation like the above provision is constitutional; and in a clash between the state interest expressed in the constitutional provision versus that in this legislative provision, the Court should defer to the judgments about linkage reflected in the state constitution.

I do not address these arguments because they have neither been made or briefed. But in light of the very recent decision in Cousin, the Court might conclude either that briefing is required, or that the issue is sufficiently clear to be resolved at this stage. Given the strength of the bar in Cousin

to court-imposed judicial election districts as a remedy for even proven vote dilution, the Court might conclude that the plaintiffs claims will not be able to prevail as a matter of law regardless of how the claim of vote dilution under § 2 is ultimately resolved.

CONCLUSION

In my opinion, if the Court limits itself to the reports of plaintiffs' experts, those reports are not cast in the appropriate form to raise genuine disputed issues of material fact regarding the presence of the three Gingles factors. If the Court is willing on summary judgment to examine the full record, including the data provided by the State's expert, Dr. Stanley, the Court can make judgments at this stage about candidates of choice and legally significant white bloc voting. The data are clear in revealing that legally significant polarized voting does not exist with respect to incumbent elections and elections for vacant seats in Wayne County Circuit Court elections. The dispute thus can be distilled down to a focus on non-incumbent elections.

For those elections, there are disputed issues concerning which candidates to classify as non-incumbents. Taking the plaintiffs' approach, black non-incumbents who were candidates of choice of the black community succeeded in general and primary elections from 1986-1996 about 50% of the time. The Court must make legal judgments as to whether that level of success or failure constitutes white bloc voting that "usually," or "normally," or "generally" -- the Gingles standard -- leads to the defeat of minority-preferred candidates. There is also a legal dispute as to whether special circumstances explain the success of those black non-incumbents who have been elected. If so, the rate of failure would increase, making more likely a legal conclusion of significant white bloc voting. From the other side, there is also a relevant legal dispute as to whether the weak form of the State's rolloff theory should be accepted; that is, whether those black non-incumbents who

lost could have been elected had they received as many black votes as the leading judicial candidates received in the same election. If the Court accepts that theory, then depending on how many losing candidates would have won, the rate of failure would diminish. This would of course make a finding of legally significant white bloc voting less likely. There is insufficient evidence at this stage to identify exactly how many losing non-incumbent black candidates might be included were this understanding of the law adopted. In some sense, these are relatively minor disputes, but on the other hand, given the small number of candidacies at issue for non-incumbent black candidates of choice, answers to these discrete questions can make for meaningful shifts in the bottom line numbers.

The State also asserts a linkage interest in tying the electorate of trial judges to the jurisdiction they serve. Given the enactment of M.C.L. 600.9948, which authorizes the drawing of election districts on a non-county wide basis in some circumstances, despite the seeming prohibition of the State Constitution, there is also a dispute as to the whether this linkage interest exists in this case and how strong the Court should consider it to be. If the State can assert a linkage interest despite M.C.L. 600.9948, then under the recent decision in Cousin v. Sundquist, 1998 U.S. App. LEXIS 10796 (6th Cir. June 1, 1998) and the decisions of other Courts of Appeals, the Court would have to reject plaintiffs' claims, regardless how some of the minor disputed issues over the extent of vote dilution in non-incumbent races are resolved. Cousin can be read to erect a per se barrier, regardless of the level of vote dilution proven, to the VRA remedy plaintiffs seek of districted judicial elections. But the weaker role of a State's linkage interest recognized in other Courts of Appeals requires that plaintiffs do more than merely make out a case of vote dilution to overcome the State's substantial interest in linkage; the vote dilution must be extreme to do so. Based on this

record, it is difficult to see how plaintiffs could meet that standard, even taking the evidence in the light most favorable to them.

I would recommend that the Court begin its consideration with a focus on this linkage issue. The issue could well be dispositive, particularly in light of Cousin. The State raises this argument in its initial summary judgment motion, but the parties do not brief it in detail and do not address the possible significance of the statutory provision.

The Court's order limited my task to addressing plaintiffs' claims under the VRA. I reiterate that I do not express any opinion on plaintiffs' claims under the Equal Protection Clause, namely that the court merger was motivated in relevant part by a racially-discriminatory purpose. From the plaintiffs' papers, including Dr. Rich's report, it is also clear that the Recorder's Court has long occupied an important place in the political and legal life of Detroit. The general costs to the Detroit community of losing this institution might well be substantial, as plaintiffs allege, but my role is limited to assessing the narrowly focused legal question of whether, under existing precedents, the electoral structure for the newly constituted Wayne County Circuit Court violates § 2 of the VRA. That decision must also be based on the record established in this particular litigation.

Respectfully submitted,

Richard H. Pildes
Professor of Law
University of Michigan Law School

Dated: June 30, 1998

Table I
GENERAL ELECTIONS 1986-1996
WAYNE COUNTY CIRCUIT COURT
BLACK CANDIDATES
STANLEY DATA

Election	V=Votes to Cast N=Number of Candidates	Rank Among Black Voters	Rank Among 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 N=Number of Candidates	Rank Among Black Voters	Rank Among 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