NO. 07-1628
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PEARL COTTIER and REBECCA THREE STARS,

Plaintiff-Appellees,

v.

CITY OF MARTIN, et. al.

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

BRIEF OF APPELLANTS CITY OF MARTIN, TODD ALEXANDER, ROD ANDERSON, SCOTT LARSON, DON MOORE, BRAD OTTE, AND MOLLY RISSE, in their official capacities as members of Martin City Council; and JANET SPEIDEL, in her official capacity as Finance Officer of the City of Martin

---

Ms. Sara Frankenstein
Mr. Donald P. Knudsen
Gunderson, Palmer, Goodsell
& Nelson, LLP
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
Attorneys for Appellants
City of Martin, et. al.

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs filed suit against the City of Martin alleging that Ordinance 122 dilutes the voting strength of Native Americans by fragmenting the Native American voters into three wards, which had the effect of denying the right of Native Americans to vote on account of race in violation of § 2 of the Voting Rights Act of 1965 ("VRA"), as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. The District Court found a § 2 VRA violation and adopted an at-large cumulative voting plan to replace Ordinance 122.

The City appeals the district court's orders, contending that the district court erred as a matter of law in finding a § 2 VRA violation and in ordering remedial at-large cumulative voting.

Given the voluminous trial record and the fundamental importance of voting rights issues, the City believes oral argument would be helpful in resolving the issues raised in this appeal. Therefore, the City respectfully requests 20 minutes of oral argument per party.

CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is not required from the City Appellants because the City of Martin, Todd Alexander, Rod Anderson, Scott Larson, Don Moore, Brad Otte, Molly Risse, and Janet Speidel are governmental parties, and are not required to submit a Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1(a).

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Statutes:

JURISDICTIONAL STATEMENT

The City appeals from a Judgment issued by the United States District Court, District of South Dakota, Western Division, the Honorable Karen E. Schreier, issuing judgment in favor of plaintiffs and against defendants. The Decision is unreported. A copy of the Decision is contained in the Addendum to this Brief.

The district court had jurisdiction over the lawsuit pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4) because plaintiffs alleged a violation under the United States Constitution and federal voting rights laws.

The basis of this Court's jurisdiction is 28 U.S.C. § 1291, which confers jurisdiction over final decisions of district courts. The district court entered final judgment disposing of all parties' claims on February 9, 2007, and the City timely filed their notice of appeal on March 6, 2007.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in finding that plaintiffs satisfied the "totality of the circumstances" in order to find the City in violation of § 2 of the Voting Rights Act.

Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997)

National Ass'n for the Advancement of Colored People, Inc. v. City of Niagara Falls, New York, 65 F.3d 1002 (2d Cir. 1995)

II. Whether the district's remedial proposal is workable, proper, or

legally allowed under South Dakota law.

Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997)

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994)(en banc)

Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998)

Mallory v. Ohio, 173 F.3d 377 (6th Cir. 1999)

STATEMENT OF THE CASE

The ACLU, on behalf of two Indian voters from the City of Martin, brought suit against the City alleging that city Ordinance 121 created voting districts within the City which violated the Voting Rights Act of 1965, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. City's Sep. App. 1-5. However, prior to commencement of the lawsuit, the City of Martin had begun the process of repealing Ordinance 121 by adopting Ordinance 122. City's Sep. App. 8. Ordinance 122 became effective May 8, 2002. Id.

A trial was held on Plaintiffs' request for a preliminary injunction on May 24, 2002. Id. at 7. Following trial, the district court entered an order denying Plaintiffs' motion for preliminary injunction finding the case moot since Ordinance 121 had been repealed. Id. at 7-10.

Subsequently, Plaintiffs moved to file a supplemental complaint and

to alter or amend the judgment. Id. at 11-12. The court granted that motion and Plaintiffs served and filed a Supplemental Complaint on September 6, 2002. Id. at 18-26. The Supplemental Complaint alleged that the City of Martin's Ordinance 122 violated § 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. Id. at 18-26.

A bench trial was held on Plaintiffs' supplemental claims in June and July 2004. Id. at 27-52. Following extensive post-trial briefing and submissions, the district court issued a Memorandum Opinion and Order. The district court found that Ordinance 122 did not violate § 2 of the Voting Rights Act because the white majority did not vote sufficiently as a bloc to usually defeat Indian-preferred candidates. City's Sep. App. 126. The district court also found that the evidence did not support Plaintiffs' claim that Ordinance 122 was adopted and was being maintained for a discriminatory purpose in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Id. at 127-129.

Plaintiffs filed a Notice of Appeal from the District Court's judgment on March 24, 2005, Appeal No. 05-1895. City's Sep. App. 131. The City

of Martin filed a Notice of Cross-Appeal on April 2, 2005. City's Sep. App. 134. The cross-appeal sought review of two portions of the district court's Memorandum Opinion and Order: first, the City appealed the district court's finding that the Indian population in the City of Martin was sufficiently large and geographically compact to constitute an effective majority in a single-member district; and second, the City sought review of the district court's finding that the Indian population in the City of Martin was politically cohesive. City's Sep. App. 136. Plaintiffs moved to dismiss the cross-appeal on April 12, 2005. That motion was granted on grounds that the cross-appeal simply sought to present additional reasons to affirm the judgment in favor of the City.

The Eighth Circuit Court Appeals entered its Memorandum Decision on May 5, 2006, finding Plaintiffs met all three pre-conditions and remanding the matter to the district court to complete the analysis required by the United States Supreme Court pursuant § 2 of the VRA as construed in Thornburg v. Gingles, 478 U.S. 30, 49-50 (1986). City's Sep. App. 138-157. The Eighth Circuit further ordered that if on remand the district court found in favor of plaintiffs, it shall develop a plan under which Native Americans will have a reasonable opportunity

to elect an Indian-preferred candidate. On remand, the district court entered judgment in favor of Plaintiffs and further ordered a remedial order on February 9, 2007. City's Add. 69.

STATEMENT OF THE FACTS

A comprehensive statement of the facts relevant to the issues raised on appeal is contained in the district court's opinion. City's Add. 1-7. Those facts are briefly summarized below.

Following the 2000 decennial census, the City of Martin became aware that it needed to redistrict its voting ward boundaries. Id. at 2. Rather than undertake this burden itself, the City enlisted the assistance of the Black Hills Council of Local Governments ("BHCLG"), an organization that exists for the purpose of assisting local governmental entities with matters outside their ordinary levels of expertise. Trial Tr. 1367-1368.

The BHCLG designed a redistricting plan for the City of Martin. The City of Martin incorporated the redistricting plan into an Ordinance which was adopted as Ordinance 121. City's Addendum 3.

Unfortunately, the BHCLG had used incorrect data in designing the redistricting plan. City's Addendum 3. Ordinance 121, based on

incorrect data, did not evenly divide the city population among the three voting districts. Id. at 4. In March, 2002, when the malapportionment problem was brought to the City's attention, the City immediately contacted BHCLG and requested a corrected redistricting plan. City's Addendum 3. A revised plan was provided to the City and to the plaintiffs' attorneys. Id. On March 12, 2002, the plaintiffs' attorneys advised the City that the revised plan solved the malapportionment problem, but suggested that the revised plan could violate the Voting Rights Act. Id. at 3-4

The City began to investigate the suggestion; however, it was important for the City to act quickly to adopt new voting districts. First, the process of adopting an ordinance creating new voting districts would take time; the new ordinance would have to have a first reading, a second reading, would have to be published in the newspaper, and a twenty-day waiting period would have to expire before the new ordinance could take effect. Trial Tr. 1709-1710. Elections for the City Council positions were scheduled for the first Tuesday in June, and candidates for the council positions would take out nominating petitions and would gather signatures on those petitions in April. Id. Therefore,

the City had no choice but to move forward with adopting the revised redistricting plan which was adopted as Ordinance 122. Ordinance 122 repealed and replaced Ordinance 121. City's Sep. App. 158-159.

Plaintiffs began this lawsuit during the time the City was in the process of adopting Ordinance 122. City's Sep. App. 1, 8 (First reading of Ordinance 122 was March 22, 2002, lawsuit filed April 3, 2002).

SUMMARY OF THE ARGUMENT

The district court erred in finding that Plaintiffs satisfied the totality of the circumstances by using factors different than those defined by Thornburg v. Gingles, 478 U.S. 30 (1986) and Stabler v. County of Thurston, 129 F.3d 1015 (8th Cir. 1997). The district court also relied on factual evidence that was substantially outweighed by conflicting evidence which was more reliable and relevant to the proper Senate factors.

The district court also erred in failing to find that it lacked the authority to impose a remedial plan in this case. All remedial plans proposed to the court were either unworkable, ineffective, or in violation of South Dakota law. In such a situation, the court must find that Plaintiffs have not established a § 2 VRA violation and that the court

lacks the power or authority to impose a remedy upon the City of Martin.

ARGUMENT AND APPLICABLE STANDARD OF REVIEW

I. The district court erred in finding that Plaintiffs satisfied the "totality of the circumstances" in order to find the City in violation of § 2 of the Voting Rights Act.

Even if Plaintiffs meet their burden under the three Gingles factors, plaintiffs must also independently demonstrate through the totality of circumstances a claim of dilution as a result of the districting adopted in Martin City Ordinance No. 122. A § 2 claim involves a searching and practical inquiry into the "past and present reality of the circumstances existent in the challenged jurisdiction." White v. Regester 412 U.S. 755, 769-770 (1973); see also Thornburg v. Gingles, 478 U.S. 30, 45 (1986) ("the [Senate] Committee determined that the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality and on a functional view of the political process.") (internal quotations omitted). "The determination is peculiarly dependant upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." Gingles, 478 U.S. at 78. In doing so,

the court must determine whether members of the protected minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice." See Bone Shirt v. Hazeltine, 461 F.3d 1011, 1021 (8th Cir. 2006); see also 42 U.S.C. § 1973(b). This Court reviews the district court findings regarding the factual context giving rise to the claim for clear error. Stabler v. County of Thurston, 129 F.3d 39 1015, 1020 (8th Cir. 1997). However, the district court's legal conclusions "including those that may infect so-called mixed findings of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing law,' are subject to plenary review." Id., quoting Thornburg v. Gingles, 478 U.S. 30, 78-79 (1986).

The Supreme Court and this circuit have held that in determining the totality of the circumstances, the court should consider the "Senate factors," which are as follows:

> (1) The history of official discrimination in the political subdivision that touched the right of minority group members to register, vote, or otherwise participate in the democratic process;
>
> (2) The extent to which voting in the elections of the political subdivision is racially polarized;

(3) The subdivision's use of unusually large election districts, majority-vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance opportunities for discrimination against the minority group;

(4) Whether minority candidates have been denied access to any candidate-slating process;

(5) The extent to which minority group members in the political subdivision bear the effects of discrimination in relation to education, employment, and health, which hinder their ability to participate effectively in the political process;

(6) Whether local political campaigns have used overt or subtle racial appeals;

(7) The extent to which minority group members have been elected to public office in the jurisdiction;

(8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group; and

(9) Whether the policy underlying the use of voting qualifications is tenuous.

Stabler v. County of Thurston, 129 F.3d 1015, 1021 (8th Cir. 1997);

Gingles, at 36-37.

1. History of official voting-related discrimination

Under the first Senate factor, the court must consider the history of official discrimination in the City that touched the right of the members

of the minority group to register, to vote or otherwise participate in the democratic process. Stabler at 1021.

As this Senate factor clearly indicates, § 2 VRA cases are not meant to air any and all perceived grievances a minority group has with all aspects of life. Rather, the first Senate factor is to consider *official* discrimination *in the political subdivision at issue* that touched upon Native Americans' rights to register, vote, or participate in the political process. Id. Many courts have dealt with this precise issue. National Ass'n for the Advancement of Colored People, Inc. (NAACP) v. City of Niagara Falls, New York, 913 F.Supp. 722 (W.D.N.Y. 1994), affm'd 65 F.3d 1002 (2d Cir. 1995). The Second Circuit held that evidence of discrimination relating to the State of New York rather than specifically to the City of Niagara Falls did not aide in determining the first Senate factor. Rather, this factor must consider an official history of discrimination that touched upon minority voting in the city at issue. NAACP, 913 F.Supp. at 743; NAACP, 65 F.3d at 1020. Other courts have also required that this study be focused on the political subdivision at issue. Solomon v. Liberty County, Florida, 957 F.Supp. 1522, 1557 (N.D.Fla. 1997); Reed v. Town of Babylon, 914 F.Supp. 843, 885

(E.D.N.Y. 1996). This Court's description of the Senate factors clearly indicates that the Eighth Circuit is in accord. Stabler at 1021.

Both parties proffered evidence of Native Americans' ability to participate in the electoral process within the City of Martin. Native Americans have a long history of being elected and appointed to office in the City of Martin. Trial Ex. 586; Trial Tr. 1799-1800. Native Americans have a long history of being hired as city employees by the City of Martin. Trial Ex. 256 and Trial Tr. 2126-2167. Approximately 30% of all employees the City has hired in the last 25 years or more have been Native American. Trial Tr. 2126-2127. Native Americans have a long history of being elected and appointed to law enforcement offices to provide law enforcement to the City of Martin. Trial Ex. 256.

The district court, however, relied on a report by professor Dan McCool ("McCool"), Plaintiffs' expert, regarding Native American history and contemporary political findings (as well as other issues falling under other Senate factors). McCool's report did not focus on the City of Martin, but rather focused on southwestern South Dakota -- the Rosebud and Pine Ridge Indian Reservations, Bennett County, and beyond.

To form his views, McCool interviewed many residents of the Rosebud and Pine Ridge Indian Reservations, and others beyond that area. Trial Tr. 83-4. In fact, McCool only interviewed three people from the City of Martin out of 46 total people interviewed. Trial Tr. 2132.

Under McCool's own standards and those accepted in the scientific community, McCool failed to analyze the political subdivision at issue in this case – the City of Martin. McCool's standards for interviewing are to interview stakeholders in the litigation who live in the area affected by the case. McCool believes that a report is geographically incomplete when it does not focus on the political subdivision at issue. When one has not interviewed stakeholders in the litigation, McCool believes it is impossible to draw conclusions regarding the affected area. Such interviews, according to McCool, lead to irrelevant evidence and incorrect conclusions. Trial Tr. 199-203; Trial Ex. 564. Yet, McCool offered opinions about life in the City of Martin without following his own protocol, and the district court relied on such evidence.

McCool's methodology was improper, unaccepted in the scientific community, and did not adhere to his own standards. Although it is important to qualitative research to have a citation to each fact, McCool

failed to cite to his purported facts. McCool did not rely on any sources not actually cited in his report. Trial Tr. 74-75. McCool did not look at Martin city ordinances. Trial Tr. 190-191. McCool does not believe he has a representative sample of interviewees from Martin, yet conducted the interviews to make inferences about people he did not interview. Trial Tr. 193, 210. McCool did not tape record any of his interviews. Trial Tr. 211-212. McCool relied on plaintiffs' counsels' interviews in forming his report. Trial Tr. 213. McCool introduced himself as hired by the ACLU to write an expert report for the Bone Shirt and Cottier cases before each interview, biasing the interviewees' answers. Trial Tr. 212. McCool conducted 60 to 70% of his interviews in the presence of ACLU attorneys, who also asked questions. Trial Tr. 212-13. All such problems render McCool's report irrelevant and unreliable.

McCool did not check actual voting records in Bennett County to see whether Native Americans were voting from 1912 on. Trial Tr. 72-73. McCool did not know whether the first county officials elected were Native American, nor the Native American electoral history of Bennett County. McCool instead operated under the mistaken assumption that Native Americans were not elected to Bennett County positions until

the 1970s. Trial Tr. 73-74.

McCool submitted virtually the same report in Bone Shirt v. Nelson, which focused on politics in South Dakota legislative Districts 26 and 27 and beyond. Trial Tr. 76-79, Trial Ex. 564. McCool testified that certain testimony was irrelevant in this case because it was about Districts 26 and 27, but included it nonetheless. McCool admitted it would have been helpful if he had asked interviewees questions about the political environment in the City of Martin rather than elsewhere in the state. Trial Tr. 173, 174. McCool admitted that he did not know where his interviewees lived. Trial Tr. 197.

Section A of McCool's Cottier report, discussing Indian/white historical relations, does not address the City of Martin. Trial Tr. 85-86. Section B of McCool's Cottier report, discussing prohibitions on Indian voting, does not discuss prohibitions on Native Americans voting in Martin. Trial Tr. 86. McCool did not know of any restrictions on Native Americans voting in Martin. Trial Tr. 93.

McCool's report relies highly on unverified speculation and perceptions held by Native American interviewees. Perceptions may or may not be reality, and therefore are unreliable. The Senate factors

require a searching examination of past and present *reality* that affects a minority's actual ability to participate in the political process. Unverified perceptions do not demonstrate reality as required. A court must access minorities' electoral opportunities "on the basis of objective factors." Gingles at 44.

McCool was told, and reported without verifying, that a "significant number" of registration cards were rejected due to inadequate address, and that people who attempted to solve the problem by writing in a physical description were still rejected. Trial Tr. 103-5. McCool admitted that the registration cards rejected for inadequate address was not likely Martin city residents. Trial Tr. 105. McCool was told, and reported without verifying, that one registrant's card was rejected three times, but could not give a name as to whose it was. Trial Tr. 106, 108. McCool was told, and reported without verifying, that a card stating a registrant lived eight miles north of Allen was rejected. Trial Tr. 108-9. The Bennett County Auditor, Susan Williams, however, disproved these assertions by McCool. Trial Tr. 2183-2205.

McCool admitted that his sources would have been more authoritative if he had known whether his interviewees actually

witnessed or experienced the stories they were relating. Trial Tr. 121. McCool stated that if numerous other people told him things to cross-validate another interviewee's account, it would have carried a lot more credibility. Trial Tr. 137. "I interviewed a number of people because I thought they had knowledge about it, not because they had the experience of it." Trial Tr. 195.

McCool made many conclusory statements devoid of citation to fact or source. In addition, nearly all of McCool's interviewee comments were unverified by any source whatsoever. Such methodology violates the methodology required under a qualitative analysis method. It is important to interview people on both sides of the issue, although McCool's interviews were nearly completely skewed in an effort to find discrimination with no effort to verify it or disprove it. Trial Tr. 23. For instance, McCool reported that Ordinances 121 and 122 exacerbated voter confusion as to where to vote even though the one and only polling place in Martin was the same under both ordinances. His basis was purely his own assumption that the new ordinance would cause confusion. Trial Tr. 149-150. McCool admits lacking footnotes to verify statements in his report. Trial Tr. 152, 166, 180. McCool relied on

hearsay in newspaper articles to form the basis of his opinions regarding the one city election he looked into – the mayor's race of 2000. Trial Tr. 180, 209. McCool did not know if current members of the city council were Indian-preferred candidates. Trial Tr. p. 235. McCool made a judgment as to what interviewee comments to believe as reliable, but included a comment he deemed unreliable in his report anyway. Trial Tr. 224.

Proper qualitative analysis methodology requires that structured interviews be used in order to provide results with scientific verifiability. Such proper methodology has been published, peer-reviewed, is accepted in the scientific community and is taught to college students in published and peer-reviewed textbooks. Trial Tr. 221; 1059. McCool did not utilize structured interviews, and therefore his results do not hold up to scientific rigor and verifiability of findings. Trial Tr. 218

McCool's reports have been discredited in the past. In Blaine County, the defendants objected to the entirety of McCool's report as unreliable and methodologically flawed under Federal Rule of Evidence 702. U.S. v. Blaine County, Montana, 363 F.3d 897, 915 (9th Cir. 2004). The

Ninth Circuit described McCool's testimony as "tainted," but found the district court's admission of the evidence harmless. Id. The Ninth Circuit further noted that the district court at most relied upon McCool's testimony to find a history of discrimination. Id. Because the first Senate factor is not essential to a voter's claim, the Ninth Circuit found the admission of McCool's tainted evidence to be harmless. Id. Due to this decision, the Ninth Circuit did not reach the issue of McCool's methodological flaws. Id.

So too is McCool's testimony "tainted" in this case. Trial Tr. 1056–65; Trial Ex. 449, p. 19-20. McCool's report fails to provide the requisite relevancy and reliability to serve as evidence supporting the Senate factors. The district court also relied upon McCool's report and testimony to find racially polarized voting in Martin and reduced political participation in Martin. City's Add. 12. The district court's reliance on McCool's report and testimony is not harmless, however, due to the court's reliance on this evidence under three important Senate factors.

The district court also relied upon the testimony of Pearl Cottier and Alice Young to find that Plaintiffs met the first Senate factor. Cottier

testified that she "felt" disliked when voting because there were no Native American poll workers. City's Add. 15; Trial Tr. 251. Young testified that she "felt" uncomfortable and unwelcome when voting in Martin, even though Young did not live or vote in Martin. Trial Tr. 538, 540. Moreover, both of these witnesses testified that they have had no problems voting. Trial Tr. 545-46. Specifically, Cottier testified that nothing hindered her ability to vote. Trial Tr. 287. Cottier testified at length to her considerable political involvement. Trial Tr. 249-250, 263-66, 270-272. Young testified that she has had no problems registering to vote or voting. Trial Tr. 545-46. Young also testified a great deal about her considerable political involvement. Trial Tr. 527-530, 533-39.

The district court determined that this Senate factor was proven by the Plaintiffs in part because there were not enough Native American poll watchers in Bennett County. Bennett County Auditor, Susan Williams, testified that she advertises for poll workers and gets little or no response. Trial Tr. 2190. The court erred in finding official discrimination affecting Indians' right to vote when Native Americans in Bennett County simply do not volunteer to serve as poll watchers. Moreover, the court did not find that Indians' political participation was

hindered by lack of Indian poll workers. To the contrary, a Plaintiff testified that it is more important to have friendly poll workers than Native American poll workers. Trial Tr. 611.

Moreover, the district court relied upon perception of discriminatory behavior whether or not it took place in Martin. The court relied upon Cottier's feelings of unwelcomeness when absolutely no evidence supports the assertion that Cottier was actually discriminated against when she went to vote. Furthermore, Young did not live or vote in Martin, but rather lived on Indian trust land. Evidence of conduct outside of the city, not related to city politics or city voters, is irrelevant. Rangel v. Morales, 8 F.3d 242, 248-49 (5th Cir. 1993). Moreover, the court relied on Young's testimony which was, at best, her perception of how she assumed other Indian Martin city residents voters might feel when they go to vote in the City of Martin.

The district court also relied on evidence regarding low Indian participation in the Martin Commercial Club to support its finding that Plaintiffs met their burden under the first Senate factor. Any evidence suggesting that Indian people are underrepresented in the Commercial Club is hardly evidence of official discrimination affecting the right to

vote. Indeed the district court did not make the leap that such a scenario touched upon Native Americans' right to register, vote, or participate politically. Indeed, this witness, Monica Drapeaux, testified that she has no problems voting or participating politically. Trial Tr. 323, 326, 340-41, 344. Specifically, Drapeaux testified that there was nothing about her personal experiences that has hindered her ability to register to vote, vote, or be involved in the democratic process. Trial Tr. 344. If no such connection is demonstrated by the evidence, such a contention cannot serve to meet the first Senate factor.

Next, the court found that the City Finance Officer's actions toward Bob Fogg was an act against the interests of Indians. Bob Fogg, however, testified that he did not consider himself an Indian and was not an enrolled tribal member. Trial Tr. 1335, 1351-1352.

Next, the district court relied upon a 1994 case settled by negotiation of the parties as proof of racial discrimination in Martin. City's Add. 17. Settlements out of court are not evidence of liability, and therefore cannot serve as evidence of discrimination. The settlement agreement explicitly states that the defendants do not admit liability. Trial Ex. 149. The court also cited Drapeaux's testimony that she was refused

loans by this bank in Martin. The court, however, did not indicate how this alleged discrimination affected Drapeaux's right to register, vote, or participate in the political process and such a leap cannot and should not have been made. To the contrary, this witness testified that she had no problems registering, voting, or participating in the democratic process. Trial Tr. 323, 326, 340-41, 344.

Next, the district court relied upon the controversy surrounding a Bennett County High School homecoming ceremony involving Indian dresses and headdresses as support for racial discrimination affecting voting. The district court found that some Indians thought the ceremony was offensive. The record also indicates that many Native Americans thought the ceremony was a nice tradition and complimentary of their culture. Trial Tr. 1622-23, 1691-92, 1805-06, 1819, 2062-2063, 2103, 2109. The complaints made came from outsiders, while the majority of the Native Americans in the City supported the ceremony. Trial Tr. 1805-06, 1819. The district court failed to recognize that many Native Americans did not want to change the ceremony. Moreover, the court does not indicate how this issue with the Bennett County school affected anyone's right to register, vote, or

participate in the political process.

Under the first Senate factor, the court is to determine not only any official history of discrimination against Native Americans touching their rights to vote, but also whether the minority's participation in the political process has been hindered by that discrimination. Plaintiffs failed to establish that any discrimination affected Native American's actual ability to register to vote, vote, or participate in the political process. Trial Tr. 287, 323, 326, 344, 545-46, 568, 570-71, 612, 854, 883, 934, 1361-62, 1364, 1399, 1525, 1580-82, 1618-19, 1636, 1692, 1693, 1804-05, 1991, 2061-62, 2078, 2106-07.

At the end of the district court's analysis under the first Senate factor, the court drew the unexplained conclusion that the history of discrimination discussed touches upon Indians' ability to register, to vote, and to actively participate in the political process. The court erred in considering evidence which was not "official" discrimination as clearly required by the Senate factor. The court also routinely relied on evidence affecting people elsewhere in the state or in Indian country and not related to people who live in the City. Rather, the court relied upon feelings and perception, entirely undocumented and unverified,

and other unofficial alleged discrimination to make the huge leap in determining that such alleged discrimination affects Indians' ability to register, vote, and participate in the political process.

The court's error is more egregious, considering that Plaintiffs were unable to proffer a single Native American witness that indicated any of these issues affected their ability to register, vote, or participate politically. Solomon v. Liberty County, Florida, 957 F.Supp. 1522, 1559 (N.D. Fla. 1997) (finding that "[n]ot withstanding the remaining vestiges of official discrimination in Liberty County, there is no evidence that the ability of blacks to participate in the political process has been hindered by the discrimination"). In Solomon, the more telling consideration was that every witness who testified on this point said that there were no blocks to the political process arising from past or present acts of official discrimination. Id. Other courts are in accord. Reed at 885 (existence of general racial discrimination in U.S. history is not enough to meet the first Senate factor). See also Mallory v. State of Ohio, 38 F.Supp.2d 525, 547 (S.D. Ohio 1997) (despite a finding of discrimination in the areas of education, employment, and health, plaintiffs must establish that minorities are actually hampered in their

ability to participate in the politically to meet this factor.)

2. Racially polarized voting

The second Senate factor considers the extent to which voting in the City is racially polarized." Stabler at 1021. This factor should concentrate on any racially polarized voting in city elections.

The City produced strong evidence that white and Indian voters are not polarized within the City of Martin. Trial Tr. 1403-04, 1580-81, 1618, 1620, 1632, 1634-35, 1693, 1797-98, 1801-03, 1805-06, 1819, 1815, 2064-67, 2100, 2104. The City produced both Native American as well as white witnesses and nearly every single City witness lived within the city and was eligible to vote in city elections.

Lay witness testimony offered by the Plaintiffs was not nearly as reliable. For the most part, Plaintiffs' witnesses were solely Indian, fewer in number, did not live in the city, and were not eligible to vote in city elections. Nearly all of Plaintiffs' witnesses lived in Indian country. Trial Tr. 523-24, 540, 547-48, 849, 880, 898, and 1488. There was a marked difference between the testimony of Native American people who lived and voted in the city as opposed to Native Americans who lived in Indian country. The court erred in relying upon evidence of

Indian people who did not vote in city elections over evidence of Indian and white witnesses alike who did live and vote in the City of Martin.

A great deal of evidence demonstrated that any "us-versus-them" mentality referred to a division between Indian members of the LaCreek Civil Rights Group or residents of Indian country and Indian people who lived in Martin. Trial Tr. 1620, 1634-35, 1694, 1802-03, 1805-06, 1808, 1819, 1828-31, 1834, 1994, 2054-2059, 2062-2066, 2097-2109, 2103, 2109. Evidence indicated that the LaCreek Civil Rights Group met on Indian trust land and was comprised nearly all of Indian people living in Indian country. Indian defense witnesses testified that they found the LaCreek Civil Rights Group's positions offensive to their own values. Trial Tr. 1802, 2063-2066. A division amongst Native Americans who live in Indian country versus those who live in the City of Martin should not have been used to find that racially polarized voting exists between whites and Indians in the City of Martin.

The court looked to evidence of polarized voting based upon Plaintiffs' experts' statistical evidence. Much of this evidence relied upon partisan county or statewide elections and none of the statistical evidence Plaintiffs proffered relied upon the nonpartisan city elections

at issue, with the exception of one exit poll. Plaintiffs' own expert conceded that political affiliation explains the divergent voting patterns between whites and Indians in Martin. Trial Tr. 1319-20. This evidence is not relevant to the issue as to whether racially polarized voting exists in the nonpartisan city elections. Therefore, the court erred in relying upon statistical evidence to find racially polarized voting in Martin City elections.

3. Voting practices or procedures that tend to enhance opportunity for discrimination

The district court found that the City's use of staggered terms (which is required by state statute) was an anti-single shot provision providing that the third Senate factor weighted slightly in favor of Plaintiffs. However, the district court did not find that staggered terms ever impaired Native Americans' ability to elect the candidate of their choice even once in the City of Martin. The Supreme Court requires the totality of the circumstances determinations to be based on a "searching practical evaluation of the past and present reality." The court erred in determining that staggered terms impair Native American's voting strength when no evidence indicated that such impairment has ever once occurred in the history of Martin city elections.

4. Denial of access to candidate-slating process

The court found that this factor weighs in favor of the City, and the court did not err in this determination.

5. Effects of discrimination in education, employment, and health which hinder the minority's ability to participate effectively in the political process

The fifth Senate factor requires the court to determine the extent to which members of the minority group in the City bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process. Stabler at 1021.

The court cited data and statistics to support its finding that Plaintiffs met the fifth Senate factor. The court did not, however, explain how such statistics prove that Indian people are hindered in their ability to participate effectively. Rather, every single Native American witness, whether Plaintiffs' or the City's, testified that they themselves had not been hindered in their ability to vote, register to vote, and were actively participating in the political process. See citations above. The court erred in using statistical evidence to assume that Native Americans in Martin are hindered in their ability to

participate politically when each and every Native American witness testified that such effects do not hinder that ability. Solomon at 1593 (holding that evidence of socio-economic disparity must also indicate a hindrance in minority political participation to meet this factor). See also Reed v. Town of Babylon, 914 F.Supp. 843, 888-889 (E.D.N.Y. 1996).

To the contrary, Plaintiffs proffered a great deal of evidence regarding flourishing Native American political involvement, including a candidate recruitment and support process, an organized get-out-the-vote effort, numerous Native American registration drives, high voter turnout, public campaigning efforts, putting a Native American on the ballot for every electoral race, etc. Trial Tr. 249, 325-26, 341-42, 344, 529-30, 588-89, 591, 836, 839-40, 843, 851, 853-54, 861, 880, 912, 931-32, 1341, 1349, 1361-62, 1364, 1503-05, 1520-22. Based on the considerable political involvement in the Native American community, the court erred in concluding that any official discrimination actually hindered the Native American involvement in the political process. See Reed at 889.

6. Use of racial appeals in campaigns

The court found that this factor weighed in favor of neither Plaintiffs nor the City and the court did not err in this finding.

7. Success of minority candidates

The fact that two Native Americans ran in one recent election, unopposed by any white candidate, is evidence of minority electoral success. Jenkins v. Manning, 116 F.3d 685, 694 (3d Cir. 1997). Trial Ex. 188. "The absence of white challengers to black incumbent[s] . . . is indicative of the lack of legally significant racial bloc voting." Mallory v. Ohio, 38 F.Supp.2d 525, 571 (F.D. Ohio 1997); affm'd 173 F.3d 377 (6th Cir. 1999). Both at the time the complaint was filed and during trial, two Native Americans sat on the city council.[1] Trial Tr. 1395, 1615. Two council members are married to Native Americans and their children are Native American. Trial Tr. 1395-96, 1986. From 1981 through the trial, twelve Native American candidates have been elected to the city council out of 81 candidacies. Trial Ex. 448; Trial Tr. 26-37. Of contested and uncontested races, Native Americans have won seven

[1] The Plaintiffs, as well as the Department of Justice, contend that if one self-identifies as Native American, the person is considered Native American for the purpose of voting rights litigation. City's Sep. App. 160-164. Therefore, under the Plaintiffs and the Department of Justice test, two councilpersons are Native American.

times and lost five times. Trial Ex. 448, Trial Tr. 26-27, 1054. In five of the seven successful Indian candidates elections, the Indian candidate ran unopposed. Evidence that Indian candidates run unopposed can indicate minority success. Jenkins at 694 (stating election between two minority candidates without a white challenger is evidence of minority success). The court erred in not giving this evidence more weight. If there truly was a racially polarized environment in Martin, white voters would not allow Indian candidates to ascend into office unopposed.

8. Lack of responsiveness

The eighth Senate factor requires consideration of "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." Senate Report, 1982 U.S.C.C.A.N. at 207.

The court relied on evidence that the city council was unresponsive to Indian concerns regarding the Bennett County Sheriff. City's Add. 41. City council did inquire into these complaints and was unable to verify any. Trial Tr. 1840, 1992-93, 1623-24, 1729. The city council set up a law board to review all complaints, and none were submitted. Trial Tr. 1992-93. When a new Indian sheriff, Charlie Cummings, was

elected, the trial court explicitly found that the city council was justified in severing its contract with the county sheriff based upon Cummings' malfeasance. City's Sep. App. 130; Trial Tr. 1841-43. Indeed, Charlie Cummings admitted at trial that he had been indicted 18 times for embezzlement from the county, in addition to a number of other incidents involving crimes or improprieties. Trial Tr. 884-894. Thereafter, the Martin City Council created its own city police department and hired Shane Valandra, a Native American, as its new police chief. Trial Tr. 888, 1931. The court erred in finding that the city council should have exerted pressure on Sheriff Waterbury when the city council looked into the Indian complaints and found them unverified and no complaints were brought to the law board.

The court found other evidence indicating that the city council has responded to some Indian needs. The court therefore found the evidence mixed on this issue, but ultimately erred in finding that this factor weighed slighted in favor of Plaintiffs.

9. Tenuousness of City's policy drawing district lines

The court did not err in finding that this factor weighed in favor of City.

II. The district's remedial proposal not is workable, proper, or legally allowed under South Dakota law.

At the time of trial, the City of Martin ran its mayoral and city council elections under the election plan adopted in Ordinance 122. This plan partitioned the City into three wards. Mayoral elections are conducted at-large every two years. The city council seats are two-year staggered terms, and two persons represent each ward, for a total of six persons on the city council. Because the city council terms in each ward are staggered, the election for council members occurred every year when a seat is contested. Both mayoral and city council elections are nonpartisan.

Under the first prong of Gingles, Defendants must propose a remedial plan which provides the minority population with a geographically compact, effective majority district in the City of Martin. Gingles, 478 U.S. at 50-51; Stabler, 129 F.3d at 1021. The remedy proposed must be proper and workable and provide the minority population better access to the political process than the challenged voting election plan. Stabler at 1025; Burton v. City of Belle Glade, 178 F.3d 1175, 1199 (11th Cir. 1999); Nipper v. Smith, 39 F.3d 1494, 1530-31 (11th Cir. 1994)(en banc). If Plaintiffs fail to submit a workable or

effective remedy, there is no § 2 violation. Stabler at 1025.

Neither party nor the Court was able to propose a workable remedy in this case, under the dictates of the law herein, for the reasons indicated below. This Court reviews the district court's chosen remedy for an abuse of discretion. Connor v. Finch, 431 U.S. 407, 415 (1977). However, the substantiality of South Dakota and the City's governmental interest under § 2 is a question of law for this Court to review de novo. League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) ("LULAC").

A. Effective Majority

According to the 2000 census data, the City of Martin has 1,078 persons, including a Native American population of 482, and a white population of 596. Several maps were proposed as illustrative maps at the trial in this matter, but the district court found that none are viable or workable remedies. Plaintiffs proposed two illustrative maps through their expert, William Cooper ("Cooper"), asserting that both comply with the first Gingles precondition.

Plaintiffs' expert Steven Cole ("Cole") admitted at trial that he did not analyze whether Cooper's illustrative plans would allow Indian

voters to effectively elect candidates of their choice in Cooper's illustrative majority wards. Trial Tr. 682. Furthermore, Cooper testified that he understood that in order to create a proper and workable remedy, he would need to create an Indian-majority district with higher than simple majority numbers. Trial Tr. 476-77.

Under Cooper's first proposed map (Plaintiffs' Illustrative Plan A), the City would be redistricted into three wards. City's Add. 70-71. Ward I would have the highest density of Indian voters. Cooper's proposed Ward I would have 351 total persons, with 220 Indian (single-race) persons, and 235 Indian (single-race) plus dual-race persons. Cooper's proposed Ward I would also have 108 Indian (single-race) VAP persons and 114 Indian (single-race) plus dual-race VAP persons. Ward I would have a 66.95% total Indian population, but only a 54.55% Indian VAP population. Therefore the district court found that Cooper's proposed Plan A does not afford the minority an effective majority-minority Ward, as Indian VAP population in Ward I is far under 60%.

Under Cooper's second proposed map, (Plaintiffs' Illustrative Plan B), Cooper redistricted the City into six wards. City's Add. 72-73. Cooper's Wards I and II have the highest concentration of Native

Americans. In Cooper's Ward I, there would be a total population of 180 people, with 112 Indian (single-race) persons and 122 Indian (single-race) plus dual-race persons. Ward I would also have 114 total VAP population (with 57 single-race Indians and 61 single-race plus dual-race Indians). Ward I would therefore have a 62.22% single-race Indian population and a 67.78% single-race Indian plus dual-race population. Looking at VAP however, there would be 50.00% single-race Indian VAP population and 53.51% single-race Indian and dual-race population in those wards. Therefore, Cooper's Illustrative Plan B does not afford the minority an effective majority-minority ward as Ward I does not reach a 60% Indian VAP threshold. Ward II does not even reach a majority-minority status as 50.00% Indian VAP is not a majority.

Voting age population numbers should be used when assessing these issues. Voting age population ("VAP") is the relevant population, as only those persons 18 years of age and older may vote. France v. Pataki, 71 F.Supp.2d 317, 326 (S.D.N.Y. 1999). Most courts use VAP numbers rather than the total minority population "in recognition of the higher non-voting age population percentages, lower voter registration and

lower voter turnout found in minority communities." Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany, 289 F.Supp.2d 269, 273 (N.D.N.Y. 2003); citing Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt, 796 F.Supp. 681, 689 (E.D.N.Y. 1992).

Neither was Defendants' expert, Dr. Ronald Weber, able to create a plan in which the minority was afforded an effective majority in any ward. City's Add. 74-79. The district court found Dr. Weber's testimony on this issue highly credible and concluded that "Indian voters in Martin are so widely dispersed that it is impossible to draw a single-member plan with an effective majority of Indian voters without running afoul of the Fourteenth Amendment's prohibition on racial gerrymandering." City's Add. 62.

Furthermore, the evidence at trial suggested that any remedial districting plan must draw a district giving Native Americans an eight to twelve percent majority to be effective. Trial Ex. 210, 561, 188.

June 3, 2003

Ward I

33 Native Americans voted	**90 were eligible to vote**	**=36.67% of Native Americans voted**
65 Whites voted	**146 were eligible to vote**	**= 44.52% of Whites voted**

Ward II

39 Native Americans voted 85 were eligible to vote =45.88% of Native Americans voted
49 Whites voted 152 were eligible to vote = 32.24% of Whites voted

Ward III

20 Native Americans voted 90 were eligible to vote = 22.22% of Native Americans voted
87 Whites voted 174 were eligible to vote = 50% of Whites voted

Totals for Ward I, II, and III:
92 Native Americans voted out of 265 eligible = 34.72%
201 Whites voted out of 472 eligible = 42.58 %

DIFFERENCE = 7.86%

June 1, 2004

Ward I

45 Native Americans voted 90 were eligible to vote = 50% of Native Americans voted
80 Whites voted 146 were eligible to vote = 55% of Whites voted

Ward II

46 Native Americans voted 85 were eligible to vote = 54% of Native Americans voted
91 Whites voted 152 were eligible to vote = 60% of Whites voted

Ward III

33 Native Americans voted 90 were eligible to vote = 37% of Native Americans voted
106 Whites voted 174 were eligible to vote = 61% of Whites voted

Totals for Wards I, II, and III:
124 Native Americans voted out of 265 eligible = 47%
277 Whites voted out of 472 eligible = 59%

DIFFERENCE = 12%

The above tables illustrate that in two election cycles, Native American voters in Martin turned out to vote at a rate lower than white voters by eight to twelve percent. Therefore, to create an effective majority-Indian district in the City of Martin, any remedial plan would have to have a majority of Indian voters over white voters by up to twelve percent. This would require a 62% majority-Indian VAP status. African American Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345, 1348, n. 4 (8th Cir. 1995). Neither party nor the Court was able to create an illustrative plan reaching anything near those numbers.

"In the process of drawing majority/minority districts in order to comply with federal law, the state or county must decide 'how substantial those majorities must be in order to satisfy the [VRA].'" Arbor Hill, at 273 (partially reversed on unrelated grounds); citing United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 162 (1977). The political subdivision should arrive at a minority percentage that is necessary "to ensure the opportunity for the election of a black representative." Id.

In determining minority percentages necessary to achieve a viable

redistricting plan, the Supreme Court held that "[w]e think it was reasonable for the Attorney General to conclude in this case that a substantial [total] nonwhite population majority in the vicinity of 65% would be required to achieve a nonwhite majority of eligible voters." United Jewish Orgs. of Williamsburgh, Inc. 430 U.S. at 164. "Courts have generally held that 'supermajorities' – more than simple majorities (51 percent) – are required to create 'safe' majority/minority districts." Arbor Hill at 274. The Eighth Circuit is recognized as having adopted the 65% total minority population and 60% or higher VAP figures as guidelines. Id., citing Villa at 1348, n. 4.

Indeed, the Eighth Circuit has defined "safe wards" as those "in which a black majority has a practical opportunity to elect the candidate of its choice." Id. Such "safe wards" are wards containing 60% VAP. Id. The Eighth Circuit concluded that 60% VAP "is reasonably sufficient to provide black voters with an effective majority." Id. Therefore, any remedial proposal, under Eighth Circuit case law, should contain a 60% or higher Indian VAP majority district.

B. Compactness

Cooper's proposed majority-minority districts are not compact, but

rather are irregularly and bizarrely shaped. One would not have drawn the maps without using race as the primary concern. As the Eighth Circuit in Stabler held, if race was the predominant factor motivating the placement of a significant number of voters within or without a particular district, the plan violates the Equal Protection Clause. Stabler at 1025. Even Plaintiffs' expert, Cooper, testified at trial that "you would not want to do a plan that would just strain together all the majority Indian blocks in a particular town or county in order to create a district." Trial Tr. 374.

Cooper also testified regarding his understanding of compactness. Cooper testified that compactness is important to allow campaigners to know which houses to visit and to know whether neighbors are in the same ward or not. Trial Tr. 379. Cooper also testified that the more adjacent the city blocks, the more compact the ward. Trial Tr. 409.

Cooper also admitted that his Illustrative Plan A has 23 sides. Trial Tr. 406. The Eighth Circuit struck down a proposed city redistricting map with 11 sides. Stabler at 1025. City's Add. 80. He also admitted that he did not consider the traditional redistricting principle of incumbency when drawing his illustrative maps. Trial Tr. 395-96. Dr.

Weber testified in accord Trial Tr. 995-96, 1001-02.

Moreover, the proposed plan struck down as unconstitutional in Stabler is less irregularly shaped than Cooper's proposed maps in this case. City's Add. 70-73. As in Stabler, if it were not for the race consideration, the districts could have been drawn in a regular fashion. When race is taken into consideration, however, Cooper was forced to jump from one census block to another to find sufficient numbers of Native Americans to create a majority-minority district. Trial Tr. 410-417. As the Stabler court held, such map drawing constitutes racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Trial Tr. 994-95, 998-99 and 1001.

While Cooper may have testified that he did not use race as his primary concern in drawing his proposed maps, such testimony should be given little weight. Cooper served as the Plaintiffs' expert in the Stabler case as well. His opinion in Stabler was that he did not draw the proposed map with his primary concern being race. The District Court and Eighth Circuit found otherwise. Cooper has not changed his opinion as to compactness despite the Eighth Circuit Stabler decision, rendering his opinions even less credible. Trial Tr. 389-90, 392-93 and

419.

Cooper is the only expert to have created a redistricting map with an Indian-majority district. As discussed above, the majority is not high enough to be a workable or effective majority for Indian voters in Martin. Secondly, if the district court had ordered Cooper's Illustrative Plan A as its remedy, the court would have imposed a map which used race as its primary concern in placing a significant number of voters within or without a particular district, which constitutes racial gerrymandering. Both the parties and the courts are required to abide by the dictates of the Constitution. Johnson v. Mortham, 915 F.Supp. 1529, 1545 (n. 5) (N.D.Fla. 1995); Johnson v. Mortham, 926 F.Supp. 1460, 1467 (n.3) (N.D.Fla. 1996). The Eighth Circuit has held that any wards drawn in order to correct a Section 2 violation should steer clear of the type of racial gerrymandering proscribed in Miller v. Johnson, 515 U.S. 900 (1995), Stabler at 1025. In other words, courts may not adopt a plan that is racially gerrymandered, regardless of Cooper's testimony that race was not *his* primary concern. If the district court had adopted Cooper's plan, the court would have made the decision to place a significant number of voters within or without the wards in

dispute based on race. Johnson at 1550.

C. Fragility

In addition to failing to provide the minority with an effective majority in any ward, Cooper's proposed wards are too fragile to constitute a workable remedy. Compactness appears to be a question of law for the Court to decide. Jeffers v. Tucker, 847 F.Supp. 655, 660, n.3 (E.D.Ark. 1994).

In examining Cooper's Illustrative Plan A, Ward I would consist of 54.55% Indian and dual-race VAP. City's Add. 70-71. If only ten Indian VAP persons moved out and were replaced by ten white VAP persons, Ward I's simple majority-minority status would be destroyed. Trial Tr. 404-05, 996. Therefore, Cooper's Illustrative Plan A simply is not a workable remedy for a § 2 violation. The Eighth Circuit held in Stabler that if four or five persons were to move and destroy the ward's majority-minority status, the plan is not workable. Id. at 1025. If only ten Native American VAP move out of Cooper's Ward I and are replaced by white VAP, its simple majority-minority status is destroyed.

The same rationale holds true for Cooper's Illustrative Plan B. Under Plan B, if only four Native American VAP persons move out and are

replaced by four white VAP persons, the simple majority-minority status would be destroyed in Ward I. City's Add. 72-73. In Plan B's Ward II, only three Native American VAP persons would need to move out and be replaced by three white VAP persons to destroy the simple majority-minority status.

Because Cooper was working with 2000 census data, districting the City according to his Illustrative Plan A may not create a simple majority-minority ward today in 2007. A few families may have moved within these seven years alone, destroying even the possibility of creating a simple majority-minority ward as Cooper has drawn. Trial Tr. 2000-01 (the census block racial data where one witness lives was inaccurate at the time of trial only four years after census data was acquired).

Moreover, residents of the City of Martin are very mobile. There are over 125 rental units in the City, and people are constantly moving from one rental to another, or into town or out of town. Cooper did not investigate or consider the City residents' mobility and its likely potential to destroy the simple majority-minority status of his illustrative wards. Trial Tr. 405, 1649, 1694, 1742, 1796, 1855-56, 1894-

97, 1989; Trial Ex. 581.

Lay testimony proved that Martin has many apartment buildings, rental homes, a nursing home, and an income-based rental building called the Martin Housing Authority. These residences are scattered about town, and see a high turnover rate in occupancy. It is quite common for individuals, couples, and families to move in and out of rental units, or from a rental unit to a permanent home, and vice versa. The new construction of a small apartment building or duplex, demolition of a current apartment building or duplex, the partitioning of one's house into several apartments to rent out, or simply two or three families moving across town would destroy the majority-minority status of Plaintiffs' proposed Plans. With such a situation, it is highly unlikely that an extremely fragile majority-minority ward would retain its simple majority-minority status. Indeed, any map using 2000 census data is outdated and may not provide for a simple majority-minority ward today in 2007. Trial Ex. 581; Trial Tr. 1649, 1694, 1742, 1796, 1855-56, 1894-97, 1796, 1989.

D. Plaintiffs proposed plans violate South Dakota law

Cooper's proposed six-ward plan and limited or cumulative voting

plans (Plan C) were not viable remedies available to the Court.

S.D.C.L. Ch. 9-8, entitled "Aldermanic Form of Government" delineates the method in which a City may run its government under an aldermanic form. S.D.C.L. § 9-8-4 states:

> **Common council - Composition - Election - Terms.**
>
> The common council consists of the mayor elected at large and two aldermen elected from and by the voters of each ward of the municipality. The term of office is two years, unless a municipality adopts an ordinance establishing the term of office to be three, four, or five years. The mayor and aldermen shall hold office until successors are elected and qualified. At the first election of aldermen, the council shall stagger the initial terms of the alderman in each ward to provide that the two aldermen are not up for reelection in the same year. A person may hold office for more than one term. A vacancy on the common council shall be filled as provided in § 9-13-14.1 or 9-13-14.2.

S.D.C.L. Ch. 9-9 delineates the method in which a City may run its government under a commissioner form of government. S.D.C.L. § 9-9-1 states:

> **Commission - Board - Composition.**
>
> Under the commission form, where a city manager is not employed, the board of commissioners shall consist of the mayor and two or four commissioners elected at large.

S.D.C.L. Ch. 9-11, entitled "Change of Form of Government," authorizes the way in which a city's form of government can change.

S.D.C.L. § 9-11-5 states:

> **Change by election.**
>
> The voters of any municipality may change its form of government or change the number of its commissioners, wards, or trustees by a majority vote of all electors voting at an election called and held as provided. Any municipality under special charter may adopt any form of government as provided in this title.

See also S.D.C.L. § 9-2-4.

The City of Martin utilizes an aldermanic form of government. Under South Dakota statute (S.D.C.L. § 9-11-5), only the resident voters of the City of Martin may change the form of government from aldermanic to a board of commissioners. City council members cannot institute this change, nor can the Court. Cane v. Worcester County, Maryland, I and II, 35 F.3d 921 (4th Cir. 1994); 59 F.3d 165 (4th Cir. 1995), S.D.C.L. §§ 9-2-4 and 9-11-5.

Furthermore, a change of government to at-large requires that only two or four commissioners serve on the board of commissioners. The district court ordered a six-member at-large form of government.

> Implicit in this first Gingles requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to

> force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives. Accordingly, we read the first threshold factor of Gingles to require that there must be a remedy within the confines of the state's judicial model that does not undermine the administration of justice.

Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc) (plurality opinion), see Id. at 1547 (Edmondson, J., concurring). "[U]nder Holder, federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies . . . Federal courts may not [ ]alter the state's form of government itself when they cannot identify 'a principled reason why an [alterative to the model being challenged] should be picked over another benchmark of comparison.'" Nipper at 1532. A court must give weight to and carefully consider the impact a remedial proposal would have on the state's statutes. Davis v. Chiles, 139 F.3d 1414, 1421 (11th Cir. 1998).

Plaintiffs argue that the Eighth Circuit Court of Appeals explicitly condoned Plaintiffs' Plan C as a viable option. The Eighth Circuit, however, authored footnote 7 of its opinion with an error in its understanding of South Dakota law. In footnote 7, the Eighth Circuit

stated that ". . . plaintiffs' at-large plan continues Martin's practice of staggering its *aldermanic* elections and maintains the current number of *aldermen*." Cottier v. City of Martin, 445 F.3d 1113, 1123 n. 7 (8th Cir. 2006) (emphasis added). In this portion of its opinion, the Eighth Circuit refers to an at-large plan as an "aldermanic" form of government. Under South Dakota law, any at-large municipal election plan is not and cannot be an "aldermanic" government. Under S.D.C.L. Ch. 9-8, aldermanic forms of government are clearly defined. Aldermanic governments in South Dakota are referred to as "common councils" which may consist of the mayor and two aldermen elected from and by the voters of each ward of the municipality. See S.D.C.L. § 9-8-4. Therefore, aldermen serve on a common council (often referred to as a "city council") and shall be elected from wards which district the city.

Under South Dakota law, at-large elections are not and cannot be run under an "aldermanic" form of government. Rather, at-large municipalities are inherently and by definition a "commission" form of government. See S.D.C.L. Ch. 9-9. Under the commission form of municipal government, a "board of commissioners" consists of the mayor

and "two or four commissioners elected at-large." See S.D.C.L. § 9-9-1. S.D.C.L. Ch. 9-9, the chapter entitled "Commissioner Form," is the pertinent governing body of law under our State's statutes governing at-large forms of municipal elections. Under South Dakota law, a commissioner (or "at-large") form of municipal government may only consist of two or four commissioners. See S.D.C.L. § 9-9-1.

South Dakota law addresses how such a commission (or "at-large") form of government shall be run. For instance, in determining terms of office after the adoption of a commissioner form of government, a municipality must follow S.D.C.L. § 9-9-3. This statute dictates how to set up terms for at-large municipalities having either two or four commissioners. Other such laws under S.D.C.L. Ch. 9-2 are, of course, specific to and rely upon the board of commissioners having two or four persons. See S.D.C.L. § 9-9-12. Other statutes under Ch. 9-9 allow for a three-or five-member board of commissioners. If such a method of governance is utilized, however, very specialized statutes govern these types of municipalities. See S.D.C.L. §§ 9-9-18, 9-9-19, 9-9-20, 9-9-21, 9-9-22, 9-9-23, 9-9-24, 9-9-25, 9-9-26, and 9-9-27. Nowhere under South Dakota statutes governing at-large municipalities did the legislature

allow for a six-member board of commissioners. See S.D.C.L. Ch. 9-9.

At-large elections are also allowed under a commission-governed municipality if a city manager is hired. See S.D.C.L. Ch. 9-10. If, however, a city manager is employed by the municipality, the number of commissioners "shall" be nine and their terms of office "shall" be three years. See S.D.C.L. § 9-10-05. Therefore, even if a city manager was forced upon the city of Martin,[2] the number of commissioners could not be six as Plaintiffs' propose.

Therefore, when this Court described Plaintiffs' at-large plan as "aldermanic," which maintains the current number of "aldermen," this basic understanding of such a form or government is distinctly at odds with South Dakota law. At-large plans cannot be and are not "aldermanic," but rather are by definition a "commission" form of government.

Thereafter, this Court stated, "[m]oreover, its current form of aldermanic government is by choice, not by legislative mandate," citing

[2] If this Court would choose to force the City of Martin to employ a city manager, it would be violating S.D.C.L. § 9-10-1. The Court would also be requiring the City to pay for the employment of a city manager when there has been no evidence that one is needed, no evidence that the City could possibly afford to employ such an employee, and no indication that the Plaintiffs would want or benefit from such as change.

S.D.C.L. §§ 9-11-5 and 9-11-6. This Court seemed to refer to these two statutes as if Plaintiffs' Plan C would continue the City of Martin's current aldermanic form of government. However, as illustrated above and made clear by South Dakota's statutes, to change from the current form of aldermanic governance to the at-large election ordered by the district court, the Court forced the City to change from a form of government governed under S.D.C.L. § 9-8 ("aldermanic form") to a form of government governed under the commissioner form—Chapter 9-9. This is precisely the change in a municipality's "form of government" that S.D.C.L. § 9-11-5 and 9-11-6 discuss and regulate. Therefore, by ordering Plaintiffs' proposed Plan C, the Court would be disregarding and violating S.D.C.L. § 9-11-5 and the other provisions of Ch. 9-11 and S.D.C.L. § 9-2-4 (requiring the present form of government of existing municipalities to be changed only as provided by the statutes discussed above). See also S.D.C.L. §§ 9-2-3, 9-11-7.

Furthermore, the district court ordered a new form of government which is a hybrid of South Dakota's commissioner form of government and aldermanic form of government, creating a deviation for the City of Martin that is not allowed for any other city or town in South Dakota.

Such a change in government is not contemplated by the VRA.

The district court ruled that the City, while a new hybrid of South Dakota municipalities, should govern itself by the common council statutes. Such a ruling is another example of the district court "using it imagination to fashion a new system" that is not allowed under South Dakota law. See Nipper at 1547. (Edmondson, J. concurring). The 27 statutes governing commissioner forms of municipalities and 11 statutes governing aldermanic forms of government give legal guidance to cities and towns across this state, instructing how to run the municipality. Neither chapter of South Dakota law apply to the new creation the Court created. Many differences exist between S.D.C.L. Chp. 9-8 and 9-9. Differences include when the city council or board of commissioners would not know when it must hold its regular meetings (see S.D.C.L. § 9-8-8 compared to S.D.C.L. § 9-9-11); if a president must be elected (see S.D.C.L. § 9-8-7 compared to § 9-9-7); if each commissioner and mayor must execute a bond (see S.D.C.L. § 9-9-5 as compared to no § 9-8 equivalent); if they have the power to summons and compel the attendance of witnesses and the production of books (see S.D.C.L. § 9-9-10 as compared to no 9-8 equivalent); if the mayor votes

(see S.D.C.L. § 9-8-3 as compared to § 9-9-7); whether the mayor can break ties (see S.D.C.L. § 9-8-3 compared to § 9-9-7); if the mayor has veto power (see S.D.C.L. § 9-9-7 compared to § 9-8-3); if commissioner or councilperson vacancies are filled (see S.D.C.L. § 9-9-6 compared to no 9-8 equivalent); if a vice president must be elected (see S.D.C.L. § 9-8-7 compared to 9-9-7); and numerous others. Thus the rationale behind the case law cited above rings true—Gingles set a "limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system." Nipper v. Smith, 39 F.3d 1494, 1547 (Edmondson, J. concurring).

Because there is no remedial plan that is proper or workable in this case, the district court lacked the power or authority to impose a remedy upon the City of Martin. "Even if a plaintiff minority group is otherwise able to establish a violation of § 2 of the Voting Rights Act, judgment must be entered for the defendants if the court determines that it lacks the power or authority to impose a remedy upon the state." Mallory v. Ohio, 38 F.Supp. 2d at 576; affm'd 173 F.3d 377 (6th Cir. 1999)(adopting the district court's opinion as its own); citing Nipper, 39 F.3d at 1546-47, Southern Christian Leadership Conf. of Alabama,

56F.3d 1281, 1298, 1297 (11th Cir. 1995) (holding that the interests in retaining the current form of government outweigh any vote dilution shown, and the state's interest in maintaining the challenged system is a legitimate factor to consider); Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998) (holding that cumulative voting is an inappropriate remedy for a Section 2 claim).

> The Court may not intrude upon state policy any more than necessary. Federal Courts should follow policies expressed in state statutory and constitutional provisions whenever adherence to state policy would not detract from Federal Constitutional requirements. Any remedy to be fashioned in this case must: (1) be district specific, that is, the remedy may be imposed only in those specific districts where violations have been proven, and (2) follow state policies except to the limited extent necessary to remedy the Federal violations.

Mallory, 38 F.Supp. 2d at 576 (internal citations and quotations omitted).

As far as Defendants can ascertain, cumulative voting has never been ordered by a federal court in the nation as a § 2 remedy without such an order being reversed by a court of appeals. As discussed above, the Fourth Circuit struck down cumulative voting as a remedy to a § 2 violation in Cane v. Worchester County. Cane I and II, 35 F.3d 921; 59

F.3d 165. When confronted with the same issue, the Sixth Circuit did the same. Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998). The Fifth Circuit also struck down cumulative and limited voting as an appropriate remedy to a § 2 violation. LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc). When addressed with the same issue, the Eleventh Circuit held in accord. Nipper, 39 F.3d 1542-47. According to the City's research, no appeals court in the nation has allowed cumulative or limited voting to be imposed as a remedy to a § 2 violation.

The Sixth Circuit held that cumulative voting is an inappropriate remedy for a § 2 claim. Cousin at 829.

> Section 2 of the Voting Rights Act specifically precludes its use to achieve proportional representation. See 42 U.S.C. § 1973(b) ("Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). See also White v. Alabama, 74 F.3d 1058, 1071-3 (11th Cir. 1996) (holding that the Voting Rights Act cannot be used as a vehicle for achieving proportional representation in Alabama's appellate courts). Yet this is precisely the effect and, proponents would argue, the strength of cumulative voting as a remedy. See Lani Guinier, The Tierney of the Majority 14-5 (1994); Pamela Karlan, Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L.Rev. 173, 231-6 (1989). The imposition of cumulative voting is thus meant to achieve an end not contemplated in Voting

Rights Act.

Id. at 829.

Mallory v. Ohio held in accord. 38 F.Supp.2d 525, 576 (S.D. Ohio 1997); affm'd 713 F.3d 377 (6th Cir. 1999) (adopting the district court's opinion as its own). The Sixth Circuit held in Mallory that courts are prohibited from altering a state's judicial election system by replacing it with a system of cumulative voting. Id. at 576. "In imposing a remedy, the Court lacks the power or authority to fashion a remedy that would alter the structure of the State of Ohio's judicial branch of government." Id.

The Mallory court not only struck down cumulative voting, but at-large limited voting as well. "A 'limited voting' scheme, under which a voter is entitled to cast a number of votes less than the number of positions open, is also an inappropriate remedy because it contravenes Ohio's election laws and 'most general concepts of a democratic-party system." Id. at 577; citing Martin v. Mabus, 700 F.Supp. 327, 337 (S.D. Miss. 1988). The Mallory court found that it lacked the power and authority to impose a remedy because it would impermissibly alter the structure of Ohio's judicial system. Mallory at 578.

The district court relied on guidance from Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000) to hold that it could order cumulative voting if no other remedy was effective or viable. Harper, however, was a case in Illinois, where Illinois statutes and Municipal Code allowed for cumulative voting. Id. at 601-602. There is no such explicit language in South Dakota authorizing cumulative voting under either South Dakota statute or City of Martin ordinances. The Harper opinion relied heavily on the fact that cumulative voting was an election method available under Illinois law and thus, by considering implementing cumulative voting, the court was "demonstrating suitable deference to the legislative body." Id. at 602. Ultimately, however, the Seventh Circuit reversed the lower court's implementation of cumulative voting not only because the court did not explain why one of the state's authorized systems of government would not work, but also because the district court had not submitted the cumulative plan to the voters. Id. at 601. Like South Dakota, Illinois law requires cities to adopt, alter, or repeal a form of government only through the referendum process. Id. at 597. Therefore, the Seventh Circuit held that any cumulative voting plan ordered must first be submitted to the

voters by referendum as Illinois law would require. Id. at 601. Ultimately, the Harper district court adopted a remedial plan with single-member districts. Harper v. City of Chicago Heights, 2006 WL 695259 (N.D. Ill. 2006).

The Harper case is not applicable to this case, as South Dakota does not allow for cumulative (or limited) voting under its statutes. Moreover, the district court did not submit the remedial plan to a vote of Martin City residents as required under S.D.C.L. § 9-11-5 and the Seventh Circuit case law as held in Harper. 223 F.3d at 601. Rather, as far as the City can ascertain, the district court was the first court in the land to order cumulative voting as a remedy to a § 2 violation, and did so outside of South Dakota law and any case law justifying such a remedy.

Because there is no remedial plan that is proper or workable in this case, this Court must find that the district court lacked the power or authority to impose a remedy upon the City of Martin. "Even if a plaintiff minority group is otherwise able to establish a violation of § 2 of the Voting Rights Act, judgment must be entered for the defendants if the court determines that it lacks the power or authority to impose a

remedy upon the state." Mallory v. Ohio, 38 F.Supp. 2d at 576; affm'd 173 F.3d 377 (6th Cir. 1999)(adopting the district court's opinion as its own); citing Nipper, 39 F.3d at 1546-47.

This Court wisely held in Stabler that plaintiffs do not establish a § 2 violation when there is no workable or effective remedy available. Id. at 1025. Under this Court's precedent, as well as the Fourth, Fifth, Sixth, and Eleventh Circuits, the City requests that this Court reverse the district court, finding that the district court lacked the power or authority to impose a remedy upon the City of Martin.

CONCLUSION

For all of the reasons set forth above, Appellants requests the Court reverse the district court's judgment in favor Plaintiffs and award Appellants their costs and expenses on appeal.

Dated this 9th day of May, 2007.

Respectfully submitted,

GUNDERSON, PALMER,
GOODSELL & NELSON, LLP

By _____
Sara Frankenstein

Donald P. Knudsen
Attorneys for Appellants
City of Martin, Todd
Alexander, Rod Anderson,
Scott Larson, Don Moore,
Brad Otte, and Molly Risse
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, version 2002, SP-2, in Century, 14 font.

Pursuant to Local Rule 38A(d), the undersigned counsel certifies that the file copied to the CD-ROM has been scanned for viruses and is virus free.

GUNDERSON, PALMER,
GOODSELL & NELSON, LLP

By_____
Sara Frankenstein
Donald P. Knudsen
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May 2007, I sent by U.S. mail postage prepaid, ten true and correct copies of the Brief of Appellants City of Martin, Todd Alexander, Rod Anderson, Scott Larson, Don Moore, Brad Otte, Molly Risse, in their official capacities as member of the Martin City Council; Janet Speidel in her official capacity as Finance Officer of the City of Martin to:

Mr. Michael E. Gans, Clerk of Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse, Rm. 24.329
111 South 10th Street
St. Louis, MO 63102

and two correct copies to:

Mr. Bryan Sells
American Civil Liberties Union Foundation
2725 Harris Tower, 233 Peachtree Street, NE
Atlanta, GA 30303

Mr. Patrick Duffy
Duffy & Duffy
629 Quince Street, Suite 105
Rapid City, SD 57709

GUNDERSON, PALMER, GOODSELL
& NELSON, LLP

By_____
Sara Frankenstein
Donald P. Knudsen
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078