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

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PEARL COTTIER and REBECCA THREE STARS,
Plaintiff-Appellees,

v.

CITY OF MARTIN, et. al.
Defendants-Appellants.

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

---

PETITION FOR HEARING EN BANC 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

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

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# I. FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT

Petitioners are requesting a hearing en banc because the panel decision of Cottier, et. al. v. City of Martin, et. al. II., No. 07-1628 (December 16, 2008) (contained at Addendum 1) conflicts with United States Supreme Court and Eighth Circuit precedent, as adeptly summarized in Judge Colloton's dissent. Addendum at 19-26. The panel's decision is inconsistent with Holder v. Hall, 512 U.S. 874 (1994) and Stabler v. Co. of Thurston, 129 F.3d 1015, 1020, 1025 (8th Cir. 1997). Therefore, consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

The issues below also involve questions of exceptional importance. The panel's decision conflicts with the authorative decisions of the United States Supreme Court and other United States Courts of Appeals that have addressed the issue. 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); Id. at 1547 (Edmondson, J. concurring in part and concurring in result); Davis v. Chiles, 139 F.3d 1414, 1421 (11th Cir. 1998); Dillard v. Baldwin Co. Commissioners, 376 F.3d 1260 (11th Cir. 2004); Sanchez v. Colorado, 97 F.3d 1303, 1311

(10th Cir. 1996); Cane v. Worcester County, 35 F.3d 921, 927-37 (4th Cir. 1994); Cane v. Worcester County, Nos. 95-1122, 95-1688, 1995 WL 371008 at *3 (4th Cir. June 16, 1995); Harper v. City of Chi. Heights, 223 F.3d 593, 603 (7th Cir. 2000). The panel's decision also sets the first and only precedent in the nation allowing for similar lawsuits against governmental bodies regardless of the governmental bodies' constraint to the dictates of their respective state's statutes.

Moreover, the panel's decision does away with the one-person-one-vote standard and institutes the first ever court-ordered remedy requiring cumulative voting. Every court confronted with cumulative voting has struck it down. See Cane I and II; Cousin v. Sandquist, 145 F.3d 818, 829 (6th Cir. 1998); Dillard at 1268.

## II. BACKGROUND

The ACLU on behalf of two Indian voters from the City of Martin brought suit against the City alleging that city Ordinance 122 created voting districts within the City which violated § 2 of the Voting Rights Act of 1965. Addendum at 1-2, 5. A bench trial was held on the plaintiffs' claims in 2004. Id. at 2, 6. The district court issued a Memorandum Opinion and Order, finding that Ordinance 122 did not

violate § 2 of the Voting Rights Act because plaintiffs did not demonstrate that the white majority voted sufficiently as a bloc to usually defeat Indian-preferred candidates. Id.

The plaintiffs appealed the district court's judgment and this Court reversed and remanded holding that the white majority in Martin usually voted in a way to defeat Native American-preferred candidates and instructing the district court to complete the analysis required by Gingles and "[i]f the district court then finds in favor of the plaintiff, it shall develop a plan under which Native-Americans will have a reasonable opportunity to elect an Indian-preferred candidate." Cottier v. City of Martin, 445 F.3d 113, 1115 (8th Cir. 2006). On remand, the district court held that Ordinance 122 diluted the Native American vote and violated Section 2 of the VRA. Addendum at 6.Consequently, the district court instructed Martin to submit a remedial proposal consistent with the district court's opinion. Id. at 7. Martin argued that no possible remedy existed for the violation. Id. Plaintiffs proposed their Plan C. Id. In a remedial order, the district court adopted Plaintiffs' Plan C, an at-large, cumulative voting scheme. Id. Martin appealed, arguing the district court erred: (1) in finding that, under the totality of

the circumstances, Ordinance 122 diluted the vote of Native Americans in Martin in violation of § 2 of the VRA; and (2) in ordering remedial Plan C. Id. at 8.

The defendants filed Notice of Appeal from the district court's judgment on March 6, 2007. The Eighth Circuit panel heard oral argument on March 12, 2008, and issued its opinion December 16, 2008, affirming the district court's opinion. Addendum at 1. The majority offered no rationale for upholding Plan C, but rather found that the district court relied on dicta as law for its authority implementing Plan C, and that such mistake was not an abuse of discretion.

## III. ARGUMENT

### A. The panel incorrectly held that the district court may order a "remedy" voting scheme that violates South Dakota law.

The district court erred in imposing a remedial plan in this case. The district court correctly found that all remedial plans proposed were either unworkable, ineffective, or in violation of South Dakota law. Specifically, the district court found that redistricting would not remedy the § 2 violation, because Indian voters are so evenly distributed throughout the town that it is impossible to draw districts as a remedy. 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.

In Stabler at 1020 and 1025, the Eighth Circuit held that under the first necessary precondition, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute "an effective majority in a single-member district." The U.S. Supreme Court has repeatedly held in accord. LULAC v. Perry, 126 S.Ct. 2594, 2616, 2654, 2655, 2660 (2006) (citing Stabler with approval). If plaintiffs cannot establish that a legal and workable alternate election plan exists which would provide better access to the political process, the challenged voting practice is not responsible for the claimed injury. LULAC v. Perry at 2616, 2655; Growe v. Emison, 113 S.Ct. 1075, 1084 (1993); ("[u]nless these [Gingles] points are established, there neither has been a wrong nor can be a remedy."); Holder v. Hall, 114 S.Ct. 2581, 2586 (1994) ("But where there is no objective and workable standard for choosing a reasonable benchmark by which to elevate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2."); Stabler at 1025; Burton v. City of Belle Glade, 178 F.3d 1175, 1199 (11th Cir. 1999); citing Thornburg v. Gingles, 478

U.S. 30, 50 (1986); Nipper v. Smith, 39 F.3d 1494, 1530-31, 1533 (11th Cir. 1994) (en banc) ("[T]he issue of remedy is part of the plaintiffs' prima facie case in § 2 vote dilution cases." Id. at 1530-31. "The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a finding of liability." *Id.* at 1533); citing Holder v. Hall, 114 S.Ct. 2581, 2586 (1994).

The district court correctly found that Plaintiffs' two proposed redistricting plans (A and B) did not provide a remedy, and that the court could not fashion its own. The plaintiffs urged the district court to adopt their proposed Plan C instead. Plan C does away with wards, as it is an at-large, cumulative voting scheme, wherein each voter casts three votes instead of one.

The panel indicated in footnote 7 of its decision that "[i]f, at the remedy stage, a redistricting of Martin's wards appears unworkable, it appears that plaintiffs' third plan would be a viable option." The panel decision in Cottier II conceded this was dicta. Addendum at 19. The district court interpreted the Court's dicta as law of the case, and therefore implemented Plan C. The Cottier II panel found that the

district court's reliance on dicta as law was not abuse of discretion. However, the proper standard of review is de novo, as the remedy was ordered under a misunderstanding of governing law. "Where the ultimate finding of dilution is based on a misreading of the governing law, however, there is reversible error." LULAC v. Perry, 126 S.Ct. 2594, 2614 (2006). The district court mistook dicta for law, and thus found liability and ordered a remedy based on a misunderstanding of governing law.

Moreover, the Cottier I court 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 I at 1123 n. 7 (emphasis added). 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 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. 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.

Therefore, when the panel 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.

Moreover, by ordering Plan C, the district court disregarded and violated S.D.C.L. § 9-11-5 and the other provisions of Ch. 9-11 and

S.D.C.L. § 9-2-4, which requires the present form of government of existing municipalities to be changed only as provided by statute (requiring referendum vote). See also S.D.C.L. §§ 9-2-3, 9-11-7.

The hybrid form of government the district court ordered created 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. 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); Holder at 2585-86 (rejecting the idea of comparing a governmental body's current governmental structure to a hypothetical one in order to determine whether the current system is dilutive under § 2.)

Because there is no remedial plan that is proper or workable in this case, the district court erred in finding liability under § 2. Holder at 2588 ("a plaintiff cannot maintain a § 2 challenge to the size of a government body."). "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 252, 576 (S.D. Ohio 1997); 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); Mallory, 38 F.Supp. 2d at 576.

### B. The "remedy" voting scheme violates the one-person-one-vote standard, South Dakota law, and the Voting Rights Act itself.

As Judge Colloton stated, the panel exercised remarkable authority in implementing Plan C, with all statutory and case authority contrary. The Fourth, Fifth, Sixth, and Eleventh Circuits struck down cumulative voting as a remedy to a § 2 violation. Cane I and II, 35 F.3d 921; 59 F.3d 165; Cousin v. Sundquist, 145 F.3d 818, 829 (6th Cir. 1998); LULAC v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc); Nipper, 39 F.3d 1542-47. No appeals court in the nation has allowed cumulative or limited voting to be imposed as a remedy to a § 2 violation, until this Court's panel.

> 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.

Cousin 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.

As Judge Colloton noted in his dissent, cumulative voting also violates South Dakota law. Addendum at 24; see also S.D.C.L. § 9-13-21. Therefore, Plan C violates South Dakota law in numerous ways, and should not be allowed to stand.

**C. Upholding the Panel's decision will open the floodgates to § 2 lawsuits in this Circuit.**

The Supreme Court specifically addressed this issue in Holder.

> With respect to challenges to the size of a governing authority, respondents fail to explain where the search for reasonable alternative benchmarks should begin and end, and they provide no acceptable principles for deciding future cases. The wide range of possibilities makes the choice "inherently standardless,"...and we therefore conclude that a plaintiff cannot maintain a § 2 challenge to the size of a government body, such as the Bleckley County Commission.

Id. at 2588; see also Id. at 2590 (stating that when a court departs from the current number of districts or other objective standards, the test loses its validity as a threshold standard.) The Supreme Court was clearly concerned with an open-ended test, subjecting a wide range of state governmental bodies to dilution challenges. Id.

As Judge Colloton noted in his dissent, Justice Thomas did not endorse cumulative voting in Holder. If one carefully reads that opinion, it is clear that Justice Thomas would hold that the size of a governing

body is not a "standard, practice, or procedure" within the terms of the VRA. Id. at 2591. Justice Thomas's description of cumulative voting is meant to illustrate the standardless effects of allowing § 2 claims to proceed against political bodies in order to change their size. Id. at 2601 (stating that "we should be cautious in interpreting any Act of Congress to grant us power to make [determinations of the best form of local governments.]" Id. at 2602). Indeed, Justice Thomas stated in LULAC v. Perry (along with three other justices) that he would dismiss § 2 redistricting claims for the reasons he set forth in Holder. Justice Thomas certainly did not endorse cumulative voting in Holder.

If this decision is allowed to stand, governmental bodies across this circuit will face the situation of being sued to change their forms of government, even though those governmental bodies cannot comply with the plaintiffs' demands as state laws forbid it. Governmental bodies will be forced to litigate lengthy and expensive § 2 cases, with the plaintiffs and courts unrestricted in their proposals and remedies to change the forms of local governments to unpredictable, hypothetical new forms of government forbidden by state laws. Holder warns against precisely this.

## IV. CONCLUSION

This Court wisely held in Stabler that plaintiffs do not establish a § 2 violation when there is no workable or effective redistricting remedy available. Id. at 1025. Under this Court's precedent, as well as the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, and the United States Supreme Court's rulings, the City requests rehearing on whether the district court lacked the power or authority to impose a remedy upon the City of Martin. Wherefore, this Court should grant rehearing en banc.

Dated this the 30th day of December, 2008.

GUNDERSON, PALMER,
NELSON & ASHMORE, LLP

By/s/ Donald P. Knudsen_________
Sara Frankenstein
Donald P. Knudsen
P.O. Box 8045
Rapid City, SD 57709-8045
(605) 342-1078
(605) 719-3471 fax

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

1. This en banc petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this brief does not exceed 15 pages, 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.

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GUNDERSON, PALMER,
NELSON & ASHMORE, LLP

By /s/ Donald P. Knudsen
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 30th day of December, 2008, I sent by overnight mail, twenty-one true and correct copies of the Petition for Hearing En Banc 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
Southern Regional ACLU
230 Peachtree Street, N.W., Suite 1440
Atlanta, GA 30303-1513

Mr. Patrick Duffy
Patrick K. Duffy, LLC
629 Quince Street, Suite 105
Rapid City, SD 57701

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By /s/ Donald P. Knudsen
Sara Frankenstein

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

# ADDENDUM

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# CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Donald P. Knudsen