No. 16-4511

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Missouri State Conference of the National Association for the Advancement of Colored People; Redditt Hudson; F. Willis Johnson; Doris Bailey,

Plaintiffs – Appellees,

v.

Ferguson-Florissant School District,

Defendant – Appellant.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OF PLAINTIFFS-APPELLEES

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    a. *Thornburg v. Gingles*, 478 U.S. 30 (1986);

    b. *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

STATEMENT OF THE CASE

Plaintiffs-Appellees, three African-American citizens who are registered voters in the Ferguson-Florissant School District ("FFSD" or the "District") and the Missouri State Conference of the National Association for the Advancement of Colored People (collectively, "Plaintiffs"), filed this case against Defendant

Ferguson-Florissant School District (the "Defendant") and the St. Louis Board of Election Commissioners on December 18, 2014, alleging that the at-large method for electing members of Defendant's seven-member school board (the "Board") deprives the District's African-American residents of an equal opportunity to elect representatives of their choice, in violation of Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301 ("Section 2").[1]

Beginning on January 11, 2016, the District Court held a six-day bench trial. Reviewing the evidence at trial, the District Court found the following: There is an undeniable history of official racial discrimination in FFSD, which has adversely impacted the rights of its African-American residents to register, vote, and otherwise participate in the democratic process. Addendum ("Add.") at 40-41.[2] FFSD was itself created to remedy state-sanctioned discrimination and segregation in education, some twenty years after the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). Add. at 90-91. *See United States v. Missouri*, 515 F.2d 1365, 1367 (8th Cir. 1975); *United States v. Missouri*, 388 F. Supp. 1058 (E.D. Mo. 1975).

[1] Both Ferguson-Florissant School District and the St. Louis County Board of Elections are defendants in this case; however, only Defendant Ferguson-Florissant School District has appealed from the District Court's judgment.

[2] Addendum ("Add.") citations refer to the District Court's August 22, 2016 Order and Memorandum (J.A.5 1154-1272), filed concurrently with Appellant's brief.

Based on the evidence at trial, the District Court found that the history of officially sanctioned discrimination is not just a distant memory. Its effects persist and form the backdrop for FFSD's present conditions, which work to hinder African Americans' ability to participate fully and equally in the political process. Add. at 99-100. There continue to be wide disparities between Black and white residents of the District on almost every socioeconomic indicator that impact African Americans' democratic participation, including employment, wealth, homeownership, and other factors underlying basic economic security. *Id.* at 96. There are undisputed disparities between Black and white students in educational achievement and the application of discipline within FFSD schools. *Id.* And there are distinct differences in how Black and white residents of FFSD are treated by local officials, including undisputed disparities between the numbers of law enforcement stops, arrests, fines, and fees. *Id.* at 97.

In part because of these longstanding and persistent disparities, African Americans have had, for many years, difficulty electing their preferred candidates to the seven-member Board under the existing at-large method of elections. Despite the fact that any-part Black residents comprise 48.19% of the voting-age population in the District, and that Black children constitute 77.1% of the student body, African Americans have a long history of underrepresentation on the Board. In the five election cycles prior to trial, thirteen African-American candidates ran for ten Board

seats, yet only two were elected, and both under special circumstances. *Id*. at 9, 87. As recently as 2014, there was not a single Black member of the Board. *Id.* at 86.

As the District Court found, after reviewing expert testimony, voting in the District is racially polarized. *Id.* at 78. Defendant's own expert testified that, in the twelve contested elections from 2000 through 2015, Black and white voters have *never* had the same top-ranked candidate. *Id.* at 49. In a consistent pattern spanning those twelve elections, the candidates preferred by Black voters usually lost. *Id.* at 78-79. During that period, the top-ranked candidates among white voters were always elected. *Id.* at 80. And Board members preferred by white voters were reelected despite Black voters' clear preference for other candidates.

After considering all of the evidence, the District Court found that the totality of circumstances in the District revealed that the political processes are not equally open to Black residents. On August 22, 2016, the District Court issued its memorandum and order, which contains extensive findings of fact and legal conclusions. Based on "a functional view of the political process," and "a searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 45 (1986) (internal quotation marks and citation omitted), the District Court found that Defendant's at-large method for electing Board members deprives African-American residents of an equal opportunity to elect representatives of their choice in FFSD, in violation of Section 2.

Relying on the evidence it found credible, the District Court found that Plaintiffs had established the three preconditions for vote dilution liability under Section 2 of the Voting Rights Act ("VRA"), as set forth in *Gingles*. First, the Court found that Plaintiffs had satisfied the first *Gingles* precondition ("*Gingles* 1) by submitting a single-member district map to illustrate that the African-American population is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Second, the District Court found that Plaintiffs had established the second *Gingles* precondition ("*Gingles* 2"), because they had "presented significant evidence" that voting in the District is racially polarized, and that there is cohesiveness among Black voters behind candidates of choice. Add. at 52-53, 78. Third, the District Court found that Plaintiffs had established the third *Gingles* precondition ("*Gingles* 3"), based on the evidence showing that Black-preferred candidates are usually defeated in Board elections due to white bloc voting. *Id.* at 78-79. The District Court also found that there were special circumstances in the 2014 and 2015 Board elections, and that those elections should be afforded "slightly less probative value than if there were no special circumstances surrounding the election." *Id.* at 79-80.

Finally, turning to the totality of the circumstances, the District Court found that of the nine non-exhaustive factors ("Senate Factors") used in this analysis, Senate Factors 1, 2, 3, 4, 5, 6, and 7, weighed in favor of Plaintiffs; that Senate

Factor 8 had neutral weight; and that Senate Factor 9 weighed in favor of Defendant. Add. at 84, 85, 89, 101, 105, 109, 112, 115. Based on the entirety of the credible evidence, the District Court held that Black voters in FFSD have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 116.

At the remedial stage, Defendant argued that, despite the District Court's finding that the existing at-large electoral system is discriminatory and violates Section 2, the court should simply leave that system in place. *Def.'s Br. in Opp'n to Rem. Plans*, J.A.7 at 1508, 1535-37. Plaintiffs submitted three remedial plans that would cure the Section 2 violation: a redistricting plan with seven single-member districts; a plan with five single-member districts and two seats elected at-large through a limited voting system; and an at-large cumulative voting plan. *Pls.' Prop. Remedial Plans & Mem. in Supp.*, J.A.6 at 1342. On November 21, 2016, the District Court issued a remedial order maintaining at-large elections but ordering cumulative voting to cure the Section 2 violation. *Rem. Ord.*, Add. at 121.

SUMMARY OF THE ARGUMENT

Despite the District Court's diligent review of the extensive record, reliance on evidence it deemed credible, and "firm[] belie[f], without equivocation" that the scheme for electing members to the FFSD School Board violates Section 2, Tr. of Dec. 19 District Court hearing at 15:17-18, Defendant seeks to reverse nearly every

one of the District Court's adverse factual finding and legal conclusions. In the face of ample support for the District Court's factual findings, Defendant seeks to re-litigate factual issues without regard for the District Court's credibility determinations and role as fact-finder, but fails to show that any of the court's findings are not plausible in light of the record. Despite the District Court's application of the correct legal standards, Defendant advances arguments outside accepted Section 2 analysis; fails to acknowledge case law that contradicts its arguments; and cites dissenting opinions as if they were precedent. The District Court's Section 2 liability determination withstands these attacks.

First, the District Court properly applied the well-established criteria for *Gingles* 1: that a person claiming a Section 2 violation must "demonstrate that [a minority population] is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles v. Thornburg*, 478 U.S. 30, 50 (1986); *see also Cottier v. City of Martin* (*Cottier II*), 604 F.3d 553, 558 (8th Cir. 2010) (en banc) (recognizing same); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006) (same); *Stabler v. Thurston Cty.*, 129 F.3d 1015, 1020 (8th Cir. 1997) (same). Plaintiffs submitted two expert-drawn illustrative plans demonstrating that the jurisdiction could be subdivided into seven constitutionally permissible, single-member districts that adhere to redistricting principles. Given this evidence, the District Court did not err in finding that Plaintiffs met the well-established standard,

or by declining to impose the novel requirement suggested by Defendant that Plaintiffs in a Section 2 case must prove, at the liability phase, the effectiveness of its illustrative plans to remedy the Section 2 violation.

Second, the District Court did not clearly err when it determined African Americans do not constitute a majority of the District's VAP. The District Court properly credited the presumptively accurate Decennial Census count of the VAP and found that Defendant had not overcome that presumption by introducing subsequent survey estimates or unreliable projections. The District Court also found that even if it had credited the calculations proffered by Defendant's expert and found that African Americans constitute a bare numerical majority of the District's VAP, the District Court's liability determination would not have changed in light of the other factual findings about the various disadvantages that African Americans in FFSD face in the political process.

Third, applying *Gingles* 2 and 3, the District Court reasonably found that voting in the District is racially polarized and that Black-preferred candidates usually lose FFSD Board elections because of legally significant white bloc voting. Even Defendant agrees that Black voters and white voters tend to support different candidates for the Board. After reviewing all the election data in evidence, the District Court determined that the Black-preferred candidates were usually defeated, whether it applied Plaintiffs' method for identifying black-preferred candidates,

which it credited, or one of Defendant's two suggested methods, which it did not credit. Add. at 52-58. Although Defendant prefers to attribute Black-preferred candidates' losses to the purported personal shortcomings of those candidates, Appellant's Brief ("App. Br.") at 70-73, 94-101, the District Court did not find Defendant's explanation credible. Add. at 89, n.29.

Fourth, the District Court properly found, based on the totality of circumstances, that African-American voters in FFSD "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See Gingles*, 478 U.S. at 43; Add. at 116. "The district court's weighing of the totality of the circumstances, like its factual findings, is subject to clear error review." *Bone Shirt*, 461 F.3d at 1027 (citing *Stabler*, 129 F.3d at 1023). Defendant does not identify any clearly erroneous factual findings or legal errors in the District Court's weighing of the Senate Factor evidence. The District Court's determination that the political process in FFSD is not equally open to Black residents was based upon its "searching practical evaluation of the past and present reality, and on a functional view of the political process." Add. at 83 (quoting *Gingles*, 478 U.S. at 45). There is no basis for displacing the District Court's fact-finding.

ARGUMENT

I. LEGAL STANDARD

"[Appellate courts] review the district court's factual findings for clear error, including the district court's factual determination of whether the Section 2 requirements are satisfied." *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1017 (8th Cir. 2006) (citing *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 425 (2006)). "Because a § 2 analysis requires the district court to engage in a 'searching practical evaluation of the past and present reality,' . . . . a district court's examination in such a case is 'intensely fact-based and localized.'" *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (citations omitted), *aff'd on other grounds sub nom. Arizona v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). An appellate court "therefore '[d]efer[s] to the district court's superior fact-finding capabilities,'. . . and review[s] for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of circumstances, the challenged practice violates § 2." *Id.* (citations omitted); *see also Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (affirming use of "clearly-erroneous" standard of review given "the trial court's particular familiarity with the indigenous political reality").

If the District Court's interpretation of the facts is a permissible one, "[a] district court's choice between two permissible views of evidence cannot be clearly

erroneous." *United States v. Vertac Chem. Corp.*, 453 F.3d 1031, 1039 (8th Cir. 2006) (internal quotation marks and citation omitted). Even if an appellate court might have arrived at a different conclusion than the district court, that is not sufficient for reversal. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record . . . , the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."); *see also* Fed. R. Civ. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). Legal questions are reviewed *de novo*. *Bone Shirt*, 461 F.3d at 1017.

II. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS SATISFIED *GINGLES* 1

To satisfy *Gingles* 1, Plaintiffs must show that the African-American population in the District is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The District Court correctly found that Plaintiffs satisfied this requirement by submitting two illustrative redistricting plans featuring four single-member districts in which

African Americans are a majority of the VAP.[3] Add. at 27-28. Defendant does not challenge that finding.

Instead of disputing that Plaintiffs proved what *Gingles* 1 requires, Defendant urges this Court to change Plaintiffs' burden and quibbles with the District Court's fact-finding. Neither argument is availing.

A. Plaintiffs' claim is not barred by the size of the Black voting age population in FFSD.

First, Defendant argues that Plaintiffs' claim is barred, relying on various population estimates, including Defendant's linear population projections, which, according to Defendant, show that African Americans are already a majority of the District's VAP. App. Br. at 37-38. The District Court found this evidence not credible, but Defendant asserts that the District Court's reliance on "presumptively accurate" Decennial Census data was clearly erroneous.

Defendant's argument fails for two simple reasons. As a factual matter, the most recent Decennial Census indicates that African Americans are "neither a majority nor a plurality of the VAP of the District," Add. at 30, and the District Court did not err in finding that Defendant failed to present sufficient evidence to overcome

[3] Each of the two illustrative plans creates three districts in which African Americans constitute more than 60% of the VAP, in addition to a fourth district in which African Americans would comprise a bare numerical majority of the VAP (52.86% and 51.50% respectively). J.A.3 at 681, *Joint Stip*. ¶¶ 45, 47.

the presumptive validity of that count. Moreover, even if the District Court clearly erred in its fact-finding as to the VAP of FFSD, such error would not change the outcome given the other facts in this case.

As a matter of law, racial minorities may still prevail on a Section 2 claim even if they constitute a bare numerical majority of the VAP of a jurisdiction. *Id.* Under the totality of circumstances in FFSD, which include historical discrimination and its ongoing effects, a pattern of exclusion from the political process, pronounced socioeconomic disparities, and disparate rates of registration and turnout, the District Court found that, "even if Black residents were to constitute a bare majority of the VAP in FFSD," their vote dilution claim may go forward where, as here, the undisputed facts show that the at-large electoral system "inhibits their participation in the political process." *Id*.

1. The District Court did not clearly err when it determined African Americans do not currently constitute a majority of FFSD's VAP.

Defendant concedes that Decennial Census data is "presumptively accurate," and that, according to the 2010 Decennial Census count, Black residents of the District are neither a plurality nor a majority of the VAP. App. Br. at 30; Add. at 9-11; *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988) ("The census is presumed accurate until proven otherwise."). Those concessions should end the inquiry. "[C]ourts resolving Voting Rights Act claims in the Eighth Circuit regularly rely on Decennial Census data for determining the demographics of a jurisdiction."

Add. at 30-31.[4] The mere passage of time since the last Decennial Census is not a basis for ignoring it, as courts regularly rely on Decennial Census data years after the Census count is taken. Add. at 36 (citing *McNeil*, 851 F.2d at 946 (holding that even if Census data does not reflect present population precisely, this does not require courts to use a different data set)); *see, e.g.*, *Clay v. Bd. of Educ. of St. Louis* ("*Clay II*"), 90 F.3d 1357, 1359 (8th Cir. 1996) (1996 decision relying on 1990 Census to determine St. Louis's African-American VAP); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1385 n.1 (8th Cir. 1995) (relying on 1980 census data because the available 1990 data did not include VAP figures).

As Defendant concedes, the Decennial Census is a "hard count" of the population. App. Br. at 33. Unlike population estimates based on a statistical sample,

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[4] Defendant claims that courts reliance on Decennial Census data is "misleading" because the American Community Survey ("ACS"), on which Defendant seeks to rely, was first released in 2008, after some of the cases cited by the District Court were decided. App. Br. at 31. Defendant also claims that it is "misleading" to suggest courts must rely on the Decennial Census because that data "has not been challenged." App. Br. at 31, n.5.

Both claims are inaccurate. ACS data has been published since 2001, U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data*, Oct. 2008, PLTF-133 at 3. Two of the cases cited were decided after 2001. And there is simply nothing to challenge, since the Decennial Census is required by the U.S. Constitution, art. I, § 2, cl. 3, Missouri state law requires the use of Decennial Census data to determine "the population . . . for the purpose of representation," *see* Mo. Ann. Stat. § 1.100.1 ("The population of any political subdivision of the state for the purpose of representation . . . is determined on the basis of the last previous decennial census of the United States."), and Defendant concedes that it is presumptively accurate, App. Br. at 30.

"[t]he decennial census required by the Constitution tallies total population. . . . These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1142 (2016) (Alito, J., concurring in judgment). Thus, courts have held that, in order to overcome the strong presumption of the Decennial Census data's accuracy, the proponent of alternative population estimates must make a "clear, cogent and convincing" showing of a substantial population shift, using "thoroughly documented" alternative population figures with "a high degree of accuracy," which reveals that the actual count of the Decennial Census is inaccurate in some respect. *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1210 (S.D. Tex. 1997) (internal quotation marks and citation omitted), *aff'd*, 165 F.3d 368 (5th Cir. 1999); *see also Kirpatrick v. Preisler*, 394 U.S. 526, 535 (1969) ("Where [substantial population shifts] can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. . . . Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner."); *Dixon v. Hassler*, 412 F. Supp. 1036, 1040 (W.D. Tenn. 1976) (three-judge court) ("[T]he decennial census figures will be controlling unless there is 'clear, cogent and convincing evidence' that they are no longer valid and that other figures are valid."), *aff'd sub nom. Republican Party of Shelby Cty. v. Dixon*, 429 U.S. 934 (1976).

Nevertheless, Defendant complains that the District Court declined to credit various population estimates created by Defendant that purport to show that the African-American VAP has changed substantially since 2010 and now exceeds 50%. The District Court, however, considered the various estimates and calculations proffered by Defendant, but found numerous deficiencies rendering them insufficient to overcome the presumptive validity of the Decennial Census. Add. at 32-37; *Ord. Denying Interlocutory Appeal*, J.A.6 at 1333-35. This finding was not clearly erroneous.

The 2011-2013 American Community Survey ("ACS") estimates. The ACS is a rolling sample survey conducted by the U.S. Census Bureau based on responses from one in about forty persons on an annual basis. Add. at 12-13. The Census Bureau conducts and publishes one- and five-year ACS estimates, and previously published three-year estimates, of population demographics based on the survey. Add. at 12. As the District Court observed, because ACS estimates are not a hard count of the population, but are instead based on a statistical sample, they are subject to sampling bias and published with margins of error "based on a 90 percent confidence level." *Id.* at 12-13. The Census Bureau cautions that ACS surveys provide only estimates, and recommends that users turn to other Census products for population counts. *Id.* at 13. A similar warning appears on every ACS population table produced by the Census Bureau. *Id.*

The District Court found that there was "no published government data stating that African Americans . . . are the majority of the VAP" in FFSD, including the three-year ACS estimates. *Id.* at 34. The 2011-2013 ACS estimates that African Americans are 48.9% of the VAP of the District, not a majority. *Id.* at 15.[5] Given the ACS's wide margins of error, the District Court found that the ACS data can only state with 90% certainty that the single-race Black VAP is somewhere between 22,800 and 25,826 and that the single-race non-Hispanic white VAP is between 21,829 and 24,655. *Id*. Because the Decennial Census count of the Black VAP in FFSD (24,030 individuals) falls within the relatively large margins of error for the ACS estimates, the ACS estimates do not establish that the Black VAP has grown since the 2010 Decennial Census. The Defendant's own expert conceded, and the District Court found that "the 2011-2013 three-year ACS estimates do not establish to a degree of statistical significance that the single-race Black VAP has grown since the 2010 Census." *Id.* Thus, the District Court did not err in concluding that, the 2011-2013 ACS estimates do not establish that the Black VAP of the District has changed since 2010, and therefore cannot show a substantial population shift. *Id.* at 33. This finding was not clearly erroneous.

[5] Defendant attempts to introduce new 2011-2015 five-year ACS estimates, which they claim were released on December 8, 2016. App. Br. at 35-36, n.7. That data is not in the trial record. Moreover, the District Court excluded the 2015 1-year ACS data from evidence based on Defendant's objection that it had not been disclosed before trial.

The 2011-2013 ACS estimates do not even demonstrate that African Americans are a *plurality* of the District's VAP. *Id.* at 15. As Defendant concedes, the confidence intervals of the VAP by race overlap: the non-Hispanic white VAP could be as high as 24,655, the single-race Black VAP could be as low as 22,800. *Id.* App. Br. at 11-12. In other words, the 2011-2013 ACS data do not establish with statistical confidence that the Black VAP of FFSD is in fact larger than the white VAP. Add. at 15-16.

None of this is to suggest that ACS data cannot be relied on by courts in certain contexts. Courts sometimes use ACS estimates in specific situations, for instance, where they show a substantial change in population since the preceding Decennial Census. *See, e.g.*, *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 745, n.3, 746 (N.D. Ohio 2009) (parties stipulated to use of 2005-2007 ACS estimates because it "reveals that African Americans have increased as a percentage of the population by approximately 50% since the 2000 Census"); *but see United States v. City of Euclid*, 580 F. Supp. 2d 584, 593-94 n.8 (N.D. Ohio 2008) (same) (relying on 2000 Decennial Census data).[6] But that is not the case here. Here, the ACS cannot

[6] Because the ACS reports citizenship status, while the Decennial Census does not, courts also occasionally rely on ACS data when a jurisdiction has a large proportion of non-citizens in order to ascertain the citizen voting-age population ("CVAP"). *See Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 714-15 (N.D. Tex. 2009) (relying on ACS estimates which show an extremely high growth rate in the Hispanic CVAP population of a jurisdiction); *but see Benavidez v. Irving Indep. School Dist.*, 690 F. Supp. 2d 451, 457-59 (N.D. Tex. 2010) (relying on

establish, to a statistically significant degree, that the Black VAP of FFSD has grown since 2010, or that it has eclipsed the white VAP. Add. at 15. The District Court therefore did not clearly err in concluding that there was insufficient evidence to overcome the presumptive validity of the 2010 Decennial Census's count of African Americans as neither a majority nor a plurality of the FFSD VAP.

Defendant's Calculations of the "Any Part Black" Population. The ACS contains estimates only for the percentage of FFSD's VAP that identifies as "single-race" Black; unlike the Decennial Census, the ACS estimates do not contain data on the District's "any-part" Black VAP – that is, the single-race Black VAP plus multi-racial individuals who identify as some-part Black. *Id.* at 16. Defendant, however, urged the District Court to rely on its extrapolations from ACS to guess the some-part Black voting-age individuals in the District. *Id*. Defendant's expert opined that, if his estimate of some-part Black voting-age individuals were added to the ACS estimate of the single-race Black VAP, then such individuals would, collectively, form a majority of the District's VAP. *Id*. The District Court did not find this method credible. *Id*. at 34-35.

The District Court concluded that Defendant's convoluted calculations suffered from three infirmities, each of which overstated the any-part Black

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Decennial Census data the following year). Here, no party has sought to rely on the ACS for the purpose of calculating CVAP.

proportion of the VAP in the District, *id*. at 34-35. The District Court found that that Defendant's expert: (1) cannot reliably calculate any-part Black VAP when those numbers are not provided in the ACS estimate itself. *Id.* at 16-17, 34-35 (indeed, the District Court noted that the demographers at the Census Bureau declined to make this very calculation when they publish the ACS data, in part because of the small sample size and resulting large margin of error); (2) did not provide a margin of error for his calculations, which violates generally accepted standards for statistical estimates in political science research, *id*. at 34-35; and (3) was unable to use the Board of Elections Commission boundaries of FFSD because they do not match exactly the Census boundaries of the District, so the District population cannot be reproduced precisely from ACS estimates, which lack census block level data, *id.* at 35. In addition, Defendant's expert used the wrong denominator to calculate any-part Black VAP, which caused "him to inflate his calculation of the percentage of the VAP in FFSD that is Black." *Id.* at 16, 35. Aside from acknowledging that it is "true, the ACS does not itself calculate the any-part BVAP," App. Br. at 32, Defendant fails to address any of these factual findings, much less establish that the District Court's decision not to credit Defendant's expert's calculations was clearly erroneous.

Defendant's Linear Population Projections. Defendant next suggests that the District Court erred by failing to credit Defendant's effort to show that African

Americans are a majority of the VAP in the District by pointing to its expert's linear projection of the Black VAP in FFSD. App. Br. at 35.[7] The District Court considered this evidence, but concluded that Defendant's linear projections "d[id] not provide the legally required clear, cogent, or convincing evidence that has a high degree of accuracy necessary to overcome the presumptive accuracy of the Decennial Census." Add. at 35-37. In addition, the District Court noted that the Census Bureau "warns against using uncertain ACS estimates to project population forward," calling the calculations "precisely the kind of 'analyses that are [] too inaccurate to serve as a basis for changing the basis of conducting elections.'" *Id.* at 36. Furthermore, the District Court found Defendant's "trend analysis does not address factors that might affect demographic change in the District and impede voting." *Id*; *see also Perez*, 958 F. Supp. at 1212-13 (noting that courts reject overly simplistic "crude" analyses as "too inaccurate to serve as a basis for changing the basis of conducting elections") (citing *Dixon*, 412 F. Supp. at 1041 (where the court noted that other factors must be taken into account to provide reliable projections, beyond a mere linear projection)). The District Court's finding is not clearly erroneous.

[7] The graph on page 35 of Defendant's brief is nowhere in the trial record and was never provided to Plaintiffs. Moreover, Defendant misleadingly attributes the graph to Plaintiffs, by mislabeling the "source" of the graph as "Joint Stipulated Fact 25; Cooper 5/27/15 Report, pg. 10, fig.4."

The District Court's finding that Defendant had not overcome the presumptive accuracy of the Decennial Census data was based primarily on its determination that Defendant's expert employed a simplistic and unreliable methodology. Add. at 35-37. Courts of appeals give substantial deference to the district court's evaluation of witness credibility, and this Court should defer to the District Court's assessment of Dr. Rodden's analysis. *See Anderson*, 470 U.S. at 574-75 (as factfinder, the district court is entitled to make credibility determinations, and findings based on credibility are almost never clear error).

Finally, even if the Defendant were correct that the District Court was required to credit its population projections, such error would not warrant reversal. FFSD is not immunized from liability because demographic trends suggest that, at some point in the future, the Black VAP may grow large enough that the Black community someday achieves equality of opportunity within the existing at-large electoral system. Indeed, the District Court recognized that "[t]he district is in the midst of an ongoing racial transition marked by white flight to the outer suburbs," Add. at 17, but nonetheless found "while there is evidence of a trend in the changing demographics of FFSD, that evidence is insufficient to support a finding that African Americans have the present ability to elect candidates of their choice to the Board," *id.* at 88. Despite the District's suggestion that Plaintiffs should wait to see if the effects of discrimination will someday evaporate, the District Court concluded on

the weight of the evidence that the current system, in the *present*, violates Section 2, and imposed a remedy to address the ongoing violation of Plaintiffs' fundamental right to vote.

2. Even if the Black VAP were a plurality or bare majority, Defendant's correctly held that African Americans in FFSD lack an equal opportunity to elect their preferred candidates.

Even if this Court were to determine that the District Court's findings of fact regarding the Black proportion of the VAP were clearly erroneous, that would not merit reversal. The mere fact that African Americans constitute a bare numerical majority of the FFSD VAP would not preclude Section 2 liability. As the District Court explained, "a racial minority group that is a bare majority of a jurisdiction's VAP may still suffer from actionable vote dilution" if, as the District Court found here, "they remain disadvantaged by a traditional at-large electoral arrangement." Add. at 37. And, under the facts of this case, the District Court found that, "even if [it] were to find that African Americans constitute a majority of the District's VAP," it would still conclude that "a bare numerical majority of the VAP is insufficient to translate into meaningful electoral opportunity." *Id.* at 37, 42.

a. There is no per se rule prohibiting liability where racial or ethnic minorities constitute a bare numerical majority of a jurisdiction's VAP.

African Americans in the District "do not suddenly lose the broad protections of the VRA at the moment that they surpass 50% of a jurisdiction's VAP." Add. at

37. As the Supreme Court explained in *Gingles*, Section 2 protects "member[s] of a protected class of racial and language minorities." 478 U.S. at 43; *see also Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1548 (5th Cir. 1992) ("The Act was aimed at measures that dilute the voting strength of groups because of their race, not their numerical inferiority."); *id.* at 1547 (noting that "the plain text of [Section 2 of the VRA], as affirmed by case law, makes clear that the Act is concerned with protecting the minority in its capacity as a national racial or language group," not in its capacity as a numerical minority in any particular jurisdiction). Even where racial minorities constitute a bare numerical majority, they may face hurdles to participation such that they still lack an opportunity to elect their preferred candidates. Add. at 40-42. Many factors besides the relative size of a group's population affect that group's ability to participate equally in the political process, such as relative registration and turnout rates and socioeconomic disparities. *Id.* at 18-23, 40-42. The District Court rejected Defendant's expert's testimony that the benefits of local voting practices "automatically inure to whatever racial group has even a bare majority of the VAP in any given jurisdiction" as "not credible." *Id.* at 114. The court's finding was not clearly erroneous.

Defendant cites the Fourth Circuit's decision in *Smith v. Brunswick County*

Board of Supervisors, 984 F.2d 1393 (4th Cir. 1993),[8] the *only* Circuit that has applied a per se rule precluding vote dilution claims where a racial minority constitutes a numerical majority of a jurisdiction. It omits the fact that all of the other Courts of Appeals that have considered this question (the Second, Fifth, Eleventh, and D.C. Circuits)[9] have rejected the Fourth Circuit's per se rule. *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003) ("Vote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have less opportunity . . . to elect representatives of their choice even where they remain an absolute majority in a

[8] *See Smith v. Brunswick Cty. Bd. of Supervisors*, 984 F.2d 1393, 1401 (4th Cir. 1993) (holding that if minority voters "have the numbers necessary to win and members of the group are allowed equal access to the polls, it cannot be rationally maintained that the vote is diluted"). The Fourth Circuit's decision barring the plaintiffs' claim arose in a vastly different context, where African Americans constituted a supermajority of the relevant districts' VAP (60%) and had a consistently higher turnout rate than white voters. *See id.* at 1400-02. Even if African Americans were to constitute a bare majority of a jurisdiction's population, Plaintiffs' claim would not be barred.

[9] Without expressly addressing this issue, the Ninth Circuit has considered claims by minority voters from a group that constituted a plurality of a jurisdiction's VAP, without suggesting that this would act as a per se bar to relief. *See Valladolid v. City of Nat'l City*, 976 F.2d 1293, 1294 (9th Cir. 1992) (considering a vote dilution claim in which the plaintiff minority groups formed a plurality of the population (49.6%)). The Seventh Circuit has noted that a bare numerical majority may be insufficient to provide a reasonable opportunity for minority voters to elect their candidates of choice. *See Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) ("minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice.")

contested voting district." (internal quotation marks and citation omitted)); *Monroe v. City of Woodville*, 881 F.2d 1327, 1332-33 (5th Cir. 1989) ("Unimpeachable authority from [the Fifth Circuit] has rejected any *per se* rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution."), *cert. denied*, 498 U.S. 822 (1990);[10] *Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1545-46 (11th Cir. 1990) (holding that a claim brought by minority voters who constitute a numerical majority could be viable because of the "functional effect" of existing system, and that the district court "properly rejected the county's contention that *Gingles* could not apply at all in a setting where the Non Latin White bloc did not constitute a majority of the total population"); *Pope v. Cty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) (approvingly citing *Salas*'s conclusion that majority-minority vote dilution claims are not barred as a matter of law).[11]

Even so, it is now apparent that the Fourth Circuit is wrong on this point. Subsequent to *Smith*, the Supreme Court has made clear that "it may be possible for

[10] The Fifth Circuit has repeatedly reaffirmed this holding. *See Salas*, 964 F.2d at 1547 (reaffirming that minorities may bring *Gingles* claims even if they constitute a voting-age population or registered-voter majority); *Gonzalez v. Harris Cty.*, 601 F. App'x 255, 256 (5th Cir. 2015) (reviewing vote dilution case involving Hispanic plurality).

[11]The Supreme Court has also noted that parity in voting-age populations by race may still be insufficient for Black voters to have an equal opportunity to elect candidates of their choice. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1016, n.12 (1994) (noting that if a plan had a large number of 51% districts, minority voters might not affect the outcome in any of the districts).

a citizen voting-age majority to lack real electoral opportunity." *LULAC*, 548 U.S. at 428. The Supreme Court's observation is incompatible with the Fourth Circuit's per se rule. Nevertheless, because the District Court's factual findings that African Americans are not a majority of the VAP are not clearly erroneous, this Court need not resolve the legal question of whether such a rule is appropriate.

b. Given the facts in FFSD, the District Court did not clearly err in finding that, even if African Americans constitute a bare numerical majority of the FFSD VAP, they still lack an equal opportunity to elect their preferred candidates.

The District Court's local appraisal of FFSD demonstrates precisely why the per se rule urged by Defendant would frustrate the purpose of Section 2: it is clear that voting in the District is racially polarized and Black-preferred candidates, who usually lose elections, have a much lower rate of success than white-preferred candidates, which indicates that, regardless of the precise size of Black VAP in the District, the existing at-large arrangement dilutes Black voting power. Here, the District Court found that, even if there is rough parity in VAP size between Blacks and whites in FFSD, there are fewer African Americans who can and actually do *vote*, because African Americans are registered to vote at lower rates than whites, turn out to vote at lower rates than whites, and are eligible to register to vote at lower rates because of the racially disproportionate effects of felon disenfranchisement. Add. at 18-23. Thus, under the facts of this case, the District Court concluded that, even if African Americans are a bare numerical majority of FFSD, they face barriers

to participation such that they still lack an opportunity to elect their preferred candidates. *Id.* at 42. That finding was not clearly erroneous.

Registration rates. Defendant claims that there is "no evidence in the record" to support the District Court's factual finding that Black residents of FFSD have lower registration rates than non-Hispanic white voters. App. Br. at 28. That is not correct. The District Court began its analysis with statewide registration rates, and then undertook the localized analysis that *Gingles* requires: it considered the statewide registration rates probative of possible similar disparities in FFSD, Add. at 21-23, then found that there was undisputed evidence of significant socioeconomic disparities within FFSD, *id.* at 93-98, including lower home ownership rates among Black residents of FFSD, *id.* at 23, which correlate with lower registration rates, *id.* at 22, 98-99. Given the record, the District Court's conclusion that such statewide disparities in registration rates was probative of similar disparities at the local level in FFSD was not clearly erroneous.

Defendant also challenges the District Court's assessment of socioeconomic disparities in FFSD and how they influence registration rates. App. Br. at 28. After citing Plaintiffs' evidence that the voter-registration differential for Black and white Missourians is approximately five percent, Add. at 98-99, the District Court found that "based on the substantial racial disparities African Americans in FFSD experience along a range of socioeconomic factors, it is reasonable to conclude that

voter registration disparities seen across Missouri are similarly disparate in FFSD." *Id.* at 99. This conclusion does not reflect any clear error. To the contrary, Plaintiffs' expert, Dr. Gordon, who is "nationally recognized as an expert in urban history, specifically in the history of development, decline, residential patterns, and segregation in the St. Louis metropolitan area," *id.* at 19, testified credibly about why FFSD residents have not been immune to the historical discrimination of the jurisdictions in which FFSD is located, including the State of Missouri, and the District Court accepted that testimony, *id.* at 92.[12] The District offered no credible evidence to counter the application of statewide voter registration rates to FFSD, *id.* at 22, and it cites nothing now to call this application into question.[13]

In arguing that the District Court erred in relying on statewide data concerning registration rates, Defendant relies on cases that are inapposite or support the District

[12] Plaintiffs' expert's acknowledgement that the socio-economic disparities – rooted in a history of segregation and discrimination — are never exactly identical throughout a state, county, or metro area, does not, as Defendant argues, invalidate using data of conditions that apply beyond the borders of the jurisdiction. Add. at 99-100.

[13] Defendant argues that the District Court erred by relying on Dr. Rodden's testimony that, *in general*, people who live in poverty, have lower levels of education, and are younger are less likely to register to vote. App. Br. at 108-09. But this testimony, when viewed along with Plaintiffs' evidence that Black residents *of FFSD* are more likely to live in poverty, have lower levels of education, and be younger, *see* Add. at 95-97, supports the District Court's factual finding that consistent with statewide data, registration rates among Black residents in FFSD is lower than among white residents.

Court's analysis. Defendant cites *Mississippi State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991), but there, the Fifth Circuit *accepted* evidence concerning statewide registration rates, and noted that the statewide data was corroborated by evidence of local conditions. *Id.* at 409-410. Defendant repeatedly cites *Magnolia Bar Association v. Lee*, 994 F.2d 1143 (5th Cir. 1993) for the proposition that the District Court improperly considered statewide registration data, App. Br. at 26-28, but in *Magnolia* the Fifth Circuit did not find that the use of statewide data was inappropriate, simply that applying statewide data to a hypothetical district could not replace the court's analysis of actual election returns in assessing *Gingles* 2 and 3. *Id.* at 1150-51. Defendant also cites *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), for the proposition that statewide data is invalid in considering *Gingles* 1, but the Eleventh Circuit there simply noted that for Senate Factor 7 purposes, the district court's reliance on Black candidates' election to positions other than in the political jurisdiction in question was misplaced. *Id.* at 1559-60. None of these cases relates to Defendant's argument on the use of statewide evidence in support of *Gingles* 1.

Turnout rates. The record demonstrated that Black turnout is lower than white turnout in FFSD. Add. at 20-23. The District Court found that African-American turnout has been lower than white turnout in four of the last five contested elections, *id.* at 41, and that, during the last twelve contested elections, African-

American turnout has been lower than white turnout six times, and has *never* exceeded white turnout, *id.* at 98-99. On these points, the District Court credited the testimony of Plaintiffs' expert, Dr. David Kimball, a tenured political science professor at the University of Missouri-St. Louis with expertise in voting behavior and research methods, which was itself based on the data provided and analyzed by Defendant's own expert Dr. Rodden. *Id.* at 98 (crediting Dr. Kimball's testimony); *Rebuttal Report of Dr. Kimball*, *PLTF*-49 at 6. The District Court also found that turnout rates, which were calculated turnout as a percentage of *registered* voters who vote, and only indicate rates of voting within the registered population, understated the disadvantages faced by the African-American community in electing their preferred candidates, because the evidence suggests that there are fewer African Americans who are *registered to vote* than there are whites. Add. at 21-22.

The District Court's turnout findings were consistent with the undisputed evidence of severe socioeconomic disparities along racial lines in the FFSD area. The District Court found that "[m]embers of the African American community in FFSD are historically disadvantaged and face functional barriers to electoral participation as a result of the ongoing socioeconomic effects of discrimination, as well as electoral processes that, in practice, favor the status quo." *Id.* at 41. The District Court was justified in concluding that Black turnout tends to be lower than white turnout in FFSD given the evidence, including testimony from experts on both

sides about the effect of socioeconomic disparities on participation rates, *id.* at 98-99, and testimony on the "calculus of voting" principle that explains why socioeconomic disparities affect voting, *id.* at 95; *see Harvell*, 71 F.3d at 1388 ("Low voter turnout can be explained by any number of socio-economic factors . . . . low voter turnout has often been considered the result of the minority's inability to effectively participate in the political process"). The District Court's finding was not clearly erroneous.

Felony disenfranchisement rates. The District Court found that there are fewer eligible African American voters in FFSD, because "African Americans in FFSD are disproportionately affected by felony disenfranchisement as compared to non-Hispanic Whites." Add. at 20. The District Court based its conclusion on the evidence before it, including the large racial disparities in disenfranchisement rates in Missouri with the rate of disenfranchisement almost 50% higher for Blacks (6.88%) than for Whites (4.59%.) *Id.* The District Court made this finding with consideration and adjustments for the proportion of the disenfranchised population in prisons and jails and the absence of jails in FFSD, *id.*; higher felony disenfranchisement rates in urban areas, *id.* at 19; and the extensive data produced by the Department of Justice on the discriminatory pattern of policing in Ferguson and over-criminalization of Black residents, *id.* at 19, 97.

In response to the District Court's nuanced localized factual findings, Defendant takes issue with the District Court's use of the statewide felony disenfranchisement rate as its starting point. App. Br. at 28-30. The Defendant terms the District Court's factual finding that Black residents of FFSD are disproportionately affected by felon disenfranchisement a "creation of its own." *Id.* at 29. But the District Court performed precisely the localized analysis that *Gingles* requires: it found the statewide data probative of possible similar disparities in the District, and it then considered the undisputed localized evidence of disparities in criminal justice outcomes, the absence of jails or prisons in the District, and the urban nature of FFSD compared to other parts of Missouri. Add. at 18-20. It is appropriate for a district court to "fine tune" statewide statistical proof offered to prove discrimination by considering those rates with respect to the localized circumstances. *See Operation PUSH*, 932 F.2d at 409-410.

Thus, even if the any-part Black VAP in FFSD is now a bare numerical majority, FFSD failed to show that the District Court clearly erred in its determination that Plaintiffs' Section 2 claims are not precluded under the circumstances of this case.

B. There is no support for Defendant's argument that a court must evaluate effectiveness of potential remedies during the liability stage.

There is no support for Defendant's argument that the District Court was required to evaluate the effectiveness of potential remedies when considering the first *Gingles* precondition. Defendant failed to present any evidence that the African-American population of FFSD was insufficiently large or insufficiently compact to constitute a majority of a single-member district, and it failed to present any evidence that the subdistricts in the illustrative plans violated one person, one vote constitutional requirements or redistricting principles. Add. at 28. What *Gingles* 1 requires is well established: that a person claiming a Section 2 violation must "demonstrate that [a minority population] is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *see also Cottier v. City of Martin* (*Cottier II*), 604 F.3d 553, 558 (8th Cir. 2010) (en banc) (recognizing same); *Bone Shirt*, 461 F.3d at 1018 (same); *Stabler v. Thurston Cty.*, 129 F.3d 1015, 1020 (8th Cir. 1997) (same).

Defendant argues instead that the first *Gingles* precondition involves something more than what it says. In so doing, Defendant conflates *Gingles* 1 and the overall totality of the circumstances analysis that dilution claims ultimately require. But this Court and the Supreme Court have both repeatedly recognized that the first *Gingles* precondition is a "threshold factor"—"a gatekeeper"—and requires

only the straightforward analysis the District Court faithfully performed. *Growe v. Emison*, 507 U.S. 25, 40 (1993) (calling the preconditions "threshold conditions" and "threshold factors"); *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009) (demonstrating the potential of a majority-minority single member district "would seem to end the matter" for purposes of *Gingles* 1.); *Bone Shirt*, 461 F.3d at 1019 ("'the Supreme Court [at this stage] requires only a simple majority of eligible voters in the single-member district. The court may consider, at the remedial stage, what type of remedy is possible . . . . But this difficulty should not impede the judge at the liability stage of the proceedings.'") (quoting *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991)); *Cottier v. City of Martin* (*Cottier I*), 445 F.3d 1113, 1117 (8th Cir. 2006) ("The ultimate viability and effectiveness of a remedy is considered at the remedial stage of litigation and not during analysis of the *Gingles* preconditions.").[14] The District Court correctly held "*Gingles* 1 requires no additional analysis of the demographics of the District or the illustrative plan districts." Add. at 29.

None of the cases relied upon by Defendant supports its argument to the contrary. In *Stabler*, this Court affirmed a district court decision finding that plaintiffs had failed to prove that Native Americans were geographically compact

[14] *Cottier I* was set aside in its entirety by *Cottier II* and is no longer binding precedent. *See Cottier II*, 604 F.3d at 562. However, its characterization of the first *Gingles* precondition was not criticized and remains consistent with other Circuit authority.

where the proposed districts, which were "bizarre" and "gerrymandered," would fail to be majority-minority as required by *Gingles* 1 if even "4 or 5" minorities moved residences. 129 F.3d at 1024–25. Defendant does not even suggest that Plaintiffs' illustrative plans here are similarly "fragile." *Id.* at 1025. Further, in *Hall v. Virginia*, unlike in this case, the plaintiffs did not demonstrate—or even allege—that the minority group was large enough to make up the majority in a single-member district. *See* 385 F.3d 421, 430–31 (4th Cir. 2004) (finding that Black voters could not form a majority in a single-member district in which they constituted only 38% of the VAP). And indeed, in *Cousin v. Sundquist*, although the Sixth Circuit noted in dicta that the minority's 50.3% "razor-thin" margin in the proposed district was unlikely to give that group a real chance at electing its preferred candidate, it explicitly declined to review the district court's findings and conclusions as to the first *Gingles* precondition. 145 F.3d 818, 829 (6th Cir. 1998) In *Meek*, 908 F.2d at 1549, the Eleventh Circuit decision similarly did not focus on—much less interpret—*Gingles* 1; to the contrary, after reciting the well-established "sufficiently large and geographically compact" language, *id.* at 1542, the *Meek* court held that "as to the first *Gingles* prong, we affirm the district court's conclusion that the plaintiffs have satisfied their burden." *Id.* at 1549.

Defendant does not challenge the District Court's remedial order. Had it done so, "the district court's remedial order is reviewed for an abuse of discretion." *Bone*

Shirt, 461 F.3d at 1017; *see Harper v. City of Chicago Heights*, 223 F.3d 593, 601 (7th Cir. 2000) ("appellate review of a district court's choice of remedy in a voting rights case is for abuse of discretion"—a deferential standard that "gives great leeway to the judge who is closest to the problems"); *see also United States v. Brown*, 561 F.3d 420, 435-38 (5th Cir. 2009) (upholding scope of Section 2 remedial order); *Bone Shirt*, 461 F.3d at 1022-24 (deferring to scope of district court's Section 2 injunctive relief that gave state officials the "opportunity to submit a remedial plan" for the district court's consideration—the functional equivalent of the District Court's injunctive relief here).

To the extent that Defendant's argument about effectiveness is a suggestion that the District Court's remedy is ineffective, that assertion is unavailing. Defendant declined the first opportunity to suggest a remedial plan, "thus leaving it to the district court to fashion its own remedy or, as here, adopt a remedial plan proposed by the plaintiffs." *Id.* at 1022. Plaintiffs submitted three plans that would effectively remedy the Section 2 violation. The District Court, following this Court's guidance, determined that cumulative voting would correct the Section 2 violation. The District Court did not err in declining to impose a burden on Plaintiffs in the liability phase greater than required by *Gingles* or *Bone Shirt*.

III. THE DISTRICT COURT CORRECTLY FOUND THAT PLAINTIFFS SATISFIED *GINGLES* 3

A district court's finding of legally significant white bloc voting is a question of fact that is reviewed for clear error. *See Gingles*, 478 U.S. at 77-80; *see also Rangel v. Morales*, 8 F.3d 242, 245 (1993). "That is, as long as the district court applies the appropriate legal standards," the district court's finding of legally significant white bloc voting stands "unless, based upon the entire record, [the court of appeals is] 'left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Anderson*, 470 U.S. at 573).

Gingles 3 asks "whether the white majority typically votes in a bloc to defeat the minority candidate," and is "determined through three inquiries: (1) identifying the minority-preferred candidates; (2) determining whether 'the white majority vote as a bloc to defeat the minority preferred candidate;' and (3) determining whether 'there [were] special circumstances such as the minority candidate running unopposed present when minority-preferred candidates won.'" *Bone Shirt*, 461 F.3d at 1020 (quoting *Cottier I*, 445 F.3d at 1119-20).

Applying this standard, the District Court carefully considered both parties' evidence concerning Board elections from 2000 through the time of trial. While the parties both submitted substantial statistical expert evidence measuring the level of racially polarized voting in the District, in making its findings, the court relied primarily on the testimony of Plaintiffs' expert Dr. Richard Engstrom, which it found

to be "reliable and highly credible." Add. at 52. Defendant does not challenge this determination. Dr. Engstrom testified that, based on his estimates and analysis of racially polarized voting in the five Board elections between 2011 and 2015, which the court appropriately deemed the most probative, voting in FFSD is in fact characterized by racial polarization. *Id.* at 78. Indeed, Dr. Engstom's estimates of racially polarized voting in the District were largely confirmed by similar analysis performed by Defendant's expert, and both experts "agreed that in FFSD Board elections, African Americans were more likely to vote for African American candidates and whites were more likely to vote for white candidates." *Id.* at 58, 78. Dr. Engstrom further testified that in these elections from 2011-2015, only two of the last eight Black-preferred candidates were elected,[15] and that white bloc voting usually vetoed Black voters' choices since 2011 with Black-preferred candidates usually receiving "minimal" or "low" support from white voters, testimony that the court deemed "credible and persuasive." *Id.* at 52-58, 74, 76, 78-79. Dr. Rodden's testimony and statistical analyses largely confirmed that a general pattern of Black-preferred candidate losses and corresponding white-preferred candidate success in Board elections has persisted since at least 2000. *Id.* at 80-82. As mandated in the third *Gingles* 3 inquiry set forth by this Court, moreover, the District Court

[15] Defendant "accepts" on appeal the District Court's identification of Black-preferred candidates using Dr. Engstrom's case-by-case approach. App. Br. at 64.

considered expert testimony, statistical, and anecdotal evidence that special circumstances marked the electoral successes of Black-preferred candidates in 2015 and 2014. *Id.* at 67-69 (2014 special circumstances), 70-74 (2015 special circumstances).

After conducting a comprehensive analysis of this evidence, the District Court found: that voting in Board elections is racially polarized; that Black-preferred candidates have been largely unsuccessful—indeed, that even under the two approaches proposed by Defendant's expert for identifying candidates of choice, Black-preferred candidates usually lost while white-preferred candidates almost always won; that recent successes of Black-preferred candidates in 2015 and 2014 were somewhat marked by special circumstances rendering those elections less probative; and electoral failures of Black-preferred candidates were due to white-bloc voting. *Id.* at 80-82. These findings, based on the District Court's reasonable weighting of the evidence, are not clearly erroneous and lead to only one conclusion—that Plaintiffs have satisfied the third *Gingles* precondition. *See Bone Shirt*, 461 F.3d at 1020-21 (affirming the district court's finding that *Gingles* 3 was satisfied where expert's interpretation of statistical analyses of the relevant elections demonstrate that "the white majority voting bloc usually defeats the [minority]-preferred candidate").

Defendant would have this Court substitute its judgment for the District Court's fact-finding related to *Gingles* 3. Defendant claims the District Court made three errors: (1) it entertained the possibility that minority voting power could be "subsumed" by a white majority given the relative population sizes in the District; (2) it did not "consider the circumstances for electoral defeat" of Black-preferred candidates; and (3) it conversely "presumed special circumstances were the cause for African-American success in both the 2014 and 2015 elections." App. Br. at 55-56. In fact, the District Court considered Defendant's evidence on these points, but found Plaintiffs' evidence more credible.

A. The District Court did not err in finding that minority-preferred candidates are regularly defeated due to white bloc voting.

Defendant first argues that *Gingles* 3 can never be satisfied here because "the demographics of the FFSD make it impossible" for white bloc voting to defeat Black-preferred candidates. App. Br. at 58-59. Defendant is wrong.

As an initial matter, the District Court correctly found that the Black VAP in FFSD is not a bare majority, and thus Defendant's theory that *Gingles* 3 is impossible to meet where the racial minority is a numerical majority is unavailing. *See supra* Section II.A. But more importantly, Defendant ignores that the purpose of Section 2 is ensuring equal voting strength for racial and language minorities—not numerical ones—*i.e.*, members of a protected class. *See supra* Section II.A(2). Defendant's focus on population size reflects a fundamental

misapprehension of the Section 2 framework, which is underscored by the fact that Defendant cites, and treats as binding precedent, the *dissent* in this Court's en banc decision in *Harvell*. *See* App. Br. at 59, 62 (citing 71 F.3d at 1393 (Loken, C.J., dissenting)). *Gingles* 3 is concerned simply with whether candidates preferred by the racial minority are usually defeated by white bloc voting, *see, e.g.*, *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1211 (5th Cir. 1996) (describing *Gingles* 3 as requirement "that in contested elections involving white and black candidates, the white community votes cohesively and that as a result the candidates supported by the minority community are usually defeated"); the numerical size of the minority does not end this inquiry. *Cf. Kingman*, 348 F.3d at 1041 ("Vote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have less opportunity . . . to elect representatives of their choice even where they remain an absolute majority in a contested voting district." (internal quotation marks and citation omitted)).

To be sure, as the Fifth Circuit in *Rangel* observed, the numerical size of the minority population may make it more or less likely that legally significant white bloc voting will exist in a jurisdiction. 8 F.3d at 245. But the standard remains the same irrespective of the size of the minority population: whether white bloc voting usually defeats the minority-preferred candidate. As outlined above, the record

amply supports the District Court's finding that Plaintiffs met this standard for *Gingles* 3 here.

B. The District Court did not err in finding that Black-preferred candidates lost because of white bloc voting.

Defendant next argues that the District Court simply "presum[ed] white bloc voting" and thus clearly erred in finding legally significant white bloc voting in the District. App. Br. at 65-69. But the District Court did no such thing. To the contrary, the District Court's finding is, as discussed above, amply supported by the evidence, particularly Dr. Engstrom's testimony, which the court found to be reliable, highly credible, and persuasive. Add. at 52, 57, 76. Based on this evidence, the court found that voting in FFSD is racially polarized; that Black-preferred candidates received only "low" or "minimal" levels of support among white voters[16]; and that special

[16] Defendant appears to suggest that, in the Eighth Circuit, courts are barred as a matter of law from finding *Gingles* 3 satisfied where, as here, there is credible and reliable statistical evidence demonstrating that minority-preferred candidates are usually defeated by white bloc voting if there is "anecdotal evidence" suggesting that other factors could have had an effect on minority-preferred candidate defeats. *See* App. Br. at 58, 64-65. None of the cases Defendant cites supports this proposition. The quoted language concerning "anecdotal evidence" and the need to evaluate "all the relevant circumstances" in *Ruiz* and *Harvell* concern what courts should consider in identifying *candidates of choice*. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998); *Harvell*, 71 F.3d at 1386-87. The District Court here applied this very standard in adopting the case-by-case method for identifying candidates of choice set forth by Dr. Engstrom, Add. at 78, and Defendant does not challenge the District Court's analysis or findings in this regard.

circumstances marked the successes of Black-preferred candidates in the 2015 and 2014 Board elections and, in any event, that Black-preferred candidates usually lost and white-preferred candidates almost always won even without discounting the 2014 and 2015 elections. Moreover, finding Dr. Engstrom's testimony on this point "credible and persuasive," the District Court also found that "white bloc voting usually vetoed Black voters' choices since 2011." *Id.* at 75-76, 78-81. Firmly rooted in the record evidence, these findings are not clearly erroneous and provide ample support for the District Court's ultimate finding of legally significant white bloc voting.

Defendant nevertheless claims that the District Court clearly erred because it purportedly "failed to consider the circumstances for electoral defeat" of Black-preferred candidates, specifically: (1) Black-preferred candidates' margins of defeat in the 2011 and 2013 school board elections; (2) purported "inefficient" voting by Black voters; and (3) the "controversial vote in favor of lifetime health insurance for the FFSD former superintendent and his wife" cast by Dr. Doris Graham and Mr. Charles Henson, Black-preferred incumbent candidates who were defeated in 2011 and 2013, respectively. App. Br. at 65-73. In fact, the District Court considered all of this evidence but concluded that the evidence of racially polarized voting was a more credible explanation for Black-preferred candidates' consistent defeat. Even

so, none of these purported omissions demonstrates that the District Court erred, let alone clearly erred, in finding legally significant white bloc voting.

First, the narrow margins of defeat of Black-preferred candidates in 2011 and 2013 do not somehow change the fact "the white majority [in FFSD] votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . – usually to *defeat* the minority's preferred candidate." *See, e.g.*, *Gingles*, 478 U.S. at 51 (emphasis added); *id.* at 60; *Bone Shirt*, 461 F.3d at 1021 (using low minority-preferred candidate success rate in determining *Gingles* 3 was met). That is especially true here, given the District Court's finding that Black-preferred candidates received only "low" levels of support among white voters in four of the last five elections, *i.e.*, in elections from 2011 through 2014, a finding that is clearly supported by the record. In particular, Dr. Engstrom testified that Black-preferred candidates, in each election from 2011 through and 2014, received the following levels of white support:

Year	**Black-preferred candidate**	**Percent of white voters' votes received**
2011	Doris Graham	6.1%
	Vanessa Hawkins	7.4%
2012	Barbara Morris	12.8%
2013	Charles Henson	17%
2014	Donna Paulette-Thurman	8.4%
	James Savala	7.0%

	F. Willis Johnson	2.8%

Add. at 74-76. According to Dr. Engstrom, these levels of white support for Black-preferred candidates were "minimal," an assessment the court credited. *Id.* at 75-76, 79. Given this low level of white support, the District Court reasonably found legally significant white bloc voting even though some of the Black-preferred candidates' losses were narrow.

Neither of the cases Defendant cites suggests that the District Court was compelled to find otherwise or that the mere fact that an election was close precludes a finding of legally significant white bloc voting. In *Sanchez v. Bond*, the Tenth Circuit simply noted that the court below had pointed to the slim margins of defeat of two Hispanic candidates as one of several pieces of evidence supporting the court's finding that there was no Section 2 liability. 875 F.2d 1488, 1492-93 (10th Cir. 1989). And in *Romero v. City of Pomona*, the district court noted, in dicta in evaluating the Senate Factors, not *Gingles* 3, that the slim margin of defeat of a Black candidate demonstrated, along with other evidence, "the potential electability of black candidates" because this near miss "could not have been achieved without substantial white cross-over support." 665 F. Supp. 853, 861 (C.D. Cal. 1987). Here, by contrast, the District Court reasonably found only minimal white cross-over support for Black-preferred candidates, and even Defendant does not claim that the

narrow defeats were achieved by substantial white cross-over voting, resorting instead to blaming the losses on "inefficient" voting by Black voters. App. Br. at 63.

Second, Defendant's claim that purported "inefficient" voting among Black voters in 2011 and 2014 is to blame for their preferred candidates' electoral defeats improperly imposes a requirement that Black voters must vote at some undefined level of efficiency or cohesiveness in order to avail themselves of the protections of Section 2.[17] Courts have repeatedly rejected that premise. *See Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) (*Gingles* does not require an absolute monolith in the white or Hispanic bloc vote); *see also Ruiz v. City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998) (noting that the ability of minority voters to bullet vote, another efficiency strategy, "does not remedy a vote dilution"); *Collins v. City of Norfolk*, 883 F.2d 1232, 1239-40 (4th Cir. 1989) (rejecting approach to identifying preferred candidates that would require minority voters to bullet vote). The fact that no "efficient voting" was necessary to ensure that white voters elected their preferred

[17] Defendant points to a number of misleading facts to buttress their claim that inefficient voting, and not white bloc voting, caused the defeat of Black-preferred candidates in FFSD. For example, Defendant claims that Black voters voted inefficiently in the 2011election because African-American voters in FFSD "spread more than half their votes (54.3%) among the other seven candidates." App. Br. at 66. But while there were three available seats in the 2011 election, there were only two Black candidates, both of whom were Black-preferred. Black voters thus necessarily had to cast one-third of their votes for a candidate that was not Black-preferred or else forsake a third-of their full franchise under the current electoral system. That Black voters only preferred two candidates does not indicate voter inefficiency, and did not cause their preferred candidates' defeat.

candidates either 100% of the time or 24 out of 27 times under Defendant's expert's two approaches identifying candidates of choice, Add. at 49, 51, demonstrates clearly why requiring a level of strategic coordination among Black voters that is not necessary for white voters is simply antithetical to the concept of equal opportunity. There is simply no authority for the proposition that, in order to avail themselves of the Section 2's protections, minority voters have an obligation to first optimize their voting power under an existing electoral system that disadvantages them. *Cf. Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988) (district court should have focused only on actual voting patterns rather than speculating on reasons why minority voters had not maximized voting strength with higher turnout).

Third, Defendant claims that the District Court "failed to 'view[] all relevant circumstances'" of the 2011 and 2013 elections because it failed to agree with Defendant that Dr. Graham and Mr. Henson, both of whom are Black and were Black-preferred candidates in their respective elections, lost re-election bids because of their "controversial vote in favor of lifetime health insurance for the FFSD former superintendent and his wife." App. Br. at 68-70.[18] But the District Court reasonably rejected Defendant's narrative. The District Court noted the wealth of evidence in support of its finding of legally significant white bloc voting, in particular: that Dr.

[18] Defendant's improper attempt to blame the defeats of Mr. Johnson and Mr. Savala, two Black-preferred candidates in the 2014 election, on their respective campaigns is discussed below in Section IV.A.

Graham and Mr. Henson were still the most preferred candidate among Black voters in their respective elections, Add. at 60, 63; these candidates' low levels of support among white voters, 6.1% (in a 3-seat election), and 17.0% (in a 2-seat election), respectively, *id*.; and the fact that two white candidates who made the same "controversial" vote were reelected (Paul Schroeder in 2012 and Leslie Hogshead in 2013, the same election in which Mr. Henson lost) were supported by 40.9% and 37.2% of white voters, respectively, *id.* at 61, 63, and re-elected. *Id.* at 60-65; J.A.3 at 695-698, *Joint Stip.* ¶¶ 119, 130, 138; Trial Tr. Vol. II at 60:8-12; 95:3-6 (testifying that health insurance vote was unanimous); App. at 51, 61 (Schroeder elected in 2009 and re-elected in 2012). Given this evidence, the District Court did not clearly err in concluding that its finding that Black-preferred candidates' losses were largely because of white bloc voting was not negated by the mere fact of the health-insurance votes cast by Dr. Graham and Mr. Henson.

C. The District Court did not clearly err in determining that the success of minority preferred candidates in 2015 and 2014 was in part because of special circumstances

Finally, Defendant claims that the District Court improperly "presumed special circumstances were the case for African American success in both the 2014 and 2015 elections." But an inquiry into whether successes of minority-preferred candidates are marked by special circumstances that might have "worked a one-time advantage" is an explicit *requirement* under *Gingles* 3. *Gingles*, 478 U.S. at 57, 76;

see also Bone Shirt, 461 F.3d at 1020. Thus, the court properly considered Plaintiffs' evidence of special circumstances. Add. at 43, 67-68 (2014), 70-74 (2015). In addition, the District Court's factual findings that the electoral successes of Dr. Graves, the sole Black-preferred candidate in 2015, and Dr. Paulette-Thurman, one of three Black-preferred candidates in 2014, were marked by special circumstances was not "presumed"; rather, it was amply supported and reasonable in light of the evidence in the record.[19] Moreover, the District Court did not completely discount the successes of Dr. Paulette-Thurman and Dr. Graves, as Defendant seems to imply. Rather, the court, as the fact-finder, merely afforded those successes less probative weight than they would have otherwise received.

With respect to the 2015 election, Defendant claims that "Plaintiffs never presented any evidence of" special circumstances. App. Br. at 80. However, the District Court discussed much of the evidence presented by Plaintiffs in finding the existence of special circumstances, Add. at. 70-74, including that:

[19] Defendant suggests that the District Court "implicitly acknowledged its own error" when it "noted that '[a] different jurist' could 'reach a different conclusion'" regarding special circumstances. App. Br. at 74. But even if it were true that reasonable jurists could differ, that would be insufficient to demonstrate that the District Court's findings of special circumstances are the requisite clear error warranting reversal.

- Dr. Graves explicitly promoted single-shot voting[20] during her campaign, *id.* at 72-73, a campaign strategy that the District Court found was "unprecedented" in the District, *id.* at 80. Courts have recognized single-shot voting as a "special circumstance." *See Gingles*, 478 U.S. at 38 n.5, 57.
- In the aftermath of the shooting death of Michael Brown, protests, demonstrations, get-out-the-vote-efforts, national news coverage, and Department of Justice action influenced voter and candidate behavior during the 2015 election.[21] Add. at 70-73, 79.

Despite Defendant's claims to the contrary, moreover, Plaintiffs presented evidence that these special circumstances may have wrought a one-time effect on the 2015 election, including evidence of changes to both the candidate pool and voting behavior. *Id.* at 72. Dr. Graves testified that she decided to run for a Board

[20] Single-shot or bullet voting is casting just one vote for a single candidate and not using the remaining vote(s) on any other candidate. By engaging in bullet voting, voters increase the likelihood of electing his or her top-choice candidate. Add. at 6.

[21] Plaintiffs also pointed out that the election took place after the filing of this case. Add. at 73, n.26, a special circumstance explicitly recognized by the Supreme Court in *Gingles*. *See Gingles*, 478 U.S. at 75-77 (sanctioning court's decision to reduce the weight accorded Black electoral successes where those successes "increased markedly in . . . an election that occurred after the instant lawsuit had been filed" (citing S. Rep. No. 97-417, at 29 n.115 (1982))); *Davis v. Chiles*, 139 F.3d 1414, 1417 n.2 (11th Cir. 1998) ("Elections of minority candidates during the pendency of Section Two litigation . . . have little probative value); *Ruiz*, 160 F.3d at 555-56, 558 (post-complaint election results are discounted where "unusual circumstances surrounded that election").

seat in part as a response to the protests surrounding Michael Brown's death. *Id.* In addition, a longtime incumbent white candidate, Mr. Schroeder, decided not to run, leaving an open seat, which, as Dr. Engstrom testified, rendered this election "the only two-seat, two-vote election in which there was only one major white candidate." *Id.*; *Engstrom Testimony*, Trial Tr. Vol. IV at 40:14-15. In addition, Dr. Rodden acknowledged that Dr. Graves won by a "landslide," in part because there was suddenly "unprecedented white support for [a] Black candidate," and that her victory was due, in part, to her use of a "single-shot" voting strategy. Add. at 72-73. In reflecting on all these changes, Dr. Engstrom testified that: "In my roughly 40 years as an expert witness in voting rights cases, I do not recall a post-litigation election that departed as dramatically from previous elections." *Id.* at 73. Based on this substantial evidence of special circumstances and their effect on the 2015 election, the District Court did not clearly err in finding that the 2015 election was marked by special circumstances warranting the slight discounting of the electoral success of Dr. Graves in the court's *Gingles* 3 analysis. *Id.* at 74.

Plaintiffs likewise presented evidence of special circumstances in the 2014 election, *Id.* at 67-69, namely, the community's reaction to the Board's treatment of Dr. Art McCoy, the District's first African-American superintendent who was suspended by the Board in late 2013 and who ultimately resigned, *Id.* at 67. As with the 2015 election, Plaintiffs also presented evidence that this exceptional event was

accompanied by unusual characteristics in the candidate pool, including undisputed evidence that Dr. McCoy's suspension led to a high level of interest among African-American voters and "an unprecedented five African American challengers." *Id.* at 68. Given this evidence, the District Court reasonably found that the 2014 election "was marked in part by special circumstances." To be sure, the District Court observed that there was insufficient evidence showing how the special circumstances impacted the success of Dr. Paulette-Thurman,[22] one of the Black-preferred candidates in 2014. *Id.* But taking into account the totality of the circumstances—*i.e.*, the existence of special circumstances—the court's decision to afford "slightly less probative value" to the Black-preferred candidate's success in that election "than if there were no special circumstances surrounding the election" is not clearly erroneous. *Id.* at 68-69.

In any event, even if the District Court had clearly erred in finding that special circumstances marked the 2014 and 2015 elections, that would not change the result of District Court's analysis. As Dr. Engstrom testified, the bottom line is that—even

[22] Defendant states that it "'borders on the absurd" to discount electoral success when the candidate, here, Dr. Paulette-Thurman, is "'qualified and popular,'" citing *Niagara Falls*. App. Br. at 77. Defendant, however, takes this cherry-picked language from this decision completely out of context. In *NAACP v. City of Niagara Falls*, the Second Circuit made the common sense point that it "borders on the absurd" to say that a candidate's "outstanding credentials and popularity" is a special circumstance warranting discounting. 65 F.3d 1002, 1021, n.22 (2d Cir. 1995). Plaintiffs here make no such claim here.

including those elections—only two out of the last eight Black-preferred candidates have won election. And, even under Defendant's expert's two approaches for identifying candidates of choice, the District Court found that testified that Black-preferred candidates were usually defeated while white-preferred candidates almost always won. *Id.* at 80-81. Thus, even according full weight to those elections, the District Court did not clearly err in finding that Black-preferred candidates are usually defeated.

IV. THE DISTRICT COURT CORRECTLY FOUND THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, AFRICAN AMERICANS IN FFSD HAVE LESS OPPORTUNITY TO ELECT CANDIDATES OF THEIR CHOICE

Proof of the three *Gingles* factors "carries a plaintiff a long way towards showing a Section 2 violation." *Harvell*, 71 F.3d at 1390. Before reaching its decision on liability, however, the District Court also considered the totality of the circumstances to determine "the question whether the political processes are equally open" through "a searching practical evaluation of the past and present reality, and on a functional view of the political process." Add. at 83 (quoting *Gingles*, 478 U.S. at 45 (internal quotation marks omitted) (citing S. Rep. No. 97-417, at 30 & n.120 (1982)). In particular, courts look to nine non-exclusive factors (the "Senate Factors") in determining whether, under the totality of the circumstances, a challenged electoral arrangement denies minority voters an opportunity to elect candidates of their choice in violation of Section 2. *See Gingles*, 478 U.S. at 44-45. After weighing the

evidence, the District Court found Senate Factors 1, 2, 3, 4, 5, 6, and 7 weigh in Plaintiffs' favor and Senate Factor 8 has neutral weight. Add. at 84, 85, 89, 101, 105, 109, 112, 115. These careful factual findings are not clearly erroneous.

As this Court explained in *Bone Shirt*, "[t]he District Court's weighing of the totality of the circumstances, like its factual findings, is subject to clear error review." 461 F.3d at 1027 (citing *Stabler*, 129 F.3d at 1023). Yet Defendant fails to identify any legal errors or clearly erroneous factual findings in the District Court's Senate Factor analysis. Perplexingly, Defendant repeatedly accuses the District Court of excluding evidence or failing to consider the full "totality" of the circumstances, but, in each instance, the District Court considered Defendant's evidence and rejected it as less probative or irrelevant. Defendant raises no valid basis for disturbing the District Court's careful evaluation of the evidence.

A. The District Court did not clearly err in finding that the predominant Senate Factors (2 and 7) weigh in favor of Plaintiffs.

The District Court first found that the "predominant" Senate Factors—*i.e.*, "the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme," *Bone Shirt*, 461 F.3d at 1022 (internal quotation marks omitted) (Factors 2 and 7)—weigh in Plaintiffs' favor, which alone is sufficient to prove a Section 2 violation. *See Gingles*, 478 U.S. at 48 n.15. As an initial matter, Defendant does not contest that the District Court's finding that Senate Factor 2, *i.e.*, whether there is racially polarized voting in the jurisdiction,

weighs in favor of Plaintiffs. Add. at 78. Defendant, however, contests the District Court's finding that Senate Factor 7, *i.e.*, the extent to which minorities have been elected under the challenged scheme, weighs in Plaintiffs' favor. But in holding that Senate Factor 7 weighs in favor of Plaintiffs, the District Court made a series of factual findings regarding the disproportionately low African American representation on the Board and the relative lack of electoral success among African American candidates, which were well-supported by the record, and certainly were not clearly erroneous.

1. The District Court correctly found that Plaintiffs had established Senate Factor 7, i.e., that African-American candidates have infrequently been elected to the Board.

The District Court found that African Americans' representation on the Board has been minimal. Add. at 85. Defendant argues that the District Court's determination "narrowed the legal standard" for Senate Factor 7 by supposedly limiting its analysis to "quantitative data." App. Br. at 86-87. But there is no authority to support Defendant's argument that the District Court committed error.

To the contrary, the District Court's conclusion was amply supported by the evidence in the record. Appropriate to a Senate Factor 7 determination, the District Court identified the number of African Americans who served on the Board in recent years. In particular, the court found, Add. at 85-86, that:

- from 1998-2000, there was only one African-American Board member;[23]
- from 2000 to 2013, there were never more than two African-American Board members;
- there were two African-American Board members starting in 2007, but only because Henson was *appointed* (rather than elected) to the Board that year; Henson served only until he faced his first contested election, which he lost in 2013;
- from 2013 to 2014, there were no African-American Board members;
- at the time of trial, there were two African-American Board members. Those two members were elected in 2014 and 2015 under special circumstances, *see supra*, Section III.C, and.

The District Court also compared the success of Black candidates to that of white candidates over the past 16 years, Add. at 87-88, and found that:

[23] Defendant describes the level of African-American representation on the Board in vague terms, asserting that Dr. Graham, who served on the Board from 1988 to 2000, "served with one other African American" "during most of that time." App. Br. at 103. That assertion obscures the fact that, from 1988 to 2000 (the first twelve of Dr. Graham's 23 years on the Board), she was the only African-American Board member.

- during the entire period from 2000 to 2015, only 20.8% of Black candidates were successfully elected, while 59.5% of white candidates were successfully elected;
- in the recent period from 2011 to 2015, these disparities were even worse, as only 15.4% of Black candidates were successfully elected, while 62.5% of white candidates were successfully elected; and
- including the post-trial 2016 election did not substantially change the overall low success rate of Black candidates: from 2000-2016, only 23% of Black candidates were successfully elected, while 58.9% of white candidates were successfully elected; from 2011 to 2016, 20% of Black candidates and 68.7% of white candidates were successfully elected.

The Court's straightforward tally of the Black candidates' limited electoral success was not clear error.

The District Court next properly rejected Defendant's attempt to introduce additional requirements into the Senate Factor 7 analysis. First, Defendant claims the District Court improperly failed to give recent elections more probative value. As an initial matter, Defendant's argument is not directly relevant to Senate Factor 7, as all of their citations refer to the standard for a *Gingles* 3 inquiry. App. Br. at 87 (citing *Bone Shirt*, 461 F.3d at 1020 and *Uno v. City of Holyoke*, 72 F.3d 973, 990

(1st Cir. 1995)), 90-91 (citing Dr. Engstrom's testimony on treating stale elections under *Gingles* 3). As noted, *see supra*, Section III, the District Court properly gave more probative value to recent elections in its *Gingles* 3 analysis, and found that Black-preferred candidates were usually defeated both in recent elections and going back to 2000. Add. at 78-79. In its Senate Factor 7 analysis, the District Court also found low rates of electoral success among African-American candidates in both recent and earlier elections. *Id.* at 85-89.[24] Based on the wealth of evidence, the court did not clearly err in finding that the extent to which African Americans have been elected to the Board weighs in Plaintiffs' favor.

2. The District Court correctly rejected Defendant's arguments concerning proportional representation.

Defendant next argues that it is saved from liability because the current School Board for the first time includes three Black members, which was achieved only *after* trial. But that argument is unavailing for multiple reasons. First, the cases on which Defendant relies for its proportionality argument are inapposite. The Supreme Court in *Johnson v. De Grandy* distinguished the issue of "proportionality" in Section 2 vote dilution claims – defined as "the relationship between the number of

[24] Far from discounting recent elections or ignoring the decrease in the white population, as Defendant charges, the District Court specifically found, "despite the growth of the African American population in the District since 2000, minority electoral success has not improved, with near equal rates of success in the last six contested elections as there was between 2000 and 2015." Add. at 88. The District Court's factual finding is not clearly erroneous.

majority-minority voting districts and the minority group's share of the relevant population," 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring) (emphasis added) – from the question of proportional *representation – i.e.*, whether the number of minority candidates on the Board equals to the minority proportion of the population. *Id.* at 1014, n.11. The cases relied on by Defendant all concern whether a redistricting plan contains a number of majority-minority single member districts that is proportional to the minority population of the jurisdiction's VAP. *See Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist.*, 56 F.3d 904, 910-11 (8th Cir. 1995) (affirming a district court decision that a proposed redistricting plan does not violate Section 2, while noting that a redistricting scheme with proportionality of majority-minority districts does not preclude Section 2 liability); *African Am. Voting Rights Legal Def. Fund v. Villa ("Villa")*, 54 F.3d 1345, 1355-56 (8th Cir. 1995) (affirming a district court's consideration of a 20 year history of sustained and substantial proportionality as one of several factors in its totality of the circumstances analysis of a redistricting scheme); *Old Person v. Brown*, 312 F.3d 1036, 1042 (9th Cir. 2002) (citing *De Grandy*, 512 U.S. at 1014, n.11, for the principle that proportionality refers to a groups' share of majority-minority districts). These cases concern a fundamentally different situation from a challenge to an at-large electoral arrangement like the one in this case. They do not support

Defendant's argument that the sudden success of a few minority candidates in FFSD immunizes it from liability.

Second, as this Court made clear in *Harvell*, proportional representation "does not provide an absolute safe harbor in which a defendant can seek refuge from the totality of the circumstances." 71 F.3d at 1388-89 ("Just as proportional representation is not mandated under Section 2, it also does not preclude finding a violation, because racial reference points do not necessarily reflect political realities."); *see also De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring) (the "central teaching" of *De Grandy*, is that proportionality, even properly defined, "is never itself dispositive"). Here, the District Court, in its totality of the circumstances analysis, weighed the evidence and made a determination that was amply supported by the record: it properly considered Defendant's purported evidence of proportional representation, but did not treat it as a dispositive safe harbor from Section 2 liability. *See LULAC*, 548 U.S. at 438 (concluding that, even assuming proportionality for Latino voters, the challenged plan violated Section 2, and explaining "the degree of probative value assigned to proportionality may vary with other facts, and the other facts in these cases convince us that there is a § 2 violation.") (internal quotation marks and citations omitted); s*ee*, *e.g.*, *Villa*, 54 F.3d at 1356 (declining to reverse a district court decision despite its over emphasis on proportionality due to its correct ultimate decision). Defendant fails to identify any reasons *in addition to* the

purported proportionality here as to why the District Court's finding of liability was inappropriate; and Defendant cites no case suggesting that this Court should reverse the District Court's decision based on proportionality alone.

Third, given the facts in FFSD — particularly the long history of underrepresentation for African Americans on the Board — the District Court was justified in concluding that the recent success of a few Black candidates was not sufficient to immunize the District from liability. Defendant attacks the District Court for supposedly ignoring the growth in the African-American VAP over time. In fact, based on the District Court's findings, Black representation on the Board has always lagged behind the growth of the Black VAP. The single-race African-American VAP was 20.77% in 1990, 32.61% in 2000, and 47.33% in 2010. App. Br. at 9. Yet from 1990 to 2000, when the BVAP grew from 20.77% to 32.61%, the Board remained only 14% African American (i.e., just one out of seven members). Add. at 86. For the next 10 years (*i.e.*, from 2000 to 2010), when the BVAP grew from 32.61% in 2000 to 47.33% in 2010, the Board was, at its height, only 28.6% African American (*i.e.* two of seven members). *Id.* at 85. ("From 2000 to 2015, there were never more than two African American members of the Board."). And again, there were two African-American Board members beginning in 2007 only because Henson was appointed (not elected) to the Board that year, And he served only until

he faced a contested election for the first time in 2013, when he lost. *Id.* As recently as the 2013-2014 term, there were zero Black Board members. *Id.* at 86.

With respect to the post-trial 2016 elections, the District Court determined that the success of one white candidate and one Black candidate in the 2016 election "does not substantially change the results" for purposes of Senate Factor 7 because the evidence still shows limited success for Black candidates. *Id.* at 88.[25] *Gingles* notes that "*persistent* proportional representation" and "*sustained* success" run against a VRA claim. *Gingles*, 478 U.S. at 77 (emphasis added). Limited post-trial electoral success does not rise to that level.[26]

[25] The District Court also properly considered the 2016 election results without assuming that the winning African-American candidate was a Black-preferred candidate. Add. at 53, n.21 ("The race of the candidate cannot be assumed to identify that candidate as the candidate of choice for that racial group.") (citation omitted). *See Clay II*, 90 F.3d at 1361 (holding that a definition of minority preferred candidate based solely on the candidates race is, as a matter of law untenable and must be rejected.); *Harvell*, 71 F.3d at 1386 (holding that court inferences based solely on race are insufficient to establish which candidate is minority preferred, and offends principles of equal protection).

[26] Defendant claims the District Court "admits" it disregarded recent election results. App. Br at 87, n.24. Far from it. The partial sentence that Defendant quotes is actually the District Court's characterization of *Defendant's* argument about recent elections which, the court finds, "seeks to oversimplify a complex case[.]" *Rem. Ord.*, Add. at 132. The District Court "choose[s] instead to take account of all of the evidence presented in this case, which led me to conclude that the current system violates Section 2." *Id.* at 132-133.

3. The District Court correctly rejected Defendant's argument that racial animus is a prerequisite to a Senate Factor 7 finding.

Finally, the District Court correctly rejected Defendant's argument that racial animus is a prerequisite to a finding that Senate Factor 7 weighs in favor of Plaintiffs. Defendant argues that the lack of success among Black candidates can be explained away by non-racial circumstances. App. Br. at 92-93. Defendant relies heavily on *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) where the Eleventh Circuit held that non-racial explanations for community voting patterns may be relevant to totality of the circumstances analysis. App. Br. at 92. But Defendant fails to note that *Nipper* expressly held that "[t]he surest indication of race-conscious politics is a pattern of racially polarized voting," *Nipper*, 39 F.3d at 1525-26. And, as noted, the District Court found racial polarization in FFSD Board elections, *see supra* Section III, a finding that Defendant does not dispute on appeal.

The District Court also correctly rejected Defendant's efforts to "cast[ ] aspersion[s] on the campaigns of unsuccessful African American candidates." Add. at 89, n.29. The District Court followed the Senate Factor 7 standard articulated in *Bone Shirt*, 461 F.3d at 1022 and *Harvell*, 71 F.3d at 1390,[27] Add. at 85-89, rather

[27] In *Bone Shirt* this Court also rejected defendants' argument that the lack of minority electoral success was caused by Native Americans' "a low interest in South Dakota politics," and instead recognized that dampened interest and less ability to participate in the electoral process is in fact a result of "the vestiges of [ ] discrimination." 461 F.3d at 1022.

than attribute Black-preferred candidates' electoral losses in 2011 and 2014 to purported personal shortcomings, as Defendant attempts to do, App. Br at 94-101.[28] Moreover, based on its consideration of the evidence, the District Court found that the three Black-preferred candidates' 2014 election campaign was motivated in part by their discomfort with the all-white Board's treatment of the District's first African-American Superintendent, and their concern that "the Board did not represent the community in terms of race." Add. at 67-68. Defendant now argues that race was entirely irrelevant to the 2014 election, and improperly attempts to blame the defeat of two Black-preferred candidates, Mr. Johnson (a plaintiff in this lawsuit) and Mr. Savala on their character and their campaigns. App. Br. at 97-100. The District Court's finding that race was a factor in the 2014 was not clear error.

The cases relied on Defendant on this point are inapposite. Defendant cites *Ruiz*, in which the Ninth Circuit "reject[ed] any invitation to disparage the credentials of any candidate running for public office," or "cast aspersions on the qualifications of . . . defeated minority candidates." 160 F.3d at 558. And in *Buckanaga v. Sisseton Independent School District No. 54-5*, this Court reversed a district court's Senate Factor 7 determination that the election of a few minority candidates foreclosed the possibility of dilution, and instructed the district court

[28] Defendant's improper attempt to blame the defeats of the Black-preferred candidates in the 2011 and 2013 elections on those same candidates, discussed above in Section III.B, is equally unavailing.

instead to consider minority candidates' success rate over time. 804 F.2d 469, 476-77 (8th Cir. 1986). The District Court in this case appropriately looked to candidates' success over time, Add. at 86-88.

Other cases cited by Defendant affirm that a finding of racial animus is not a prerequisite to satisfying Senate Factor 7 or the totality of the circumstances analysis. For example, in *Goosby v. Town Board of Hempstead*, the Second Circuit affirmed liability where the district court had explicitly *rejected* the defendant's argument that a Section 2 claim fails if "plaintiffs cannot *prove*" that racial bias was the cause of white bloc voting. 180 F.3d 476, 494 (2d Cir. 1999); *Goosby v. Town Board of Hempstead*, 956 F. Supp. 326, 353 (E.D.N.Y. 1997). Meanwhile, in *Milwaukee Branch of NAACP v. Thompson*, the Seventh Circuit held that it is proper for a court to consider, as the District Court did here, a variety of factors that may be related to race, such as candidates' fundraising capacity or name recognition, in assessing African Americans ability to participate equally in the political process and elect candidates of their choice. 116 F.3d 1194, 1199 (7th Cir. 1997) ("[w]hat turns out to be related to race is not easy to know . . . . A district judge therefore should not assign to plaintiffs the burden of showing *why* the candidates preferred by black voters lost; it is enough to show *that* they lost."). Add. at 99 (noting that Black voters in FFSD may have fewer resources to volunteer or donate to Board campaigns and that Black candidates may rely on public transportation or be unable

to access candidate forums). Finally, in *League of United Latin American Citizens, Council No. 4434 v. Clements* ("*Clements*"), the Fifth Circuit's decision attributes divergent voting patterns among minority and white citizens to partisanship, not race, which is a systematic non-racial explanation for polarization, and a far cry from casting aspersions on individual candidates' character or campaigns, 999 F.2d 831, 850, 852-54 (5th Cir. 1993) (en banc).

Ultimately, Defendant asked the District Court to look at everything but race to explain Black-preferred candidates' electoral losses – despite the consistent racially polarized voting patterns in the District. Weighing the evidence, the District Court found that Defendant's proffered explanations were "of little probative value." Add. at 89 n.29. The District Court did not, as Defendant suggests, fail to undertake such an inquiry, but simply weighed the evidence and did not credit Defendant's explanation of events. In so doing, its determinations were not clearly erroneous.

B. The District Court did not clearly err in finding that Senate Factors 1 and 5 weigh in favor of Plaintiffs.

Senate Factor 1 is "the [] history of official [voting-related] discrimination in the state or political subdivision" and Senate Factor 5 is "the extent to which members of the minority group [] bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process." *Bone Shirt*, 461 F.3d at 1021. As Defendant acknowledges, an application of Senate Factors 1 and 5 required the District Court

to examine historical discrimination against the minority group and its effect on minority group participation in the democratic process. *See Bone Shirt*, 461 F.3d at 1021; *Gingles*, 478 U.S. at 36–37. The record contained substantial evidence—in the form of expert testimony, lay witness testimony, and stipulated facts—to support the District Court's finding that these Senate Factors "weigh heavily in favor of Plaintiffs." Add. at 89.

In criticizing this factual finding, Defendant does not dispute Plaintiffs' evidence that various jurisdictions encompassing FFSD, as well as several jurisdictions inside of FFSD, historically engaged in official discrimination against Black residents. *See* J.A.3 at 710–15, *Joint Stip.* ¶¶ 226–230, 241, 251, 253, 254–260, *cited by* Add. at 89-90. Nor does Defendant dispute that Black residents of FFSD continue to bear the effects of that discrimination. *See* J.A.3 at 712–18, *Joint Stip*. ¶¶ 235–74, *cited by* Add. at 91-94. Nonetheless, Defendant contends that Plaintiffs failed to proffer sufficient proof *about FFSD itself* to meet their burden as to these Factors.

Defendant's argument invites this Court to ignore the particularized expert and lay testimony about FFSD upon which the District Court relied. The creation of FFSD itself was a remedy to state-sanctioned discrimination, and segregation in education, some 20 years after the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). *United States v. Missouri*, 388 F. Supp. 1058 (E.D.

Mo. 1975); Trial Tr. Vol. I, 120:11-16 (testimony of Colin Gordon). Jurisdictions within FFSD historically engaged in purposeful discrimination against African Americans in education, housing, and other areas. *United States v. Missouri*, 515 F.2d 1365, 1367 (8th Cir. 1975); *United States v. Missouri*, 388 F. Supp. 1058 (E.D. Mo. 1975). Expert witnesses Dr. Gordon and Dr. Kimball discussed how the infrastructure and physical footprint of the land *inside FFSD* were intended to perpetuate a dual school system; the way local zoning, incorporation, land use, and urban redevelopment policies were used to perpetuate segregation inside the District; and the racially motivated practices of redlining and exclusion of Black FFSD residents from mortgage finance opportunities. Add. at 89-93. Furthermore, Defendant did not dispute the testimony of former members of the School Board concerning their own families' experiences with these discriminatory policies *inside FFSD*. *Id.* at 90. (Graham and Henson testimony) Defendant also overlooks the fact that the District Court credited Dr. Gordon's uncontested testimony that "the processes of segregation and discrimination of those jurisdictions affected and fundamentally continues to affect the lives *of FFSD residents* in 'particularly powerful' ways" and that his opinion was based on a historical review of FFSD. *Id.* at 91-92 (emphasis added, quoting Gordon testimony); *see also id.* at 93 (district court finding that Dr. Gordon provided "multiple salient examples from the St. Louis metropolitan area, including in North St. Louis County *and FFSD itself*"); *id.* at 93-

94 (district court finding that racial segregation persists *within FFSD* along a "north-south divide" and "is reflected in socioeconomic, educational, and other disparities") (emphasis added). In sum, there was ample undisputed evidence about conditions in FFSD itself to support the District Court's findings as to Senate Factors 1 and 5.

Defendant asserts that the District Court erred by relying on testimony concerning the "calculus of voting" by Dr. Kimball, arguing that this testimony was not directly relevant to conditions within FFSD. That is a mischaracterization of Dr. Kimball's testimony. As Dr. Kimball explained, the "calculus of voting" is a heuristic framework that describes how the costs of voting – in terms of time and resources – may affect an individual's propensity to vote, and how these costs may be more difficult for some voters to overcome due to socioeconomic factors such as poverty and lower levels of education. *Id.* at 95-96. Dr. Kimball then applied this general framework to the particular socioeconomic circumstances of FFSD, including the undisputed disparities between Black and white residents on virtually every measure of economic security and educational attainment, including in the relative rates of employment, household wealth, homeownership, access to health care, engagement with the labor market, and poverty. As the District Court noted, three of Plaintiffs' experts, as well as Defendant's own expert, confirmed aspects of these disparities. *Id.* at 96. The record also contained uncontroverted statistics showing racial gaps in educational achievement of students *in FFSD*, the disparate

application of discipline in schools *in the District*, and the numbers of law enforcement stops, arrests, fines, and fees conducted and imposed by jurisdictions *within FFSD*, which the District Court also credited and the District did not dispute. *Id.*

Thus, the District Court did not rely on the calculus of voting framework in a vacuum, but rather *applied* the calculus of voting to the local circumstances of FFSD, and found that there was "ample evidence that the costs of voting are higher and the benefits lower for African American residents of FFSD as compared to white residents." *Id.* It was perfectly appropriate for the District Court to consider how the disparities that affect FFSD residents fit into the calculus of voting framework described by Dr. Kimball.

Nonetheless, Defendant now challenges the District Court's findings that "African American participation in the political process is [] depressed," in the form of lower registration and turnout rates as compared to whites in FFSD. App. Br. at 106. But as noted above, Section II.A(2), with respect to turnout rates, the District Court determined, based on Dr. Kimball's testimony regarding the data compiled and analyzed by the *Defendant's own expert*, that African-American turnout in the FFSD is generally lower than white turnout. Add. at 98 (citing Dr. Kimball's Rebuttal Report) (of the last twelve contested Board elections, Black turnout has never exceeded white turnout and has been lower than white turnout six times). With

respect to disparities in registration rates, the District Court found, based on Dr. Kimball and Dr. Gordon's testimony, that the socioeconomic disparities, and other characteristics particular to the District, correlated with lower registration rates, that the statewide rates were probative, and similar disparities were likely present in the District. *Id.* at 20-23, 93-99.

The District Court's findings with respect to lower African-American turnout and registration are entirely consistent with the uncontested evidence of socioeconomic disparities in FFSD, factors that, as experts on both sides testified, correlate with lower turnout and registration rates. *See infra* Section IV.C(2). That evidence distinguishes this case from *Clay v. Board of Education of City of St. Louis*, 896 F. Supp. 929, 943 (E.D. Mo. 1995), where the district court did not credit the plaintiffs' evidence on Senate Factor 5 because in that case, unlike this one, the "plaintiffs offer[ed] *only* evidence of low voter turnout" (emphasis added), without also showing other evidence of socioeconomic disparities that depress participation. *Id.* And Plaintiffs' evidence of lower turnout and registration rates distinguishes this case from *Clements*, 999 F.2d at 867 (weighing Senate Factor 5 against plaintiffs because "[p]laintiffs ha[d] offered no evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process").

Where, as here, there is clear evidence of political disadvantage resulting from past discrimination, the burden is on those who would deny any causal nexus between that discrimination and depressed minority participation to show that something else is the cause of lower participation rates. *United States v. Marengo Cty. Comm'n.*, 731 F.2d 1546, 1568–69 (11th Cir. 1984) (rejecting district court speculation that depressed Black turnout was a result of voter "apathy"). Here, Plaintiffs introduced—and the District Court found credible—undisputed evidence of *both* socioeconomic disparities resulting from past discrimination *and* depressed minority participation in politics. Add. at 93-94, 100. *See Marengo Cty. Comm'n.*, 731 F.2d at 1568–69 (where plaintiffs show racialized gaps in "educational, employment, income level and living conditions arising from past discrimination" and "where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation") (quoting S. Rep. No. 97-417 at 29 n.114 (1982)). The showing was sufficient, and the District Court's findings on Senate Factors 1 and 5 are not clearly erroneous.

C. The District Court did not clearly err in finding that Senate Factors 3 and 4 weigh in favor of Plaintiffs and that Senate Factor 8 is neutral.

While not essential to Plaintiffs' claim or the District Court's ultimate conclusion, the District Court did not err in finding that Senate Factors 3 and 4 also

weigh in Plaintiffs' favor and Senate Factor 8 is neutral. Defendant again urges this Court to substitute its view of the evidence for the District Court's factual findings. This Court should not re-weigh the evidence, but, even if the District Court had erred, it would not render the District Court's overall weighing of the totality of the circumstances clearly erroneous, particularly in light of the fact that the two "predominant factors" weigh in favor of Plaintiffs. *See Bone Shirt*, 461 F.3d at 1029 (Gruender, J., concurring) (concluding that District Court's weighing of the totality of the circumstances in plaintiffs' favor not clearly erroneous despite concluding that district court erred in weighing three Senate Factors); *Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 926 F.2d 487, 494 (5th Cir. 1991) ("The court need not rule on all of the Senate factors as long as it is satisfied that the totality of the circumstances warrant liability."); *United States v. Charleston Cty.*, 365 F.3d 341, 353 n.4 (4th Cir. 2004) (focusing on only three of the numerous factors that the district court considered when affirming its finding of a Voting Rights Act violation).

1. The District Court properly applied the relevant standards and did not clearly err in finding that Black candidates in FFSD have been denied "meaningful access" to slating groups (Senate Factor 4).

Under Senate Factor 4, courts consider whether there is a candidate slating process, and if so, whether members of the minority group have been denied access to that process. *Bone Shirt*, 461 F.3d at 1021. Properly applying this standard, the

District Court found that the Ferguson-Florissant National Education Association ("FFNEA") and the North County Labor Club ("NCLC") are both slating organizations and that Black candidates in the District "are largely denied *meaningful access* to those slating groups." Add. at 109. These findings are amply supported by expert and lay witness testimony, factual stipulations and other evidence and as such are not clearly erroneous.

Defendant seeks to re-litigate the District Court's findings by dressing up its dissatisfaction with those findings as two legal errors. Neither claim of legal error has merit.

First, Defendant claims that the District Court "relied on Fourth Circuit precedent over the Eighth Circuit" and applied the wrong standard in evaluating whether FFNEA and NCLC are slating organizations. App. Br. at 109. But the District Court did no such thing. As Defendant and the District Court recognize, this Court has stated that a slating group is a group that "consists of a small number of individuals who select candidates to run as a bloc to fill seats that are up for election." *Clay II*, 90 F.3d at 1362 n.11. And the Supreme Court has "viewed 'slating' as essentially involving the endorsing of candidates." *Collins v. City of Norfolk*, 816 F.2d 932, 938-39 (4th Cir. 1987) (citing *White v. Regester*, 412 U.S. 755, 766-67 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 150-51 & n.30 (1971)). The District Court applied precisely these standards in finding FFNEA and NCLC to be slating

organizations,[29] relying on, among other things, record evidence that: both FFNEA and NCLC have a small committee that choses which candidates to endorse for school board elections; both regularly endorse school board candidates; and both organizations jointly promote—and provide tangible advantages to—the candidates that they endorse essentially as a bloc, a feature that Plaintiffs' expert testified was a hallmark of slating. Add. at 105-06.

Second, Defendant complains that the District Court erred in finding that Black candidates "are largely denied *meaningful access* to" FFNEA and NCLC, suggesting that under this Senate Factor courts cannot, *as a matter of law*, find that this factor favors plaintiffs where there is evidence that the slating group invites all candidates to apply for endorsement. App. Br. at 109-111. But Defendant offers no support for its cramped view of what constitutes "access to the [slating] process," *Bone Shirt*, 461 F.3d at 1021. To the contrary, looking to the totality of circumstances, as Defendant agrees courts must do, the District Court considered all the evidence concerning Black candidates' access to the slating process, including their ability to access the slate—*i.e.*, the organizations' endorsements—itself. As the Eleventh Circuit has noted, "[i]n jurisdictions where there is an influential official

[29] Defendant seems to suggest that only organizations that *recruit* candidates can be slating organizations *as a matter of law*, citing *Overton v. City of Austin*. But the Fifth Circuit in *Overton* announced no such rule; it merely reported the district court's definition without further comment. 871 F.2d 529, 534 (5th Cir. 1989).

or unofficial slating organization, the ability of minorities to participate in that slating organization *and to receive its endorsement may be of paramount importance*." *Marengo Cty. Comm'n*, 731 F.2d at 1569 (emphasis added). Thus, while the District Court agreed with Defendant that the evidence "shows that all candidates are sent invitations to seek endorsement," and thus Black candidates not denied access to the slating process, its consideration of the totality of the circumstances—in particular, the undisputed evidence that FFNEA and NCLC endorse (and thus confer the tangible endorsement benefits on) more white than Black candidates—the court found that Black candidates were denied "*meaningful access*." Add. at 107-09. Given this evidentiary grounding, the court's ultimate finding that this denial of meaningful access meant that this factor weighs very slightly in favor of Plaintiffs is not clearly erroneous.

In any event, given that the two "predominant factors" weigh in favor of Plaintiffs and that the District Court found that this factor weighs only "very slightly in favor of Plaintiffs," *id*. at 109, any error in the court's analysis of this factor would not render the District Court's overall weighing of the totality of the circumstances clearly erroneous.

2. The District Court's finding that voting practices that tend to enhance the opportunity for discrimination exist in the District is not clearly erroneous.

Senate Factor 3 considers whether there are "voting practices or procedures that tend to enhance the opportunity for discrimination" in the jurisdiction. *Gingles*, 478 U.S. at 45. Applying this standard, the District Court found that three such practices exist in FFSD: the at-large voting scheme, staggered terms, and off-cycle elections. Add. at 112-15. These findings are amply supported by the record evidence, including expert testimony by experts, including *Defendant's* expert. *Id*.

Defendant's claim to the contrary simply does not reflect the evidence. As an initial matter, Defendant does not dispute that the discriminatory practices identified by the District Court "tend to enhance the opportunity for discrimination." App. Br. at 115. Nor does it dispute that its own expert wrote and published an article arguing that discriminatory practices were present in North County, the geographic area in which the District is located. Add. at 113. But, contrary to Defendant's claim, the District Court did not end its analysis at this point. Instead, the District Court went on to consider evidence of whether these practices tend to enhance the opportunity for discrimination *in FFSD*—the very "intensely local appraisal" Defendant pretends the District Court did not do—including: "the ample statistical evidence that at-large voting" dilutes Black voters' voting strength in FFSD and witness testimony regarding how at-large voting has worked in conjunction with

socioeconomic racial disparities in FFSD to disadvantage Black candidates; expert testimony concerning disproportionately low turnout among Black voters in FFSD, which correlates with a discriminatory effect of off-cycle elections, as well as evidence of the existence of well-organized interest groups in FFSD (the FFNEA and NCLC) who generally endorse white candidates, a phenomenon that likely enhances the opportunity for discrimination because off-cycle elections "increase the relative influence of well-organized interest groups in maintaining the status quo"; and the fact that the staggered terms in FFSD are combined with at-large voting, a combination that tends to enhance the opportunity for discrimination. *Id.* at 112-14.

In any event, even if District Court clearly erred in finding this factor weighs in favor of Plaintiffs, the error would not render the District Court's overall weighing of the totality of the circumstances clearly erroneous.

3. The District Court did not err in finding that Senate Factor 8 has "neutral weight."

Defendant claims that the District Court misapplied the standard for Senate Factor 8 in crediting Plaintiffs' evidence that the Board was at times "unresponsive" to the particularized needs of the African-American community rather that evaluating whether there was a "significant lack of responsiveness." App. Br. at 116. But this is a distinction without a difference, as reflected in *Gingles* itself. While the *Gingles* Court does reference at times that Senate Factor 8 is concerned with a

"significant lack of responsiveness,"[30] the Court later states that "evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group . . . may have probative value." 478 U.S. at 45. Defendant does not dispute that Plaintiffs presented evidence of the Board's "unresponsive[ness] to the particularized needs" of African Americans in FFSD. But the court credited Plaintiffs' interpretation of only a subset of this evidence, specifically, Board member testimony indicating their lack of awareness of the particularized needs of the African-American community and witness testimony that the Board has responded poorly to the transfer of Black students in the District, doing little to respond to discipline and achievement gaps between Black and white students. Add. at 101-02. Taking into account the level of unresponsiveness demonstrated by this evidence and considering it alongside Defendant's evidence that the Board is making efforts to be responsive, the District Court properly applied the relevant standard and found that this factor is "neutral." *Id.* at 105. This finding is not clearly erroneous.

In any event, even if the District Court erred, the minimal impact of reversing the court's neutral weight finding on this factor would not make the District Court's overall weighing of the totality of the circumstances clearly erroneous.

[30] The "significant lack of responsiveness" language is on page 37 of the *Gingles* decision, not 45, as cited by Defendant, which instead refers simply to "unresponsiveness."

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: March 7, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Plaintiffs-Appellees hereby certify that this brief complies with the requirements of Fed R. App. P. 32(a)(5) and (6) because it has been prepared in Microsoft Office Word 2010 in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's order of February 13, 2017, allowing Plaintiffs-Appellees to file an over-length brief, because it contains 20,512 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to Microsoft Word.

Finally, I certify that this document was scanned for viruses with Symantec Endpoint Protection, which is continually updated. According to the virus scan, this file is free of viruses.

/s/ Anthony E. Rothert

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Appellees' Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on March 7, 2017. I further certify that one true and correct paper copy of the Brief will be sent via first-class mail to Appellant's counsel upon notice that this brief has been accepted for filing.

/s/ Anthony E. Rothert