No. 07-1628

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Pearl Cottier and Rebecca Three Stars,
Plaintiffs-Appellees,

v.

City of Martin, et al.,
Defendants-Appellants

On Appeal from the United States District Court
for the District of South Dakota

APPELLEES' BRIEF

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SUMMARY OF THE CASE

This is a voting-rights challenge to the aldermanic ward boundaries in the City of Martin, South Dakota. At issue is the plaintiffs' claim that the boundaries diluted Native American voting strength in violation of Section 2 of the Voting Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. On remand from this Court, *see Cottier v. City of Martin,* 445 F.3d 1113 (8th Cir. 2006) ("*Cottier I*"), the district court issued a 49-page ruling in which it concluded that the boundaries violated Section 2. The defendants now appeal the district court's judgment in the plaintiffs' favor and the court's subsequent order implementing a remedy.

Although the defendants make many contentions in their brief, the central question of this appeal is whether the district court's ultimate finding of vote dilution is clearly erroneous. Because that question is easily resolved on the basis of *Cottier I* and the district court's thorough and meticulous fact-finding on remand, the plaintiffs submit that no oral argument is necessary. Should the Court choose to hear oral argument, no more than ten

minutes of argument per side will be necessary to address the most salient issues.

CORPORATE DISCLOSURE STATEMENT

Neither Pearl Cottier nor Rebecca Three Stars, the two plaintiffs and appellees in this case, is a nongovernmental corporation to which the corporate disclosure requirements apply. *See* Fed. R. App. P. 26.1(a).

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STATEMENT OF THE ISSUES

This appeal by the City of Martin and various city officials raises two main issues:

1. Ultimate Finding of Vote Dilution. The United States Supreme Court has held that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a district court's ultimate finding of vote dilution under Section 2 of the Voting Rights Act. The district court in this case found, after a thorough review of the evidence, that the City of Martin's aldermanic ward boundaries did, in fact, dilute Native American voting strength. Is that finding clearly erroneous?

Most apposite cases:

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

Johnson v. De Grandy, 512 U.S. 997 (1994)

Harvell v. Blytheville Sch. Dist. No. 5,
71 F.3d 1382 (8th Cir. 1995) (en banc)

2. Remedial Order. This Court previously held that the plaintiffs' three illustrative redistricting plans were proper and workable remedies for the alleged vote dilution and noted that the

district court had discretion to implement any of the plaintiffs' plans as a remedy if the court found in the plaintiffs' favor on remand. The district court did find in the plaintiffs' favor on remand and chose one of the plaintiffs' plans as the remedy. Was that choice an abuse of discretion?

Most apposite cases:

Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006).

STATEMENT OF THE CASE

In this appeal from the United States District Court for the District of South Dakota, the City of Martin and various city officials seek to reverse the district court's ruling that the city's aldermanic ward boundaries diluted Native American voting strength in violation of Section 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. The defendants also appeal the district court's remedial order.

Two Native American voters filed this action on April 3, 2002, challenging the constitutionality of the aldermanic ward boundaries in the City of Martin. (City's Sep. App. 1.) After a brief hearing on the plaintiffs' motion for a preliminary injunction, the district court dismissed the complaint as moot because the city had changed its ward boundaries while the case was pending. (City's Sep. App. 9-10.) The plaintiffs then sought and were granted permission to file a supplemental complaint challenging the amended boundaries, which are the boundaries at issue in this appeal. (City's Sep. App. 17.)

The supplemental complaint alleged that the amended ward boundaries dilute Native American voting strength in the City of Martin in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and were adopted for a discriminatory purpose in violation of Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the United States Constitution. (City's Sep. App. 22-23.)

After the completion of discovery, the district court held a nonjury trial on the plaintiffs' claims over eleven days in June and July 2004. (City's Sep. App. 27-52.) On March 22, 2005, the court issued a memorandum opinion and order in which it found that the plaintiffs had succeeded in establishing numerosity and minority political cohesiveness, the first and second factors identified as probative of vote dilution in *Thornburg v. Gingles*, 478 U.S. 30 (1986), but had failed to establish the third: legally significant racially polarized voting. (City's Sep. App. 73, 103, 127.) The court concluded on the basis of that finding that the plaintiffs could not

prevail on either of their claims, and it consequently entered judgment in favor of the defendants. (City's Sep. App. 127, 130.)

The plaintiffs appealed. (City's Sep. App. 131.) This Court held that the plaintiffs had, in fact, established all three of the *Gingles* factors and remanded the case to the district court for further proceedings on the plaintiffs' Section 2 claim. *Cottier v. City of Martin,* 445 F.3d 1113 (8th Cir. 2006) (City's Sep. App. 138-52).

On remand, the district court ruled in favor of the plaintiffs and gave the defendants 30 days within which to propose a remedy. *Cottier v. City of Martin,* 466 F. Supp. 2d 1175 (D.S.D. 2006) (City's Add. 1-49). The defendants declined, arguing instead that no remedy was possible. (City's Add. 50.) The district court then issued a remedial order and entered judgment for the plaintiffs. *Cottier v. City of Martin,* 475 F. Supp. 2d 932 (D.S.D. 2007) (City's Add. 50-69).

This appeal followed.

STATEMENT OF THE FACTS

1. The City of Martin adopts Ordinance 122.

Martin is a small city in southwestern South Dakota. (City's Add. 2.) It lies at the center of Bennett County, which is surrounded to the north and west by the Pine Ridge Indian Reservation and to the east by the Rosebud Reservation. (City's Add. 2.) Native Americans make up approximately 45% of the city's total population and 36% of the city's voting-age population. (City's Add. 2.)

Martin has a well-documented history of racial conflict between Indians and whites. (City's Sep. App. 139.) In the mid-1990s, for example, Martin saw a series of protests over a racially offensive homecoming tradition that depicted Native Americans in a demeaning and stereotypical way. (City's Add. 17; City's Sep. App. 139.) Also in the mid-1990s, the United States Department of Justice sued and later entered into a consent decree with the local bank over alleged discrimination against Native Americans in the bank's lending and hiring practices. (City's Add. 17; City's Sep.

App. 139.) In early 2002, conflict resolution specialists from the Justice Department came to Martin in an attempt to quell rising hostility over claims of racial discrimination against Native Americans by the local sheriff and his deputies. (City's Sep. App. 139.)

It was against this backdrop of racial tension in the winter and spring of 2002 that Martin adopted the redistricting plan at issue in this appeal. (City's Sep. App. 140.) That plan, known as Ordinance 122, divided the city into three wards. (City's Sep. App. 138.) Each ward elected two aldermen to staggered two-year terms on the city council, and all three wards contained a white supermajority of at least 62%. (City's Sep. App. 138, 140 n.2.) *See* Table 1.

Table 1
Total population and voting-age population (VAP) under Ordinance 122

Ward	Total Population	Indian Population	Percent Indian	VAP	I ndian VAP	Percent Indian VAP
1	352	165	46.88%	236	90	38.14%
2	361	177	49.03%	237	86	36.29%
3	365	143	39.18%	264	90	34.09%
Total	1078	485	44.99%	737	266	36.09%

Source: *Cottier v. City of Martin,* 466 F. Supp. 2d 1175, 1180 (D.S.D. 2006) (City's Add. 4).

In an attempt to prevent the city from implementing the newly adopted plan, Indian voters submitted a petition seeking to refer Ordinance 122 to the voters as a ballot issue in the next municipal election. (City's Add. 5.) Martin's Finance Officer, Janet Speidel, reviewed the petition more than a week before the petitioning deadline and determined that it fell 11 signatures short of the required number. (City's Add. 5; Trial Tr. 2124.) Speidel didn't notify the petitioners of the deficiency, however, until the deadline had passed – thus depriving them of the ability to collect more signatures. (City's Add. 5.)

The petition failed, and Ordinance 122 went into effect on May 8, 2002. (City's Add. 4.)

2. Indian voters challenge Ordinance 122.

Shortly after it became law, two Indian voters and residents of Martin challenged Ordinance 122 in the district court. (City's Sep. App. 18.) They alleged that the redistricting scheme had the purpose and effect of diluting Native American voting strength in violation of the Fourteenth and Fifteenth Amendments to the

United States Constitution and Section 2 of the Voting Rights Act of 1965. (City's Sep. App. 22-23.)

> Section 2 provides as follows:
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority], as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

After the completion of discovery, the district court held a nonjury trial on the plaintiffs' claims over 11 days in June and July 2004. (City's Sep. App. 27-52.)

3. The district court initially rules for the defendants.

The district court ruled in the defendants' favor. The court first considered whether the plaintiffs had established, by a preponderance of the evidence, the three factors that the Supreme Court identified in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), as generally necessary to succeed on a vote-dilution claim under Section 2:

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

Id. (internal citations omitted). The court found that the plaintiffs had established the first and second *Gingles* factors but had failed to establish the third. (City's Sep. App. 61-127.)

With respect to the first *Gingles* factor, the district court found that the plaintiffs had submitted two illustrative redistricting plans, Plan A and Plan B, which demonstrated that Native Americans in Martin are sufficiently numerous and compact to constitute an effective majority of at least 65% of the total population in at least one ward. (City's Sep. App. 67.) The court rejected the defendants' argument that the Indian majorities in Plans A and B were too fragile to constitute a workable remedy, finding instead that the wards proposed by Plans A and B were neither fragile nor unworkable. (City's Sep. App. 69.) The court also rejected the defendants' argument that Plans A and B were unconstitutional racial gerrymanders. (City's Sep. App. 70-73.) The court found that the plaintiffs' demographer had used traditional race-neutral districting principles when drawing the plans and that none of the wards looked so irregular on their face as to warrant strict scrutiny. (City's Sep. App. 70-73.) Finally, the court noted that the plaintiffs had introduced a third illustrative plan, Plan C, which proposed at-large elections for aldermen using a limited voting system. (City's

Sep. App. 73.) Although Plan C would provide Indian voters with an opportunity to elect two aldermen to the city council, the district court concluded that the plan did not satisfy the first *Gingles* factor because the court didn't have the authority to order such a plan into effect as a possible remedy. (City's Sep. App. 73.)

With respect to the second *Gingles* factor, the district court found that the statistical evidence offered by both parties demonstrated "significant cohesion among Indian voters." (City's Sep. App. 92.) The court also surveyed the parties' nonstatistical evidence of cohesion, including numerous historical documents and the testimony of lay witnesses, before finding that Indians in Martin are politically cohesive and that the plaintiffs had therefore satisfied the second *Gingles* factor. (City's Sep. App. 95-103.)

In analyzing the third *Gingles* factor, the district court gave no weight to the results of any of the three elections held under Ordinance 122 by the time of trial. (City's Sep. App. 106.) The court examined only the results of an exit poll conducted by the plaintiffs at the 2003 aldermanic elections but gave the poll no weight

because white voters had participated in the poll at a much lower rate than Indian voters. (City's Sep. App. 94-94, 106.) Instead, the district court relied exclusively on national, state, and county elections held in Bennett County between 1996 and 2002 and found that the results of those elections did not establish that white voters in Martin usually defeat the candidates preferred by Indian voters. (City's Sep. App. 106-27.)

The district court concluded on the basis of those findings that the plaintiffs couldn't prevail on their "effects" claim under Section 2. (City's Sep. App. 127.) The court further concluded that, because the plaintiffs' "purpose" claim required proof of a discriminatory effect, the plaintiffs couldn't prevail on their claim that the city adopted Ordinance 122 for the purpose of diluting the Indian vote. (City's Sep. App. 127.) Finally, the court found in the alternative that there wasn't enough evidence to prove that the defendants had adopted Ordinance 122 for a discriminatory purpose. (City's Sep. App. 128-30.)

The district court then entered judgment for the defendants (City's Sep. App. 130), and the plaintiffs appealed (City's Sep. App. 131-33).

4. The Eighth Circuit reverses.

On appeal, this Court held that the plaintiffs had, in fact, established the third *Gingles* factor and that the district court's decision to the contrary erred in three respects. (City's Sep. App. 146.) First, the district court erred when it rejected the plaintiffs' exit poll, the results of which "clearly showed racial polarization." (City's Sep. App. 150.) Second, it was error for the district court to ignore the 2002, 2003, and 2004 aldermanic elections, the results of which revealed that every one of the Indian-preferred candidates in those elections was defeated. (City's Sep. App. 148.) Third, the district court erred in relying exclusively on the results of national, state and county elections which were not probative in determining whether Ordinance 122 denied Indian voters an equal opportunity to elect their preferred candidates for alderman. (City's Sep. App. 148-49.) The Court found that the results of the most probative

elections, those aldermanic elections held under Ordinance 122, established the third *Gingles* factor and provided "striking proof of vote dilution in Martin." (City's Sep. App. 148.)

The Court also rejected the defendants' argument that the district court erred when it found that the plaintiffs satisfied the first and second *Gingles* factors. (City's Sep. App. 142-52.) The defendants argued again that Plans A and B were fragile and unworkable, but the Court agreed with the district court that the plans were neither. (City's Sep. App. 143, 152.) The Court also agreed with the district court's finding that Plans A and B weren't racially gerrymandered. (City's Sep. App. 144.) With respect to the second *Gingles* factor, the Court found that the statistical and nonstatistical evidence in the record presented "clear" proof of political cohesion among Native American voters. (City's Sep. App. 145.)

Finally, the Court affirmed the district court's conclusion on the plaintiffs' "purpose" claim. (City's Sep. App. 149-50.) The Court found that the evidence in the record simply wasn't sufficient to

support a finding of discriminatory purpose (City's Sep. App. 149-50), but the Court didn't reach the district's alternative holding that a discriminatory-purpose claim requires proof of a discriminatory effect (City's Sep. App. 149).

Finding that the plaintiffs had established all three *Gingles* factors, the Court reversed the district court's decision and remanded the case with the following instructions:

> [W]e remand the matter to the district court with instructions to initially determine whether, in view of the fact that plaintiffs have met all three *Gingles* preconditions, the plaintiffs are entitled to relief in light of the totality of the circumstances. . . . In the event the district court finds that under the totality of the circumstances, the plaintiffs are entitled to relief, the district court shall devise and implement a remedy that will give Native-Americans in Martin a reasonable opportunity to elect Indian-preferred candidates to alderman. In so doing, the defendant shall be given an opportunity to propose a remedy within a specified amount of time. *See Cane v. Worcester County,* 35 F.3d 921, 927 (4th Cir. 1994). The court should then review the proposed order to determine whether it is "legally unacceptable." *Id.* If the defendant fails to propose a legally acceptable remedy, the district court shall devise a plan that ensures that Indian-preferred candidates have a reasonable chance of prevailing in Martin municipal elections for alderman. Among its options, the district court has the discretion to implement any of the three plans presented by the plaintiffs.

(City's Sep. App. 151-52 (footnote omitted).) The Court further noted that it disagreed with the district court's assertion that it lacked authority to implement the plaintiffs' Plan C as a possible remedy, finding instead that Plan C "would be a viable option." (City's Sep. App. 152 n.7.)

5. The district court rules for the plaintiffs on remand.

On remand, the district court applied the "totality of the circumstances" test set forth in Section 2. (City's Add. 9.) The court examined each of the nine factors that, according to the Senate Report on the 1982 amendments to the Voting Rights Act, are potentially relevant to a totality-of-the-circumstances analysis:

> (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or subdivision is racially polarized; (3) the extent to which the state or subdivision has used voting practices or procedures that tend to 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 minorities have borne the effects of past discrimination in relation to education, employment, and health; (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.

(City's Add. 9 (quoting *Cottier I,* 445 F.3d at 1122).) Collectively, these are known as the "Senate factors." The district court also considered one additional factor, "proportionality," that the Supreme Court has found to be relevant to the totality of the circumstances. (City's Add. 9-10.) The court found that seven of the ten totality factors weighed in the plaintiffs' favor. (City's Add. 10-47.)

A. The History of Discrimination

With respect to the first Senate factor, the district court found that "South Dakota, Bennett County, and Martin all have a history of discrimination against Indians that touches Indians' ability to register, to vote, and to actively participate in the political process." (City's Add. 18.) The court based that finding primarily on the extensive findings of statewide voting discrimination in *Bone Shirt v. Hazeltine,* 336 F. Supp. 2d 976, 1019-23 (D.S.D. 2004), *aff'd* 461

F.3d 1011 (8th Cir. 2006), which the court expressly incorporated into its opinion. (City's Add. 11-12, 17.) The court in *Bone Shirt* found, for example, that South Dakota had officially excluded Indians from voting and holding office until the 1940s. (City's Add. 11.) The court in *Bone Shirt* also noted several instances of more recent discrimination against Indians by the State of South Dakota and political subdivisions within the state, including purposeful efforts to deny Indians the right to vote. (City's Add. 11, 12.)

The defendants argued that any history of discrimination by the State of South Dakota or Bennett County is irrelevant to the first Senate factor because it does not focus specifically on the City of Martin. (City's Add. 12.) The district court disagreed. (City's Add. 13.) It found not only that the city had its own unique history of discrimination against Native Americans, including purposeful discrimination, but also that Martin was "not an island" in the state's history of discrimination. (City's Add. 15.)

Based on all of those findings, the court concluded that the first Senate factor weighed in the plaintiffs' favor. (City's Add. 18.)

B. The Extent of Racially Polarized Voting

The district court found that "there is a persistent and unacceptable level of racially polarized voting in the City of Martin." (City's Add. 19.) The court described that polarization as "high" and "overwhelming." (City's Add. 22, 23.)

The district court based its conclusion partly on this Court's findings in *Cottier I.* (City's Add. 19.) Specifically, the court relied on the fact that the Indian-preferred candidate had lost in every aldermanic election held under Ordinance 122. (City's Add. 19.) The court also relied on the fact that the results of the plaintiffs' exit poll in the 2003 aldermanic elections showed clear evidence of racial polarization. (City's Add. 19-20.) The court found that this evidence, in combination, "strongly indicates racially polarized voting" in aldermanic elections. (City's Add. 20.)

The district court also based its conclusion on the parties' statistical evidence. (City's Add. 20-22.) The plaintiffs' statistical analyses revealed racial polarization in voting that was both pervasive and severe. (City's Add. 21-22.) Notably, the plaintiffs'

analyses revealed that the average white crossover vote for the Indian-preferred candidate decreased from a low 29% to an even lower 11% whenever an Indian candidate was in the field. (City's Add. 22.) The defendants' statistical analyses revealed the same pattern of pervasive and severe polarization. (City's Add. 22.)

Finally, the district court based its conclusion on lay witness and expert witness testimony that described an "Indian-versus-white mentality" in recent elections. (City's Add. 22-23.) Pearl Cottier, for example, testified that white and Indian voters are separated and that white voter turnout increases whenever an Indian candidate runs for office. (City's Add. 23.)

The district court rejected the defendants' assertion that their witnesses' testimony established the absence of polarization in Martin. (City's Add. 23.) The court observed that the defendants were making too much of the testimony and that, if interpreted as the defendants' suggested, in would be "incredible because it conflicted with the statistical evidence, which shows overwhelming levels of racially polarized voting." (City's Add. 23.)

The court ultimately found that the second Senate factor weighed "heavily" in the plaintiffs' favor. (City's Add. 24.)

C. Other Potentially Dilutive Voting Practices

The district court found that Martin used staggered terms for aldermanic elections and that this practice increased the likelihood of vote dilution under Ordinance 122 by preventing Native Americans from engaging in single-shot voting. (City's Add. 24-26.) The court also found that Martin had used a majority-vote requirement in aldermanic elections but that the city repealed that provision just before trial. (City's Add. 26.) On balance, the court concluded that the third Senate factor weighed slightly in the plaintiffs' favor. (City's Add. 26.)

D. Access to a Candidate Slating Process

The district court found that there was no formal or informal candidate slating process for candidates seeking election as an alderman in Martin and consequently that no Native Americans in Martin had been denied access to any candidate slating process. (City's Add. 28.) The court concluded on that basis that the fourth Senate factor weighed in the defendants' favor. (City's Add. 28.)

E. The Effects of Past Discrimination

Evidence of the socioeconomic disparities between Indians and non-Indians was largely undisputed. The district court examined socioeconomic data from the 2000 Census and identified a host of factors on which Native Americans in Martin lagged behind their white counterparts. (City's Add. 30-34.) Based on this "overwhelming evidence," the district court found that "burdens of discrimination still affect the education, employment, and health of Indians in Martin." (City's Add. 32.) The district court also found that Indians in Martin suffer from depressed participation in the political process, relying in particular on evidence of depressed turnout and severe underrepresentation among the city's pollworkers. (City's Add. 33-34.)

Based on those findings, the court concluded that the fifth Senate factor weighed in the plaintiffs' favor. (City's Add. 34.)

F. Racial Appeals

The district court found that there was some evidence of racial appeals in elections in South Dakota. (City's Add. 36.) The court noted in particular that the local newspaper in Martin ran articles

suggesting that Native Americans were engaged in voter fraud "even though there was no evidence of fraudulent activity." (City's Add. 35.) Ultimately, however, the court gave this factor little weight because most of the racial appeals involved elections outside of Martin. (City's Add. 36.) The court concluded that the sixth Senate factor weighed in favor of neither the plaintiffs nor the defendants. (City's Add. 36.)

G. Lack of Indian Elected Officials

Relying primarily on the defendants' own evidence, the district court found that "Indians have rarely been elected to the Martin City Council." (City's Add. 36.) There were 80 elections for the city council between 1981 and 2002 and only seven successful Indian candidacies. (City's Add. 37.) Only two of those successes, however, came in contested elections, and three of the five uncontested elections involved incumbents running for reelection. (City's Add. 37.) And one of the successful Indian candidates was not the Indian-preferred candidate in that election. (City's Add. 36.) As a

result, the court found that the seventh Senate factor weighed in the plaintiffs' favor. (City's Add. 38.)

H. Unresponsiveness

Evidence of the eighth Senate factor was mixed. (City's Add. 43.) On the one hand, the district court found that the city had provided some funding to two programs that primarily benefitted Indians. (City's Add. 43.) On the other hand, however, the city council had disregarded Indian concerns about both Ordinance 122 and the local sheriff. (City's Add. 39-40, 41-43.) The court further found that Martin's Finance Officer, Janet Speidel, had engaged in an intentional effort to stop Indian efforts to refer Ordinance 122 to the voters. (City's Add. 41.) On balance, the court concluded that the eighth Senate factor weighed slightly in the plaintiffs' favor. (City's Add. 43.)

I. Tenuousness

The district court found that Martin's policy for adopting Ordinance 122 "was to effect redistricting following the 2000 census and comply with the one-person-one-vote requirement imposed by federal law." (City's Add. 44-45.) The court further

found that Ordinance 122 was not tenuously related to that policy and, as a result, that the ninth Senate factor weighed in the defendants' favor. (City's Add. 46.)

J. Lack of Proportionality

Finally, the district court found that Ordinance 122 lacked proportionality in that it gave Indian voters control over a disproportionately small number of seats on the city council: zero. (City's Add. 47.) Although Indians comprise approximately 45% of the Martin's total population and approximately 36% of the city's voting-age population, Ordinance 122 gave Indians a majority in none of the three wards. (City's Add. 47.) A more proportional system, the court noted, would give Indians a majority in one of the three wards. (City's Add. 47.) The court thus concluded that the lack of proportionality was another factor that weighed in the plaintiffs' favor. (City's Add. 47.)

K. Ultimate Finding of Vote Dilution

After reviewing each of the factors in its analysis, the district court found, based on the totality of circumstances, that "Ordinance 122 creates a districting plan that fragments Indian

voters among all three wards, thereby giving Indians 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973." (City's Add. 47-48.) Accordingly, the court concluded that the plan "impermissibly dilutes the Indian vote and violates § 2 of the VRA." (City's Add. 48.)

6. The district court implements a remedial plan after the defendants decline to do so.

After finding a violation of Section 2, the district court gave the defendants the first opportunity to propose a remedy. (City's Add. 48.) The defendants declined, arguing instead that there was no workable and proper remedy possible in this case. (City's Add. 50.) The district court disagreed and, in February 2007, issued a remedial order enjoining the defendants from using Ordinance 122 in future elections and adopting the plaintiffs' Plan C as "the most equitable remedy in this case." (City's Add. 68.)

Under Plan C, Martin retains its six-member city council. (City's Add. 52.) Plan C also retains Ordinance 122's two-year terms and staggered elections, with three aldermen elected each year.

(City's Add. 52.) Plan C differs from Ordinance 122 only in that it requires the city to use cumulative voting and at-large elections for aldermen instead of Ordinance 122's dilutive dual-member ward system. (City's Add. 52.)

Although the defendants' expert political scientist testified at trial that Plan C would be a good system for the City of Martin (Trial Tr. 1191-93), the defendants themselves objected to it. They argued that state law prevented the district court from implementing cumulative voting and at-large elections, but the district court disagreed. (City's Add. 54-55.) Noting that this Court had explicitly approved Plan C as a "viable option" at the remedy stage, the district court concluded that it had discretion to adopt Plan C: "The Eighth Circuit's decision on this matter is the law of the case, and this court is bound to follow it." (City's Add. 55.)

Before settling on Plan C, however, the district court weighed five factors to assess the plan's particular suitability as the remedy in this case. (City's Add. 51-68.) Among other things, the court found that Plan C would give Indian voters in Martin "a strong

chance" of electing one alderman in each election cycle (City's Add. 52) and that the plan would therefore correct the vote dilution caused by Ordinance 122 (City's Add. 54). In fact, the court concluded that Plan C was the only plan that would correct the vote dilution in this case because, according to the court, neither Plan A nor Plan B was a workable and effective remedy. (City's Add. 57, 61-62.) The district court also observed that Plan C "respects the legislative policies of both South Dakota and Martin by preserving as much of Ordinance 122 as possible." (City's Add. 66.) Ultimately, the court concluded that Plan C complied with all of the relevant remedial standards.

Finally, the district court noted that "Plan C has several distinct advantages." (City's Add. 67.) Because it uses an at-large system, Plan C eliminates constitutional concerns about racial gerrymandering. (City's Add. 67.) The at-large system also eliminates the need to redistrict after each decennial census. (City's Add. 67.) And Plan C makes it easier to find candidates because

eligibility isn't restricted to those living within a specific ward. (City's Add. 67-68.)

On balance, the court concluded that Plan C was the most equitable remedy available and ordered the defendants to implement it. (City's Add. 68.)

SUMMARY OF THE ARGUMENT

The defendants make many contentions in their brief, but the main question for decision on appeal is whether the district court's ultimate finding of vote dilution is clearly erroneous. It is not. The voluminous trial record contains more than enough evidence to support the district court's finding. Indeed, the most striking proof of vote dilution isn't even at issue in this appeal because it's the law of the case: not a single Indian-preferred candidate for alderman ever won election under Ordinance 122. *See Cottier v. City of Martin,* 445 F.3d 1113, 1122 (8th Cir. 2006). The district court's ultimate finding of vote dilution rests firmly on this Court's decision in *Cottier I* as well as its solid review of other relevant factors in its totality-of-the-circumstances analysis.

Once the district court found vote dilution, moreover, it had an obligation to devise and implement a remedy. In doing so, the court did not abuse its discretion when it chose a remedial plan that this Court had already identified as a permissible option. The

court's own independent analysis of the plan's relative merits in the unique circumstances of this case further supports its choice.

For these reasons, this Court should affirm the district court's judgment for the plaintiffs and uphold its remedial order.

STANDARDS OF REVIEW

This Court reviews a district court's ultimate finding of vote dilution, like all findings of fact, for clear error. *League of United Latin Am. Citizens v. Perry,* 126 S. Ct. 2594, 2614 (2006); *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986); *Bone Shirt v. Hazeltine,* 461 F.3d 1011, 1017 (8th Cir. 2006); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (en banc); *see also* Fed. R. Civ. P. 52(a). Under this deferential standard, a district court's choice between two permissible views of evidence cannot be clearly erroneous. *Tadlock v. Powell,* 291 F.3d 541, 546 (8th Cir. 2002). Rather, the Court may overturn a factual finding only if the finding is not supported by substantial evidence in the record, if the finding is based on an erroneous view of the law, or if the court is left with the definite and firm conviction that an error was made. *United States v. Vertac Chem. Corp.,* 453 F.3d 1031, 1039 (8th Cir. 2006), *cert. denied sub nom. Hercules Inc. v. United States,* 127 S. Ct. 2098 (2007). And the Court must always give due regard to the district court's opportunity to judge the credibility of the witnesses. Fed. R.

Civ. P. 52(a). Even greater deference is owed to the district court's findings of fact when those findings are based on determinations regarding the credibility of witnesses. *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985).

When reviewing a district court's remedial order in a voting-rights case, this Court must apply the abuse-of-discretion standard. *Connor v. Finch,* 431 U.S. 407, 414 (1977); *Bone Shirt,* 461 F.3d at 1017. An abuse of discretion occurs only if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors. *Aaron v. Target Corp.,* 357 F.3d 768, 774 (8th Cir. 2004). "The abuse of discretion standard means that a court has a range of choices, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Id.* (internal citation and quotation marks omitted).

ARGUMENT

I. The district court's ultimate finding of vote dilution is not clearly erroneous.

The district court's ultimate finding of vote dilution rests on firm footings. The voluminous record in this case provides ample evidentiary support for the district court's finding that Ordinance 122 gave Indian voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). (City's Add. 48.)

First and foremost, the district court's finding rests on this Court's decision in *Cottier I.* This Court held that the plaintiffs had established all three elements that are generally necessary to succeed on a vote-dilution claim. *Cottier I*, 445 F.3d at 1122. Proof of those elements, known as the *Gingles* factors,"carries a plaintiff a long way towards showing a Section 2 violation." *Harvell,* 71 F.3d at 1390; *see also Johnson v. DeGrandy,* 512 U.S. at 1012 ("lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include

the three essential *Gingles* factors"). While a court must still consider the totality of circumstances before making its ultimate finding of vote dilution, proof of the three *Gingles* factors raises an inference of vote dilution that is difficult to overcome: "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.,* 4 F.3d 1103, 1135-36 (3rd Cir. 1993); *accord id.* at 1116 n.6; *Sanchez v. Colorado,* 97 F.3d 1303, 1322 (10th Cir. 1996); *Clark v. Calhoun County,* 88 F.3d 1393, 1396 (5th Cir. 1996); *Uno v. City of Holyoke,* 72 F.3d 973, 983 (1st Cir. 1995).

In this case, moreover, the inference raised by proof of the three *Gingles* factors is particularly strong. This Court found that the record contained "striking proof of vote dilution in Martin." *Cottier I*, 445 F.3d at 1121. More specifically, the Court found that statistical and nonstatistical evidence in the record presented "clear" evidence of political cohesion among Native American voters.

Id. at 1119. The Court found that the record "clearly showed racial polarization." *Id.* at 1122. And the Court found that the record "clearly reflect[ed]" that not a single Indian-preferred candidate for alderman had won election under Ordinance 122 despite eight candidacies over three election cycles. *Id.* at 1120.

These findings, of course, are now the law of the case and are not at issue in this appeal. *See Mosley v. City of Northwoods,* 415 F.3d 908, 911 (8th Cir. 2005). Together, they firmly support the district court's ultimate finding.

The district court's finding also rests on its solid analysis of other relevant circumstances. The court found that five of the nine Senate factors, plus one additional factor, weighed in the plaintiffs' favor. The district court's weighing of the totality factors, like its factual findings, is subject to clear-error review. *Stabler v. Thurston County,* 129 F.3d 1015, 1023 (8th Cir. 1997); *see also Bone Shirt,* 461 F.3d at 1025 (Gruender, J, concurring).However, "there is no requirement that any particular number of factors be proved, or

that a majority of them point one way or the other." *Gingles,* 478 U.S. at 45.

Notably, the district court found that the two "most important" Senate factors weighed in the plaintiffs' favor: (1) the extent to which minorities have been elected in the jurisdiction; and (2) the extent to which voting is racially polarized. *Gingles*, 478 U.S. at 48-49 n.15; *accord Harvell,* 71 F.3d at 1390.

Based on the defendants' own evidence, the court found that there had been only seven successful Indian candidacies out of 80 aldermanic elections between 1981 and 2002. (City's Add. 36-37.) Notwithstanding the defendants' assertion that there were actually 12 successes out of 81 elections, the district court's finding that this factor weighed in the plaintiffs' favor is not clearly erroneous.

Likewise, the district court found that "there is a persistent and unacceptable level of racially polarized voting in the City of Martin." (City's Add. 19.) The court based its finding in part on this Court's findings of polarized voting in *Cottier I*, which are now the law of the case, in addition to a variety of statistical evidence and

witness testimony. (City's Add. 37.) Despite the defendants' argument that the district court should have found their witnesses to be more credible, the district court's finding that this factor weighed "heavily" in the plaintiffs' favor (City's Add. 24) is not clearly erroneous.

The district court's findings on those factors alone are enough to support its ultimate finding of vote dilution. *See, e.g., Bone Shirt,* 461 F.3d at 1022 (upholding a finding of vote dilution based on the two most important Senate factors).

But the district court didn't stop there. The court found, for example, that Ordinance 122 lacks "proportionality," meaning that Native American voters in Martin control less than their proportionate share of seats on the city council and that white voters control more than their proportionate share. (City's Add. 47.) Both the United States Supreme Court and the Eighth Circuit have placed a special emphasis on this factor, *see Johnson*, 512 U.S. at 1013-14; *Stabler*, 129 F.3d at 1021-22, and the defendants do not dispute the district court's finding on appeal. That finding, in

combination with the others already mentioned, further supports the district court's ultimate finding of vote dilution.

While not essential to the plaintiffs' claim or to the district court's ultimate conclusion, the court's findings on the first, third, fifth, and eighth Senate factors also support the court's finding that Ordinance 122 results in unequal electoral opportunity. *See Gingles,* 478 U.S. at 48 n.15 (noting that the other Senate factors "are supportive of, but *not essential to*, a minority voter's claim"); *accord Harvell,* 71 F.3d at 1390. The defendants make a variety of arguments regarding those factors, but none of their arguments establish reversible error. Most of the arguments simply rehash the evidence they presented at trial, claiming that the district court didn't give enough weight or credibility to their witnesses or that the district court gave too much weight or credibility to the plaintiffs' witnesses. The defendants' arguments do not, however, fully address the substantial evidence on which the district court relied in making its findings on those factors and thus do not even begin to establish clear error.

The defendants' few legal arguments on the totality factors are similarly lacking in merit. The defendants argue, for example, that the district court erred in finding that the first Senate factor weighed in the plaintiffs' favor because the court failed to limit its review to the history of official discrimination *in the City of Martin*. The rule in this circuit, however, is just the opposite. This Court has twice reversed a district court for failure to consider evidence of statewide discrimination in cases challenging school board elections. *See Harvell*, 71 F.3d at 1390; *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5,* 804 F.2d 469, 474 (8th Cir. 1986). Indeed, courts routinely take a broad view of historical discrimination because its vestigial effects rarely stop at the city limits or county line. *See, e.g., Gingles,* 478 U.S. at 38-39; *United States v. Blaine County*, 363 F.3d 897, 913 (9th Cir. 2004); *Westwego Citizens for Better Gov't v. City of Westwego,* 946 F.2d 1109, 1121-22 (5th Cir. 1991).

The plaintiffs dispute each and every one of the defendants' legal and factual arguments on the totality factors, but there is no

need to belabor the point here. The defendants have not established that any of their arguments on the totality factors, either alone or in combination, would compel reversal if this Court were to accept them. The district court's ultimate finding of unequal electoral opportunity does not rest on such shaky ground. Even if the Court were largely to discount the other evidence to which the defendants object, this Court's previous findings in *Cottier I*, together with the district court's findings on proportionality, polarization, and electoral success are still enough to support the judgment. *See, e.g., United States v. Charleston County*, 365 F.3d 341, 353 (4th Cir. 2004) (holding that four factors were enough to support a finding of vote dilution).

The district court considered evidence submitted by all parties and conducted a "searching practical evaluation" of local electoral conditions in Martin. *Gingles,* 478 U.S. at 45. The court's subsequent finding that Ordinance 122 diluted Indian voting strength rests on substantial evidence and is not clearly mistaken.

II. The district court did not abuse its discretion when it adopted Plan C as the remedy in this case.

This Court has already answered the question of remedy. In *Cottier I,* the Court held that all three of the plaintiffs' illustrative plans were viable remedies for the alleged vote dilution. *Cottier I,* 445 F.3d at 1123 and n.7. That holding, which is now the law of the case, gave the district court the discretion it needed to adopt Plan C as the remedy in this case.

The law-of-the-case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Morris v. American Nat'l Can Corp.,* 988 F.2d 50, 52 (8th Cir. 1993) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)). The doctrine serves to "prevent[ ] the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency." *Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. and Urban Dev.,* 807 F.2d 1433, 1441 (8th Cir. 1986). The doctrine applies to appellate decisions, *see Mosley v. City of Northwoods,* 415 F.3d at 911, as well as to final decisions by the district court that have not

been appealed. *Little Earth,* 807 F.2d at 1441 (citing *In re Design Classics, Inc.,* 788 F.2d 1384, 1386 (8th Cir. 1986)).

Here, the Court decided the issue of remedy in *Cottier I* when it held that the plaintiffs had satisfied the first *Gingles* factor. As the Court recognized, the law of this circuit requires a plaintiff to demonstrate, as precondition to success under Section 2, that "a proper and workable remedy exists." *Cottier I,* 445 F.3d at 1117. The defendants argued then, as they do now, that there was no viable remedy available and that the district court therefore erred when it held that the plaintiffs' Plans A and B satisfied the first *Gingles* factor. The plaintiffs defended the district court's decision but argued further that Plan C satisfied the first *Gingles* factor even if the other plans didn't. The viability of Plan C was hotly contested at oral argument. Ultimately, the Court rejected the defendants' arguments and decided that all three plans were viable options, observing that the district court had discretion to implement any of them on remand if the defendants failed to propose a suitable remedy. *Cottier I,* 445 F.3d at 1123 and n.7. When the defendants

declined to seek review of that holding in the Supreme Court, the viability of Plan C and the district court's discretion to adopt it became the law of the case. *See Little Earth,* 807 F.2d at 1441.

The defendants do not argue in their brief that the viability of Plan C was not, in fact, decided in *Cottier I.* Rather, they argue only that the Eighth Circuit made a mistake of law. Mere error, however, isn't one of the few grounds for departure from the law of the case. *See Bethea v. Levi Strauss and Co.,* 916 F.2d 453, 457 (8th Cir. 1990). "[T]he common law strongly directs courts to follow decisions made in an earlier proceeding unless substantially different evidence is introduced or the earlier decision is both clearly erroneous and works a manifest injustice or some other extraordinary circumstances exist." *Id.*

The defendants do not suggest that either exception applies here, nor would any such suggestion be tenable. The district court didn't hear any new evidence on remand, and there is nothing both clearly erroneous and manifestly unjust about the adoption of Plan C. The defendants' only hope of keeping the question of remedy

alive after *Cottier I* was to obtain further review. *See Vertac Chem. Corp.,* 453 F.3d at 1047; *see also Liberty Mut. Ins. Co. v. Elgin Warehouse and Equip.,* 4 F.3d 567, 571 and n.6 (8th Cir. 1993). Because they failed to so, the question of remedy in this case has been answered conclusively.

Even if this Court hadn't conclusively determined the viability of Plan C as a remedy, moreover, the district court's selection of Plan C still wouldn't have constituted an abuse of discretion. The district court proceeded through a methodical analysis of the unique circumstances of this case, considering all of the relevant factors, before finding that Plan C was "the most equitable remedy." (City's Add. 68.) The district court's careful analysis didn't fail to consider any relevant factors, give undue weight to any irrelevant factors, or make a serious error in weighing the factors.

Although the district court plainly erred in departing from the law of the case regarding the viability of Plans A and B, that departure does not undermine the court's assessment of Plan C's relative merits. The court did not clearly err in finding that Plan C

would give Native Americans a "strong chance" of electing their preferred candidates and would achieve perfect population equality. (City's Add. 52.) The court did not clearly err in finding that Plan C "respects the legislative policies of both South Dakota and Martin by preserving as much of Ordinance 122 as possible." (City's Add. 66.) Nor did the court err in finding that Plan C offers "several distinct advantages" over Plans A and B and is particularly well suited for use in non-partisan elections in a small town like Martin. (City's Add. 67.) Indeed, the defendants do not dispute any of those findings.

Instead, the defendants argue that Plan C violates state law. They fail, however, to articulate any coherent or principled basis for concluding that state law should dictate, in all cases, the scope of the remedies available under the Voting Rights Act. Their position turns the Supremacy Clause on its head and would, if extended, lead to absurd results. The argument finds no support in *Cane v. Worcester County,* 35 F.3d 921 (4th Cir. 1994) (*"Cane I"*), *Cane v. Worcester County,* 59 F.3d 165 (4th Cir. 1995) (*"Cane II"*), or *Nipper*

v. Smith, 39 F.3d 1494 (11th Cir. 1994) (en banc), the cases on which the defendants principally rely, which stand only for the proposition that the district court must give due deference to state policies in crafting a remedy. *See Cottier I,* 445 F.3d at 1123 n.7 (discussing *Cane I*); *Nipper*, 39 F.3d at 1529 (observing that the state's interest should be considered when determining the feasibility of a proposed remedy).

It is important to remember, moreover, that a court-ordered redistricting plan is, by definition, provisional. *See Johnson v. Mortham,* 915 F. Supp. 1529, 1541-45 (N.D. Fla. 1995). The city remains free to replace it at any time, if authorized by state law to do so, as long as the replacement plan otherwise complies with state and federal law. *See id.* This fact further decreases Plan C's footprint on state and local policies.

As Justice Thomas noted in *Holder v. Hall,* 512 U.S. 874, 910 (1994) (Thomas, J., concurring), "nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from

instituting a system of cumulative voting as a remedy under § 2." A court must certainly give due deference to state policies before implementing cumulative voting as a provisional remedy, but state law is no absolute bar. Cases in which cumulative voting is appropriate may be rare, but this is such a case.

In light of this Court's decision in *Cottier I* and the district court's careful analysis of Plan C's relative advantages over Plans A and B, the district court was well within its discretion when it selected Plan C as the remedy in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). Excluding those portions of the brief exempted from the limitations by Fed. R. App. P. 32(a)(7)(B)(iii) the brief contains 8,955 words. The brief was prepared in WordPerfect X3 using a Bookman Old Style 14-point font.

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Bryan Sells

CERTIFICATE OF SERVICE

I hereby certify that I did on this 11th day of June, 2007, mail two true and correct copies of the foregoing Appellees' Brief by placing it in the U.S. mail, postage prepaid and addressed to the following:

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I further certify that two CD-ROMs labeled Cottier v. City of Martin, No. 07-1628, Appellees' Brief, were scanned for viruses by using the Symantec AntiVirus scan software program, which reported no viruses were found on either CD-ROM. One of these CD-ROMs is being sent to the United States Court of Appeals for the Eighth Circuit, and the other is being sent to the counsel listed above.

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Bryan Sells