Nos. 07-60588 & 07-60729

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

IKE BROWN, *et al.*,

Defendants-Appellants

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

---

# BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellants' request for oral argument.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 1345. The court entered final judgment on August 27, 2007. R. 1737-1749.[1] Defendants Ike

[1] "R. __" refers to the page number following the Bates stamp "USCA5" on documents in the official Record on Appeal. "R.E. __" indicates the tab number of documents in appellants' Record Excerpts. "Tr. __" refers to the consecutively numbered pages of the trial transcript. "Br. __" indicates the page number of appellants' opening brief. "Ex. P-__" refers by number to the United States' trial exhibits. "Doc. __" indicates the docket entry number of documents filed in the

(continued...)

Brown and the Noxubee County Democratic Election Commission (NDEC) filed a timely notice of appeal on September 13, 2007. R. 1750-1751. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court's finding that appellants acted with a racially discriminatory intent is clearly erroneous.

2. Whether appellants' constitutional challenges to the remedial order are forfeited because they were not properly raised in the district court; if not forfeited, whether the remedial order is constitutional.

## STATEMENT OF THE CASE

On February 17, 2005, the United States sued Brown, the NDEC, and the Noxubee County Election Commission, alleging violations of Sections 2 and 11(b) of the Voting Rights Act. 42 U.S.C. 1973, 1973i(b). The district court held a bench trial from January 16-31, 2007.

On June 29, 2007, the district court ruled that Brown and the NDEC violated Section 2 by engaging in intentional racial discrimination that had the purpose and effect of diluting white voting strength in Noxubee County. R.E.4 at

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[1](...continued)
district court.

17, 100.[2] On August 27, 2007, after holding two additional evidentiary hearings and considering written submissions by the parties, the court issued a remedial order. R.E.6; pp. 24-29, *infra*.

## STATEMENT OF FACTS

The district court found that NDEC chairman Ike Brown and the NDEC "engaged in improper, and in some instances fraudulent conduct, and committed blatant violations of state election laws, for the purpose of diluting white voting strength." R.E.4 at 100. Brown and the NDEC accomplished this intentional discrimination through several means, including absentee ballot abuses, illegal voter assistance, and threatening to challenge 174 white voters if they tried to vote in the Democratic primary. See pp. 9-23, *infra*. Brown's motivation for engaging in these actions is reflected in public statements that reveal his racially discriminatory intent. See pp. 4-9, *infra*.

### *1. Noxubee County's Racial Composition And Voting Patterns*

Noxubee County is a majority-black county with a voting age population that is 32.5% white. R.E.4 at 3 n.2. Approximately 22% of voters in the County's

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[2] The court held Brown did not violate Section 11(b) and that the County Election Commission did not violate Section 2. R.E.4 at 81 n.56, 101. The court retained jurisdiction over the Election Commission in order to fashion complete relief. R.E.4 at 101-102.

Democratic primary elections are white. Tr. 1384; R.E.4 at 78. Only two of the 24 elected officials in Noxubee County are white: county prosecutor Roderick Walker and Eddie Coleman, a member of the Board of Supervisors. Ex. P-1 ¶ 31; Tr. 218, 387; R.E.4 at 99. Voting in Noxubee County is racially polarized, and Brown nearly always opposes white-preferred candidates. R.E.4 at 98-99 n.72; Ex. P-1 ¶ 63, 216, table 1; Tr. 382-383.

*2. Brown's "Racial Agenda"*

The district court found that Brown's long history of racially-tinged remarks and actions "present a clear picture of [his] racial agenda." R.E.4 at 23. The court emphasized that, although many of these remarks and actions did not themselves violate the Voting Rights Act, they provided "compelling evidence" that Brown acted with racially discriminatory intent when, as NDEC chairman, he engaged in conduct that diluted the white vote. R.E.4 at 23-24, 27, 94.

One of the clearest examples of Brown's racial agenda is his longstanding and unequivocally expressed view that blacks, as the county's majority race, "should hold all elected offices, to the exclusion of whites." R.E.4 at 17; Tr. 215, 218, 1738. This agenda began before Brown assumed leadership of the NDEC and "did not change" thereafter. R.E.4 at 23-24.

For example, in 1995, Brown wrote a letter to "black voters of Noxubee County" urging them to "Vote Black in '95'." R.E.4 at 19; Ex. P-33. At a meeting attended only by African-Americans, Brown told David Boswell that he "was looking for a 'good black candidate,'" expressed concern that a white candidate (Johnny Kemp) might win a position on the Board of Supervisors, and told Boswell that "since the county was predominantly black, all county officials should be black." R.E.4 at 20; Tr. 1738. Brown emphasized to Boswell that "[w]e want to keep this thing as black as possible." R.E.4 at 20; Tr. 1738. Brown made similar statements to Larry Tate while he was running for office in 1991 and 1995. R.E.4 at 20; Tr. 214-217. Brown said that "since the county was predominantly black, we need a black candidate." R.E.4 at 20; Tr. 215.

Brown was critical of blacks who supported or worked with whites. In the early 1990s, Brown criticized a black politician "for making an 'alliance' with the whites." R.E.4 at 21; Tr. 1223. At a 1998 Board of Supervisors meeting, Brown called a black member of the Board "a white man's nigger" after he voted to fire two black employees accused of stealing. R.E.4 at 21; Tr. 1307-1310, 2067-2069.

Brown continued to make racial appeals after he became chairman of the NDEC. For example, Brown proposed a redistricting plan that would move more blacks into District 4, which was represented by Coleman, the only white member

on the Board of Supervisors. R.E.4 at 24 n.13; Tr. 142-143. Brown did this "for the express purpose of improving the opportunity for a black to be elected." R.E.4 at 24 n.13; Tr. 142-143. Tate testified that Brown told him that because District 4 is majority black, it should be represented by a black supervisor. Tr. 218. In 2001, the local newspaper published a letter from Brown concerning the defeat of a black mayoral candidate in Macon, the county seat. R.E.4 at 98 n.70; Ex. P-40; Tr. 1198-1200. The letter warned that, "before you celebrate," remember that the city's "[w]hite population is shrinking," the black population is growing, and thus it is "just a matter of time" before blacks take over Macon's city government. R.E.4 at 98 n.70; Ex. P-40; Tr. 1198. The district court found that the letter conveyed "a clear racial message." R.E.4 at 98 n.70.

In May 2003, Brown charged in a letter published by the local newspaper that Supervisor Coleman's road paving practices favored whites and exemplified "the vestiges of discrimination and slavery in Noxubee County." R.E.4 at 30; Tr. 259-260, 295-297. In 2003, Coleman was running for reelection to the Board of Supervisors from District 4 and faced a black challenger, Jerome Miller, in the Democratic primary. Tr. 255-256, 1135. Brown knew his allegation "was unfounded" and admitted at trial "that Coleman had done the best job of all the supervisors with respect to the paving of roads." R.E.4 at 30-31; Tr. 1242-1243.

Nonetheless, Brown used this racial appeal, as Brown said, "to get the job done" – *i.e.*, to inflame black voters against Coleman. R.E.4 at 31; Tr. 2024.

Brown also attempted to recruit black candidates he knew were not qualified to run against the County's few white incumbents. R.E.4 at 24-27. Prior to the 2003 Democratic primary, Brown recruited a black candidate to oppose incumbent prosecutor, Ricky Walker, the only white countywide officeholder, even though Brown knew the black candidate did not qualify to run for that office under state law. R.E.4 at 24-25; Tr. 1455-1457, 1459. When Walker discovered that Brown's candidate, Winston Thompson, was not a county resident, he filed a petition with the NDEC to challenge Thompson's candidacy. R.E.4 at 25-26; Tr. 69-70.

The court found that Brown's response to Walker's petition was "blatantly obstructionist." R.E.4 at 28. Brown gave Walker short notice of a meeting to be held at Brown's home and refused Walker's request for copies of the State Party Constitution and a list of NDEC members. R.E.4 at 28; Tr. 75, 1463-1467. NDEC meetings were normally held at the courthouse and open to the public. Tr. 121-122, 148, 1463-1465. When two white NDEC members, neither of whom Brown had notified about the meeting, arrived at Brown's house, he initially refused to let them in and said they were no longer committee members. R.E.4 at 29; Tr. 80-81, 121-122, 1473-1476. Brown eventually let the white NDEC members into his

house but forced them to stay in the kitchen and did not let them participate in the meeting. Tr. 123-124. These members were not given written notice or an opportunity for a hearing that the State Party Constitution requires before members may be removed from the County committee. R.E.4 at 29; Tr. 121, 1476-1477, 1886-1890. Brown also sought to exclude a black NDEC member. R.E.4 at 29-30 n.21; Tr. 81. At the meeting, Brown refused to allow Walker to present his petition. R.E.4 at 28; Tr. 80-83. Brown claimed the petition was insufficiently specific about the reason for the challenge, "even though Brown was well aware of the basis and Walker was armed with evidence substantiating his position." R.E.4 at 28; Tr. 80. Walker later filed a lawsuit that succeeded in getting Thompson disqualified. R.E.4 at 26; Ex. P-138.

Brown's later comments confirmed that he acted with racially discriminatory intent in trying to unseat Walker. In April 2006, Brown told a *USA Today* reporter that Noxubee County has only "one white official elected countywide, prosecutor Ricky Walker," and then added: "If I could find a black lawyer who lives in the county, we'd get him, too." R.E.4 at 25 n.15; Tr. 1483-1484.

In May 2005, Brown tried to convince Kendrick Slaughter, a black candidate for Macon City Alderman, to use his sister's address instead of his own so he could run against the white incumbent in Ward 2, rather than the black incumbent in

Ward 4. R.E.4 at 25 n.15, 26; Tr. 941. Brown told Slaughter that if he ran in Ward 4, where he lived, he and the black incumbent would "split the black vote[]" and let a white challenger, whom Brown called "the white one," win. R.E.4 at 26; Tr. 942.

*3. Appellants' Voting Rights Act Violations*

Appellants' violations of the Voting Rights Act relate chiefly to the 2003 Democratic primary and runoff elections. Before turning to the evidence of the violations themselves, we provide some background about the 2003 elections to put appellants' discriminatory conduct in context.

The 2003 primary involved at least three black/white races in which Brown took a special interest: white incumbent Supervisor Coleman against black challenger Jerome Miller; black incumbent Sheriff Albert Walker against white challenger Samuel Heard; and black candidate Bruce Brooks against white candidate Johnny Kemp for a seat on the Board of Supervisors. R.E.4 at 27-28 n.18, 50; Tr. 255-256, 948-950, 984, 1135. Brown opposed the white candidate in each race. As previously explained, Brown had tried to move more blacks into Coleman's district during redistricting to make it harder for him to win reelection. See p. 5-6, *supra*. And, in May 2003, Brown accused Coleman of being part of "the vestiges of discrimination and slavery in Noxubee County." See p. 6, *supra*. In addition, in early 2003, Brown publicly threatened to prevent Heard from

running for sheriff in the Democratic primary, implying that he was not a true Democrat. Tr. 953-954, 1026. And Brown expressed concern that Kemp might win a seat on the Board of Supervisors, explaining that "since the county was predominantly black, all county officials should be black." See p. 5, *supra*.

*a. The Program Of Absentee Ballot Abuses*

As described in detail below (pp. 12-21, *infra*), "Brown and the NDEC engaged in a pattern of absentee ballot abuses" designed to dilute white voting strength during the 2003 Democratic primary and runoff elections. R.E.4 at 33-34. In the "first phase" of Brown's "absentee ballot scheme," he sponsored more than 50 notaries and sent them into the black community to encourage large numbers of African Americans likely to support his preferred candidates to vote absentee, regardless of whether they qualified to do so. R.E.4 at 34-37. These notaries sometimes urged voters to select Brown-favored candidates and, at times, completed ballots for the voters, "sometimes without the knowledge and consent" of those voters. R.E.4 at 34, 39-43. In the second phase of the scheme, Brown and the NDEC installed a "nearly all black" group of poll workers "over whom they had effective influence and control." R.E.4 at 34. These Brown-controlled poll managers, including some of Brown's notaries, "ignored or rejected proper challenges to the [absentee] ballots of black voters." R.E.4 at 34. Indeed, Brown

often entered polling places and directed poll managers to count all absentee ballots and ignore challenges. R.E.4 at 52-53. Brown also intervened in the process by directing poll officials to reject specific absentee ballots cast by white voters. R.E.4 at 55, 64-65.

Under Mississippi law, the only people who qualify to vote by mail are individuals who are 65 and over, disabled, temporarily residing outside the county or who have a spouse, parent or child hospitalized more than 50 miles away and who will be with the patient on election day. Miss. Code Ann. § 23-15-715. To vote by mail, the voter must appear before a notary and mark the ballot in secret but in the presence of the notary. *Id.*, § 23-15-719. The voter must seal the ballot, sign an affidavit, and have the affidavit notarized. *Ibid.*

Brown's notaries got an "astounding" number of Noxubee County voters to vote absentee. R.E.4 at 34. In the 2003 Democratic primary, Noxubee County's absentee voting rate was 20 to 23%. R.E.4 at 34; Ex. P-1 at 88 table 2. That rate contrasts starkly with the 3 to 6% absentee voting rate in other jurisdictions in Mississippi and is, the court concluded, incommensurate with the state's eligibility requirements for absentee voters. R.E.4 at 34-35; Ex. P-1 at 35-36. The court found that such a high level of absentee voting could not occur except by fraud. R.E.4 at 35; Ex. P-1 ¶ 94. The court credited expert testimony that there is no

"reasonable legal rationale that would account for this degree of difference" between Noxubee County's absentee voting rate and that of the rest of Mississippi. R.E.4 at 35; Tr. 412. The court found no evidence that Noxubee County has an unusually high number of people who qualify to vote absentee compared to other counties. R.E.4 at 35 n.24.

The high absentee voting rate benefitted Brown. In the closely contested 2003 sheriff's election, Brown's candidate, Albert Walker, received more than 1,050 absentee votes. Tr. 1020-1021. Samuel Heard, the white-preferred candidate, received only 155, a difference of 895. Tr. 1020-1021; see Ex. P-1 at 149 (100% of white voters voted for Heard in the 2003 primary). The election was decided by 441 votes.[3]

*i. Brown's Notaries Collected Absentee Ballots*

The district court found that "Brown closely monitored" records in the clerk's office that documented the receipt of absentee ballot requests, the mailing of absentee ballots, and the return of completed ballots. R.E.4 at 44; Tr. 1817-1821. Brown normally checked the clerk's records twice or more each day to keep track of this absentee ballot activity. Tr. 1819.

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[3] Http://www.sos.state.ms.us/elections/2003PrimaryReCap/ Democrat/ Noxubee.pdf.

Brown's interest in the process was specifically racial. "[F]or the [2003] runoff election between Johnny Kemp and Bruce Brooks, Brown copied the pages of the absentee ballot book and tallied the number of white and black ballots returned for each precinct." R.E.4 at 45; Tr. 1271-1274, 1277, 1318. Indeed, Brown acknowledged that his practice for all elections in Noxubee County was to review all absentee ballots at each polling place and calculate the number of blacks and whites who cast such ballots. Tr. 1274-1275.

From 1999 to 2004, a corporation owned by Brown paid the notary application fees of 54 African-American residents of Noxubee County. Tr. 1289, 1675-1692, 1701; R.E.4 at 37. The state processed 43 of those applications in 2002 and 2003 before the 2003 Democratic primary. Tr. 1686-1692; Ex. P-145. Brown's company also paid the surety bonds of at least some of the notary applicants. R.E.4 at 37-38; Tr. 1287-1289, 1691-1693.

Brown sought to prevent others from interfering in his absentee-ballot collection operation. In 2003, Brown contacted Mable Jamison, a notary who worked "not for any particular candidate but as a public service," to tell her she "shouldn't be picking up his ballots." R.E.4 at 40; Tr. 916-920. "Brown clearly indicated there were specific people collecting absentee ballots under his direction,

and he wanted control over who was collecting those ballots." R.E.4 at 40; Tr. 918-919.

The court found that Brown-sponsored notary and NDEC member Carrie Kate Windham engaged in "fraud in the collection of absentee ballots." R.E.4 at 40-41, 54. Windham is the sister of NDEC secretary Dorothy Clanton McCoy. Ex. P-9; Tr. 1278, 1404.

One example of this ballot fraud involved Nikki Halbert, who is African-American. R.E.4 at 42. In 2003, Windham recruited Halbert and her mother to vote absentee. Tr. 1152-1154. Halbert and her mother had already marked their absentee ballots when Windham came to collect them. Tr. 1156. Windham told Halbert, "I hope you voted for Albert" (referring to Sheriff Albert Walker, Brown's preferred candidate). Tr. 1156. Windham took the ballots and left without the voters signing or sealing them. Tr. 1157, 1161. Someone later forged Halbert's signature on her ballot. Tr. 1154; Ex. P-68, P-68A. The person who filled out Halbert's ballot "checked the box indicating Halbert was voting absentee because she had a temporary or permanent disability." R.E.4 at 42; Tr. 1154-1155. This was not true: Halbert has never been disabled. Tr. 1155. Windham also marked other ballots for absentee voters who were not disabled and

selected candidates for them when they were unsure for whom to vote. R.E.4 at 41-42; Tr. 1786-1792.

Another Brown-sponsored notary, Gwendolyn Spann, said Brown recruited her in 2003 to collect and notarize absentee ballots for pay. Tr. 1642-1644. Brown instructed her how to do absentee ballot work for him and told her to get a list of voters from the clerk's office and then contact them. Tr. 1644-1646. All individuals on the list were black. Tr. 1645. Spann collected absentee ballots from this all-black group of voters. Tr. 1645. In the process, Spann sometimes told the absentee voters which candidate she thought was best. Tr. 1645, 1654. Spann reported to Brown the number of absentee ballots she had collected. Tr. 1647-1650. Brown paid Spann based on the "amount of work" she did, a practice the court found "perilously close" to violating a state-law ban on per-ballot payment. R.E.4 at 39 & n.31 (citing Miss. Code Ann. § 23-15-753(2)); Tr. 1647-1651. Brown later used Spann in the second phase of his absentee ballot scheme. She was assigned as a poll manager in a precinct where she reviewed absentee ballots she had notarized. R.E.4 at 40 n.32; Tr. 1646-1647.

*ii. Brown Ensured His Absentee Ballots Were Counted*

Brown and the NDEC chose a loyal, "nearly all-black" group of poll workers and managers to ensure that the absentee ballots collected by his notaries would be

counted. R.E.4 at 45, 48.[4] During the 2003 Democratic primary, the poll managers regularly violated state law, at Brown's command, by refusing to allow challenges to absentee ballots. See pp. 17-21, *infra*.

Candidates and their representatives "have the right to reasonably view and inspect the ballots when they are taken from the box and counted." Miss. Code Ann. § 23-15-581. Poll managers must allow challengers to view the counting of ballots from a "suitable position" and permit them to "carefully inspect the manner" in which the election is conducted. *Id.*, § 23-15-577. Candidates and their poll watchers "shall be allowed to challenge the qualifications of any person offering to vote, and [their] challenge shall be considered and acted upon by the managers." *Id.*, § 23-15-571. No one other than the "election managers of each voting precinct" are statutorily authorized to rule on challenges to absentee ballots. *Id.*, § 23-15-639; *accord id.*, § 23-15-579.

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[4] In the 1999 Democratic primary, before Brown became the NDEC chairman, approximately 21% of poll workers were white. Ex. P-135. In the 2003 Democratic primary, after Brown became chairman, about 6% of poll workers were white. Tr. 1383-1384. The state Democratic Party had a rule of thumb that encouraged "the hiring of poll workers in each precinct to be representative racially of the Democratic electorate in that precinct." R.E.4 at 45-46; Tr. 1881. Brown, however, chose not to follow this party rule or the practice of his predecessor. Tr. 1383-1384, 1882, 2746-2748.

During the 2003 primary, poll managers at the Shuqualak precinct reviewed absentee ballots using a speedy, disorganized process. This process made it difficult for poll watchers to see whether the ballots complied with state law. Tr. 1133-1134. A poll watcher for Coleman, the county's only white supervisor, complained that the poll workers were moving too quickly, but they continued to count ballots in the same manner at the direction of NDEC member Gary Naylor. Tr. 1132-1134. Nonetheless, poll watchers were able to challenge some obviously deficient absentee ballots, and some of those challenges were sustained. Tr. 1133. When Brown came into the precinct, he said, referring to the absentee ballots that had been rejected, "No, we are not going to do that. We're going to count them all." R.E.4 at 53; Tr. 275. The poll managers obeyed and counted all the absentee ballots, including those previously rejected. Tr. 1136-1137. When a poll watcher protested the counting of rejected ballots, Brown ignored him. Tr. 1137.

A poll watcher for Samuel Heard, the white-preferred candidate for sheriff, tried to challenge an absentee ballot at the West Macon polling place. Tr. 1317-1318, 1858-1861. The poll manager, Octavia Stowers, spoke to Brown by telephone and then told Heard's poll watcher, "Ike [Brown] instructed me to count all the ballots." R.E.4 at 50-51; Tr. 1860-1861. When that poll watcher later tried

to challenge another ballot, Stowers repeated that she was following Brown's instruction and would not consider any challenges. Tr. 1873-1874.

At the East Macon precinct, poll managers "did not call out the names of the voters, check the register to see if the person had voted at the polls or take the time to check the envelope and application to ensure the statutory requirements were met." R.E.4 at 51; Tr. 974-975. Absentee ballots were processed so fast that poll watchers were unable to check to see if the signatures on the application and envelope matched. Tr. 975-979. When Heard, who was acting as a poll watcher for himself, tried to get the poll managers to slow down, Deputy Sheriff John Clanton told the managers not to listen, saying "[y]ou know what you've been told to do." R.E.4 at 51; Tr. 975. Brown later came into the precinct and instructed the poll managers to "[c]ount every vote, count them every one right now," and said specifically, "[p]ick up those absentee ballots that are on that table and bring them over here and put them in that machine right now." R.E.4 at 52; Tr. 980.

Poll managers at the Title One precinct also counted absentee ballots very quickly without checking the ballots for legal deficiencies. The managers ignored a poll watcher's request to slow down. Tr. 1163. The poll watcher, who worked for Heard, challenged a ballot whose signature obviously did not match the signature on the application. R.E.4 at 54; Tr. 1162, 1167-1168. Windham, a

Brown-sponsored notary and NDEC member, and her sister, NDEC secretary Dorothy McCoy, effectively ruled on the challenge even though they were not poll managers. Windham asserted that the signatures matched, and the ballot was counted. Tr. 1167-1168.

At the Brooksville precinct, poll managers processed absentee ballots so quickly that poll watchers could not tell whether they were deficient. Tr. 1598-1600. Poll managers "did not compare the signatures on the applications and envelopes," as required by state law. R.E.4 at 55; Tr. 1627. A poll watcher for Heard tried to challenge a few ballots. Tr. 1598-1600. A black poll manager told her the ballots she challenged would be counted anyway. Tr. 831, 1598-1600, 1614-1615. Poll managers did not vote on the challenge, as state law requires. Tr. 1600-1601, 1614-1615.

Brown involved himself even more directly in the absentee ballot counting during the 2003 runoff election for District 3 Supervisor between Johnny Kemp, who is white, and Bruce Brooks, who is black. R.E.4 at 55. The night before the election, Brown put yellow stickers on a number of absentee ballots that were to be counted. Tr. 774, 777, 890, 1262. On each sticker Brown wrote that the ballot, to which the note was attached, should be rejected and gave a reason rejection was warranted. Tr. 774. On election day, Brown came into the polling place before the

absentee ballots were counted and told poll managers he had put yellow stickers on the ballots he wanted rejected and that the rest should be counted. Tr. 774. The managers followed Brown's instructions. Tr. 774. All of the absentee ballots with yellow stickers were ballots of white voters. Tr. 775; R.E.4 at 64. Brooks won the election by approximately 42 votes. Tr. 871.[5]

The court also found that "ballots of black voters with defects similar to those of white voters with yellow stickies [*i.e.*, ballots rejected pursuant to Brown's instruction] were not marked by Brown for rejection and were counted." R.E.4 at 64. Specifically, the court found "the ballot of white voter Charles Bryant Cooper had a yellow stickie on it indicating it should be rejected because he did not sign entirely on the line for 'signature of voter'; yet Johnny Will Thomas, Larry Williams and Alberta Harper, all black voters, signed their ballots the very same way and their ballots were counted." R.E.4 at 64-65; Tr. 789-794, 802-803, 806-807.

Heard filed a challenge in state court to the results of the 2003 sheriff's race. While the result was upheld, the state court found that 33 of the absentee ballots materially departed from legal requirements. Ex. P-1 ¶ 166; Tr. 2184-2186. The

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[5] Brown engaged in similar conduct regarding absentee ballots during the 2002 general election. R.E.4 at 59 n.43; Tr. 1965-1966, 2003-2004.

district court found "that there were likely additional problems with ballots that [the state court's] scrutiny would not have revealed, such as a voter's ineligibility to vote absentee, or a notary's having marked the ballot rather than the voter." R.E.4 at 63 n.47. In addition, an absentee ballot was cast in the 2003 Democratic primary by a woman who no longer lived in the County. Ex. P-60, P-61; Tr. 1558-1561.

*b. Brown Threatened To Prevent 174 White Voters From Casting Their Ballots*

Before the 2003 Democratic primary, Brown sent a press release to the local newspaper listing the names of 174 white voters who, he said, could be challenged if they attempted to vote in the primary. Ex. P-128; Tr. 151. At trial, Brown admitted his purpose was to keep these 174 individuals from voting in the 2003 primary. Tr. 1335. "The majority of the 174 voters listed were from District 4," that of Eddie Coleman, the only white member of the Board of Supervisors. R.E.4 at 74; Ex. P-128, Tr. 249-250. Coleman was running for reelection in 2003 against a black challenger. Tr. 255-256, 984, 1135. Brown claimed at the time that these 174 voters were either living outside their precinct or were in violation of a Mississippi law stating that voters who participate in a party's primary must intend

to support that party's nominees in the general election. Tr. 151-152, 1336-1338; Ex. P-128.

After Brown's letter was published, "several persons telephoned the circuit clerk's office expressing concern they would be challenged." R.E.4 at 76, Tr. 2220-2221, 2233. "[O]ne voter felt intimidated and took her husband with her to the poll." R.E.4 at 76; Tr. 900-901, 910. Another testified she did not go to vote because she was "worried [she] might be arrested." Tr. 913. The court found that Brown's threat to challenge the 174 white voters was intended to "discourage white voters from voting in the 2003 Democratic primary." R.E.4 at 81.

*c. Improper Assistance To Black Voters*

During the 2003 Democratic primary, there was "a concerted effort" to offer "unsolicited assistance" exclusively to black voters. R.E.4 at 67. In Mississippi it is illegal to provide assistance to a voter unless he or she asks a poll manager for assistance. R.E.4 at 66 (citing Miss. Code Ann. § 23-15-549 and *O'Neal* v. *Simpson*, 350 So. 2d 998, 1099 (1977)). In the 2003 primary, black individuals at polling places would approach and offer assistance to black voters and, in some cases, would mark ballots without consulting the voters. R.E.4 at 66-67; Tr. 1101-1103, 1129, 1582, 1586-1587. The court found that the illegal assistance to black voters contrasted sharply with the treatment of an elderly white voter at the

Brooksville precinct. R.E.4 at 67. When this voter was having difficulty, a poll official offered no help and "instead ran the voter's blank ballot though the [voting] machine," thus preventing her from voting. R.E.4 at 67; Tr. 1587-1589.

The court found that this racially targeted illegal assistance occurred at the East Macon, Shuqualak, and Brooksville precincts in plain view of the NDEC-appointed poll workers at those precincts. R.E.4 at 66-68; Tr. 1101-1103, 1129, 1582, 1586-1587. When a poll watcher in Brooksville complained to poll managers about this "assistance," she was ignored. Tr. 1586, 1610. These poll workers had the legal "authority and responsibility to stop [the] patently unlawful" voter assistance but did not. R.E.4 at 68; Tr. 1101-1103, 1129-1132, 1610. The court concluded that the illegal assistance "could not have occurred without complicity on the part of Brown and the NDEC." R.E.4 at 67. This unlawful conduct in 2003 was similar to illegal voting assistance in which Brown was personally engaged in 1994. R.E.4 at 68 n.49; Tr. 1746-1751.

*d. Discriminatory Enforcement Of Election Laws*

Aided by the Sheriff's Department, Brown enforced campaigning and electioneering laws in a discriminatory manner. R.E.4 at 69-71. Brown loudly ordered white candidate Eddie Coleman away from a polling place when Coleman arrived to vote and immediately summoned Deputy Sheriff Terry Grasseree, an

NDEC member, when Coleman refused to leave. R.E.4 at 70; Tr. 270-271, 1300-1301. In refusing a request that white candidate Heard be allowed to have a poll watcher at each table, Brown said, "This isn't Mississippi state law you're dealing with. This is Ike Brown's law." R.E.4 at 71 n.51; Tr. 1596-1597. The court also found that race may have been a factor in Grasseree's discriminatory enforcement of a 150-foot anti-campaigning law. R.E.4 at 69-70; Tr. 968-970, 1104.

*4. Remedial Proceedings*

The district court issued its liability ruling on June 29, 2007, and directed the parties to submit remedial proposals. R.E.4 at 103-104. The United States filed its proposal on July 25, 2007 (R. 1491) and asked the court to delay the Democratic primary scheduled for August 7, 2007. R. 1498-1499. Along with its motion, the United States submitted newspaper articles in which Brown stated: "We will win on appeal[.] * * * Nothing is going to change in the meantime. * * * There's no way [the court's liability ruling] will affect the upcoming primary." R. 1530.

Also on July 25, 2007, appellants filed a "Memorandum of Curative Remedy," which represented that "Ike Brown has voluntarily elected to refrain from participating in the absentee ballots process during this election cycle" and would not "monitor[] the absentee ballot rolls, go[] to the polls, or give[] any

appearance of participating in the absentee ballot process." R. 1538. Appellants also assured the court that: (1) "[n]o one will be allowed to loiter in the polling place and stand around 'asking' voters if they need help"; (2) "[a]ny voter requiring assistance [will have] to inform the poll manager at the table upon arrival"; (3) poll watchers "will be allowed to * * * challenge absentee ballots" and "visually examine the signatures on the envelope and the application"; and (4) "poll workers will vote on each specific challenge for a specific absentee ballot." R. 1536-1537.

The district court held two evidentiary hearings before issuing its remedial order: one before and one after the August 7, 2007, primary. At the first hearing, Brown testified he would not be "involved on election day other than certifying the election" and promised "[n]ot to be involved" in the absentee ballot process. Doc. 238 at 54, 81, 84. Based on Brown's representations, and because of the time and money candidates had already spent, the United States withdrew its motion to delay the August 7 primary. See Doc. 269 at 7.

The court allowed the August 7 primary to proceed as scheduled. R. 1544. At that primary, federal election observers were present at the polling places and wrote reports detailing their observations. Doc. 269 at 22-23.

The court heard evidence about the primary at a second remedial hearing on August 22, 2007. Contrary to Brown's representations at the earlier hearing, he

was heavily involved in the counting of absentee ballots during the primary, and the evidence contradicted many of appellants' representations about how the election would be conducted. Brown distributed absentee ballots to poll officials on the night before the election, had access to the absentee ballots in the clerk's office, and was in charge of assigning and replacing poll workers. Doc. 269 at 42-47.

The evidence showed Brown had two phone conversations with poll managers on election day. He called Poll Manager Mildred Reed while poll workers were counting the absentee ballots and told her to "rush up" the process. Doc. 269 at 50. Brown also spoke to poll manager Samantha Dixon. As soon as Dixon got off the phone, she reported "that she had just spoken with Mr. Ike Brown" and said "it's time to wrap things up and close down." *Id.* at 123. The poll managers then packed up the ballots even though the process was incomplete and a poll watcher had asked to review unchecked ballots. *Id.* at 106-108, 123.

Poll Manager Reed was trained by Brown that she had the authority to overrule the decisions of other poll officials regarding absentee ballots. R. 1583. On election day, Reed's co-manager Catherine Johnson asserted that she had "veto power" after three poll officials voted to sustain a challenge to an absentee ballot. Doc. 269 at 54. Johnson told them that "[w]hatever decision you make, Ms. Reed

and I have veto power and we will make the final decision." *Ibid.* Johnson further emphasized: "I don't care what the poll managers vote, I don't care what their vote is. I'm going to veto it and we'll count that ballot." *Id.* at 78. After Johnson asserted that she and Reed had veto power, the group of poll officials who had earlier sustained an absentee ballot challenge did not sustain any more. *Id.* at 56.

At one polling place, poll watchers were not allowed to stand close enough to the poll officials to see and challenge absentee ballots. Doc. 269 at 150. Absentee ballots voted in-person at the clerk's office were not checked at all. *Id.* at 105, 120, 137.

As in the previous elections, there were a strikingly high number of absentee ballots. Appellants admitted that more than 1,000 absentee ballots were cast in the 2007 primary (Doc. 269 at 233), out of approximately 5,000 total votes.[6] Thus, in the 2007 Democratic primary, as in 2003, the absentee voting rate was approximately 20%. See Tr. 1021. The court found it "evidence of fraud in itself to have so many absentee ballots." Doc. 269 at 233.

At one polling place during the 2007 primary, there were about 15 black "assisters" who would not give their names to federal observers. Doc. 269 at 98-

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[6] No more than 5,000 total votes were cast in any race during the primary. See http://www.sos.state.ms.us/elections/2007/PrimaryCert/Democratic/Noxubee.pdf.

100. These assisters stood in line beside voters and went up to vote with them. *Id.* at 100-101. Poll manager Octavia Stowers frequently discouraged the assisted voters from allowing federal observers to watch the process. *Id.* at 102-103. Nonetheless, federal observers witnessed approximately 180 instances of improper voter assistance. *Id.* at 104. The assisters either told voters whom to vote for or pointed to the screen so that the voters would follow along. *Id.* at 103. All of the assisters were black, and the assistance was offered only to black voters. *Ibid*.

On August 27, 2007, the court permanently enjoined Brown and the NDEC from violating Section 2 and ordered specific limitations on Brown's involvement in county elections. R.E.6 at 1-2, 8-9. The court appointed a Referee-Administrator to take over appellants' "electoral duties" through November 20, 2011. R.E.6 at 2-5. The decree bars appellants from "interfer[ing] or attempt[ing] to interfere in any way with the responsibilities of the Referee-Administrator." R.E.6 at 5. It allows the Referee-Administrator to delegate electoral duties to, and seek advice and assistance from, the NDEC. R.E.6 at 2-3 & n.2. The decree outlines procedures for reviewing and challenging ballots, training poll officials, and assisting voters at the polls. The order also authorizes appointment of federal observers for county elections and prohibits poll workers from interfering with those observers. R.E.6 at 5-11. The court enjoined poll managers "from contacting

or receiving communication from defendant Brown or anyone communicating on [Brown's] behalf * * * regarding the review of the absentee ballots." R.E.6 at 6. The order also states that Brown may not "give any written or oral instructions or make any suggestions to poll officials regarding their duties as poll officials." R.E.6 at 9. The decree further provides that "Brown may not be present in the Circuit Clerk's office two weeks prior to any primary election except for matters pertaining solely to him or his immediate family" and that he "may not be present in the polling places unless he is voting, has been appointed as a poll watcher for a candidate, or the Referee-Administrator has appointed him to work as a poll official." R.E.6 at 9.

## SUMMARY OF ARGUMENT

The district court found that appellants acted with racially discriminatory intent in violating Section 2 of the Voting Rights Act. This factual finding is not clearly erroneous. It is supported by overwhelming record evidence, which the district court carefully assessed in its 104-page opinion. In attacking the court's finding of discriminatory intent, appellants ignore or mischaracterize key evidence and improperly ask this Court to second-guess the district judge's credibility determinations. Nothing in appellants' brief comes close to demonstrating clear error.

This Court should not address appellants' constitutional challenges to the remedial order because they were not properly raised before the district court. In any event, their objections are meritless.

## ARGUMENT

## I

## THE DISTRICT COURT'S FINDING THAT APPELLANTS ACTED WITH A RACIALLY DISCRIMINATORY INTENT IS NOT CLEARLY ERRONEOUS

### *A. Standard Of Review*

A district court's determination that a voting practice was implemented with racially discriminatory intent is a finding of fact. *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-574 (1985). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Ibid.*

*B. Legal Standard*

Section 2(a) of the Voting Rights Act prohibits any state or political subdivision from imposing or applying any "qualification or prerequisite" to voting or any "standard, practice, or procedure" 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." 42 U.S.C. 1973(a). A violation of Section 2 "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 * * * 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." 42 U.S.C. 1973(b).[7]

A plaintiff can prove a Section 2 violation by showing that the challenged practice was motivated by racially discriminatory intent or resulted in racial discrimination. *McMillan* v. *Escambia County*, 748 F.2d 1037, 1046 (5th Cir. 1984). "[I]f a section 2 plaintiff chooses to prove discriminatory intent, 'direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions' would be relevant evidence of intent." *Id.*

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[7] The district court correctly held, and it is unchallenged in this appeal, that the Voting Rights Act provides the same protection to whites as to members of other racial groups. R.E.4 at 6-9.

at 1047. Section 2 "covers episodic practices, as well as structural barriers, that result in discrimination in voting." *Welch* v. *McKenzie*, 765 F.2d 1311, 1315 (5th Cir. 1985).

In voting cases, this Court analyzes evidence of intentional discrimination using the standard adopted by *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). See *Nevett* v. *Sides*, 571 F.2d 209, 222 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980). Under *Arlington Heights*, this Court considers, in addition to direct evidence of discriminatory intent, the historical background of a challenged practice, departures from normal decisionmaking, and statements by decisionmakers. 429 U.S. at 267. In a Section 2 claim, "[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act." *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1022 (5th Cir. 1984).

### *C. The District Court's Finding That Appellants Acted With A Racially Discriminatory Intent Is Well Supported By Record Evidence*

#### *1. Introduction And Overview Of Key Evidence*

Starting in the early 1990s and continuing until at least 2006, Brown repeatedly expressed his view that because Noxubee County is majority black, it should have no white officeholders. During this time, Brown also made numerous

racially inflammatory statements about white officeholders in the county. In order to serve his racial purposes after becoming NDEC Chairman, Brown knowingly recruited blacks who were not qualified under state law to run against white officeholders in the county. See pp. 4-9, *supra*. These statements and actions are not themselves violations of Section 2 but, instead, are highly probative of Brown's intent and that of the NDEC as they engaged in practices that diluted white votes. R.E.4 at 23-24, 27.

The evidence of unlawful vote dilution focuses primarily on appellants' conduct relating to the 2003 Democratic primary and subsequent run-off election. Brown directed and funded a massive effort to get blacks to vote absentee that resulted in an astoundingly high 20 to 23% absentee voting rate – a percentage that the district court, crediting expert testimony, found could only have occurred by fraud. Brown kept track of this effort by checking the clerk's absentee-ballot records twice a day. While doing so, he tallied the number of whites and blacks who had returned absentee ballots. Brown made sure his absentee ballot program succeeded on election day when he commanded a nearly all-black group of loyal poll workers, including many of his notaries, to count all absentee ballots in spite of valid challenges. And Brown and the NDEC were complicit in allowing "assisters" to repeatedly provide unsolicited assistance to black voters at the polls

(in violation of state law), while denying assistance to a white voter who needed help in casting her ballot. See pp. 9-23, *supra*.

In a hotly contested run-off election, Brown pre-screened the absentee ballots and ordered rejection of several ballots cast by white voters. Brown demanded that the rest of the ballots be counted, including ballots of black voters that had the same defect Brown identified as the reason for rejection of white voters' ballots. See pp. 19-20, *supra*.

Brown also published the names of 174 white voters in a newspaper advertisement, threatening to challenge them if they tried to vote in the 2003 Democratic primary. The threat achieved its intended purpose; indeed, a white voter testified she did not vote for fear she would be arrested. See pp. 21-22, *supra*.

This summary includes just some of the key evidence that supports the district court's finding of racially discriminatory intent. The court carefully analyzed this and other evidence in its 104-page opinion. Because the court's factual finding is amply supported by the record, it is not clearly erroneous and must be upheld by this Court.

*2. This Court Should Refuse To Second-Guess The District Court's Credibility Determinations*

The district court's finding of racially discriminatory intent rests in large part on its assessment of witness credibility, including that of Brown, who testified at trial. See, *e.g.*, R.E.4 at 46-47, 64-65, 79-80. In attacking the finding of intent, appellants improperly invite this Court to second-guess the district court's credibility determinations. See Br. 22-23, 29. The Court should decline the invitation.

Where "findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575. For this reason, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Ibid.*

In asking this Court to re-weigh witness credibility, appellants imply (Br. 22-23) that the district court disbelieved black witnesses because of their race. This

accusation is unfounded. Indeed, the district court credited the testimony of David Boswell, Larry Tate, William Oliver, Kendrick Slaughter, Gwendolyn Spann, Mable Jamison, Peggy Brown and Nikki Halbert, all of whom are black. See R.E.4 at 20-21, 26-27 & n.16, 39-42 & n.34, 50-51, 98 n.71.

*3. This Court Should Reject Appellants' Piecemeal Attack On The Evidence*

In challenging the district court's finding of discriminatory intent, appellants engage in a piecemeal attack on the evidence by inviting the Court to examine snippets of evidence in isolation. See, *e.g.*, Br. 13-15, 16-19, 26-27. The relevant inquiry for this Court, however, is whether "the district court's account of the evidence is plausible in light of the record *viewed in its entirety*." *Anderson*, 470 U.S. at 573-574 (emphasis added). Under the clear-error standard, "[n]o single piece of circumstantial evidence need be conclusive when considered in isolation; the question, rather, is whether the evidence, when considered as a whole, provides a substantial basis for the [factual finding]." *United States* v. *Miller*, 146 F.3d 274, 281 (5th Cir. 1998).

The district court's finding of racially discriminatory intent was not based on any single piece of evidence. Rather, the finding rested on a massive amount of evidence – 164 exhibits and two weeks of testimony by more than 50 witnesses –

which the district court carefully analyzed in its 104-page opinion. Even without one or more of the individual pieces of evidence that appellants attack, the district court's ultimate finding of discriminatory intent is not clearly erroneous.

*4. Appellants' Attacks On Individual Pieces Of Evidence Are Unsupported*

In any event, appellants' attacks on each piece of evidence are refuted by the record. As explained below, appellants fail even to acknowledge, much less address, voluminous portions of the record that support the district court's finding of intent. See pp. 41-42, 44-45, 46-47, *infra*.

*a. Absentee-Ballot Abuses*

Appellants claim (Br. 19) that no "credible evidence" supports the district court's finding that Brown and the NDEC engaged in a pattern of racially discriminatory absentee-ballot abuses. This contention is refuted by the evidence set forth at pp. 9-21 of this brief, as well as the detailed, 35-page analysis of the absentee-ballot abuses in the district court's opinion. See R.E.4 at 31-65.

Specifically, appellants assert (Br. 19) that there is "no credible evidence of racially disparate treatment in the voting or counting of absentee ballots." In fact, Brown pre-screened absentee ballots before the hotly-contested runoff election that pitted a white-preferred candidate against an African-American who was Brown's

preferred candidate. R.E.4 at 55-56; see pp. 19-20, *supra*. Brown selected for rejection only ballots cast by whites. R.E.4 at 64; p. 20, *supra*. Brown went to the polling place and demanded that poll workers reject the ballots he pre-selected and count the rest, including ballots of black voters that had the same defect he asserted as the reason to reject white voters' ballots. R.E.4 at 55-56, 64-65; pp. 19-20, *supra*. This incident is sufficient, by itself, to show racially disparate treatment by Brown in the handling of the absentee ballots.

Moreover, appellants incorrectly contend (Br. 21, 23-24) that Brown's refusal during the 2003 primary to allow challenges and his demand that all ballots be counted had the same effect on whites and blacks. Appellants ignore a crucial point, however. Because of the massive, racially targeted absentee-ballot abuses Brown orchestrated "on the front end" of the absentee-ballot scheme, he "would have considered it to the likely benefit of [his] preferred candidates that all the ballots be counted." R.E.4 at 62.

Next, appellants assert (Br. 19, 21) that no credible evidence links Brown to the program of absentee-ballot abuses. In fact, abundant evidence establishes the link. As noted, Brown pre-screened absentee ballots cast by whites and ordered poll workers to reject them. Moreover, Brown sponsored and directed the activity of more than 50 notaries, including NDEC member Windham, whom the court

found engaged in absentee ballot fraud. See pp. 13-15, *supra*. Brown constantly monitored absentee ballot activity in the clerk's office, tallied numbers of absentee ballots by race, and commanded poll managers in the 2003 Democratic primary to count all absentee ballots, including ballots that had been successfully challenged. See pp. 12-13, 17-18, *supra*.

Appellants argue (Br. 19-20) that the United States was required to prove fraud but failed to do so. First, the United States was not required to prove that any of the absentee ballots cast by African-Americans were fraudulent. Even if (contrary to the evidence) all of those absentee ballots were validly cast, Brown engaged in intentional race discrimination when he ordered rejection of white voters' absentee ballots even though they were similarly situated to the ballots of black voters that he directed poll workers to count. By targeting only the ballots of white voters for rejection, Brown violated Section 2.

At any rate, the record amply supports the district court's conclusion that appellants engaged in absentee-ballot fraud. R.E.4 at 35, 40-41, 43. The court permissibly inferred that the 20 to 23% absentee voting rate in Noxubee County could not occur except by fraud. R.E.4 at 35. The court cited the normal 3 to 6% Mississippi absentee-voting rate and the state's restrictive requirements for voting absentee. R.E.4 at 32, 34-35. The court's finding was supported by expert opinion

finding it "highly unlikely that twenty percent or more of those on the voter rolls of Noxubee County are eligible to vote by absentee ballot." R.E.4 at 35. Moreover, the record supports the court's conclusion that Brown-sponsored notary Windham engaged in fraud. R.E.4 at 40-41, 43; p. 14-15, *supra*. Finally, Brown committed fraud when he ordered absentee ballots to be counted even though they had already been rejected, and even though he had no legal authority to override poll managers' rejection of those ballots. R.E.4 at 54; pp. 19-20, *supra*.

Appellants further allege (Br. 20) that the district court disregarded "the demographic breakdown of the political parties in Noxubee County" in considering the "more than 90% black" poll workforce. In fact, the court's opinion states that "[a]pproximately twenty percent of voters in the Democratic primary are white." R.E.4 at 78. Beyond the significant difference between the racial composition of the party and the poll workers, the court considered evidence that Brown broke with the party's past practice and ignored the State Democratic party's recommendation that the racial composition of the poll workers roughly match the demographics of the Democratic electorate in the jurisdiction. R.E.4 at 45-46. At any rate, the race of the poll workers was not the court's "greatest concern." R.E.4 at 48. Instead, the court focused on appellants' selection of and influence over the

poll workers as a "means" of "pushing through absentee ballots that had been collected by Brown's people." R.E.4 at 45, 48.

*b. Threatening To Challenge 174 White Voters At The Polls*

The district court properly concluded that Brown's threatened challenge of 174 white voters was motivated in part by race. See Br. 26-27. One reason for the court's finding was that, apart from a few exceptions, Brown could not identify "any concrete basis for suspecting [these voters] were not true Democrats" or "any investigation that was undertaken prior to publishing these names." R.E.4 at 79-80; Tr. 1336-1340, 1351-1355. Moreover, Brown failed to include Shuqualak Mayor Velma Jenkins, who is African-American, on the list of 174, even though she publicly supported Republican Congressman Chip Pickering. Tr. 2472-2474. This fact undercuts Brown's claim that he challenged these voters based on party loyalty rather than race.

Another reason, not acknowledged by appellants, is that, although Brown claimed that some of the voters were placed on the list because they no longer lived in their precinct, he did not include the names of any black voters. R.E.4 at 80. Indeed, Brown claimed to have identified about 2,000 voters who had moved and were no longer eligible to vote in their precinct. R.E.4 at 80; Tr. 1336-1338. It is implausible that in a county where the voting age population is 65.7% black,

Brown was unaware of any blacks who had moved out of their old precincts and thus were ineligible to vote.

Appellants also ignore a crucial fact supporting the finding of discrimination: the majority of the white voters on the list were in Supervisor Coleman's district and Coleman was running for re-election against a black challenger. R.E.4 at 80. This confirms that Brown's true intent was to intimidate white voters in order to accomplish his avowed goal of unseating the only white member of the Board of Supervisors. Tr. 219.

*c. Improper Voter Assistance*

Contrary to appellants' argument (Br. 24-25), the district court did not clearly err in finding that Brown and the NDEC were "complicit[]" in a "concerted effort to illegally 'assist' black voters." R.E.4 at 67-68. Improper "assistance" was being given to black voters at a number of polling places. R.E.4 at 67-68. Poll workers, trained by Brown and the NDEC, had the legal authority and obligation to stop this "assistance" but did not. R.E.4 at 67. These poll workers were appointed by the NDEC and thus were acting as agents of the NDEC while supervising the polling places. Tr. 1384. And these violations occurred, unimpeded, at polling places where NDEC members were present. See R.E.4 at 67-68; Tr. 1101-1103, 1129-1132, 1146, 1586-1587, 1590, 1609-1610.

This evidence amply supports the finding that Brown and the NDEC were complicit in allowing the improper assistance to occur. Because the illegal assistance was so open and flagrant, one can reasonably infer that the failure of the NDEC-appointed poll workers to intervene signifies that they consented to this unlawful activity. And given the degree of control that Brown exercised over the poll workers on election day and their loyalty to him (see *e.g.*, pp. 17-20, 26, *supra*), one also can infer that these NDEC agents would not have permitted the unlawful assistance to continue without Brown's consent.

Appellants attempt to confuse the issue by citing a federal law, 42 U.S.C. 1973aa-6, that provides voters a right, under certain circumstances, to receive assistance in voting. See Br. 25. As the district court made clear, Mississippi law "requires that before any voter may be given assistance, the voter must first request such assistance." R.E.4 at 66 (citing Miss. Code Ann. § 23-15-549). The court found that black assisters not only offered unsolicited assistance, in violation of state law, but also marked some ballots "without consulting the voters." R.E.4 at 66-67. Even if the assistance of the black voters had not violated Mississippi law, the disparate treatment of the white voter who needed assistance (see p. 22, *supra*) is evidence that the assistance was being provided in a racially discriminatory manner.

*d. Other Evidence Of Discriminatory Intent*

*i. Brown's Statements*

The district court found that Brown has "consistently and repeatedly declared his racial agenda." R.E.4 at 94. The court made clear that Brown's statements did not themselves violate Section 2, and considered the statements only as background evidence of intent. R.E.4 at 23-24; *cf.* Br. 12.

Although appellants challenge the district court's finding that Brown repeatedly made comments indicating his racial intent, they ignore most of the evidence on which the court based this finding. Significantly, appellants ignore Brown's repeated statements over the years that because a majority of Noxubee County's residents are black, no white should hold an elected office there. See pp. 4-9, *supra*; see also *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1021-1022 (5th Cir. 1984) (official's statement that "one of the reasons for the adoption of the [challenged] requirement was to insure a minority could not gain control of the city government" was probative of racially discriminatory intent). These statements alone would provide ample evidence of Brown's "racial agenda."

Appellants address only two of the many statements the district court considered. See pp. 4-9, *supra* (detailed discussion of Brown's many statements evidencing racially discriminatory intent). This focus on two statements to the

exclusion of many others illustrates appellants' strategy of engaging in a piecemeal attack on the evidence, rather than looking at the record as a whole, as this Court must do in reviewing a factual finding. See pp. 36-37, *supra*. Even without these two statements, the record amply supports the district court's finding.

In any event, appellants ignore or severely mischaracterize key evidence in attacking these two statements. Br. 12-16. In appellants' version of events, Brown's 1995 letter merely urged blacks to "support candidates who 'pledge to keep the dream alive.'" Br. 13. This ignores the letter's explicit racial appeal: "Vote Black in '95'." R.E.4 at 19.

Appellants also object to the court's finding that Brown falsely attributed a racist statement to white District Attorney Forrest Allgood in order to inflame black voters. Br. 15 (quoting R.E.4 at 21-22). Appellants assert that the quote – attributing to Allgood's representative the statement "none are good enough" in response to a question about why Allgood had not hired any blacks – was "substantially accurate." Br. 15. In fact, Brown admitted at trial that Allgood's representative actually said "[w]e hire the best qualified person," and did not say "none are good enough." Tr. 1246-1247. This was one example of Brown's using a factually unfounded racial appeal "to get the job done." R.E.4 at 22.

Appellants inaccurately assert that the district court concluded "that this *one* statement [Brown's attack ad misquote], * * * presented a 'clear picture of Brown's racial agenda.'" Br. 15-16 (emphasis added). In fact, as previously explained, this statement was just one of many on which the district court based its finding. See pp. 4-9, *supra*.

*ii. Recruiting Unqualified Black Candidates*

Appellants argue (Br. 16-19) that the district court improperly relied on Brown's recruitment of black candidates as evidence of his discriminatory intent. In attacking the district court on this point, appellants ignore crucial evidence supporting the court's finding.

For example, appellants ignore Brown's attempt to convince a black candidate for Macon City Alderman to falsify his address so he could run against a white incumbent. R.E.4 at 26; Tr. 941. Brown explained that if the candidate ran in his own district "he and another black candidate * * * would 'split the black votes between [them] and let the white one win.'" R.E.4 at 26; Tr. 942.

In addition, in 2003, Brown recruited a black candidate to run against Prosecuting Attorney Roderick Walker, the only white countywide officeholder in Noxubee County. See p. 7, *supra*. In attacking the court's reliance on this incident, appellants ignore two critical facts. First, Brown made a statement to a

*USA Today* reporter after the election revealing his racial motivation for trying to unseat Walker. He told the reporter that Noxubee County has only "one white official elected countywide, prosecutor Ricky Walker," and then added: "If I could find a black lawyer who lives in the county, we'd get him, too." R.E.4 at 25 n.15; Tr. 1482-1484. Second, appellants ignore the fact that Brown knew that the black candidate he recruited to challenge Walker was not a county resident and thus was not qualified under state law to run for prosecuting attorney. R.E.4 at 24-25; Tr. 69-70, 1454-1456, 1459.

When Walker tried to challenge his opponent's candidacy, Brown held the hearing on Walker's petition at Brown's "personal residence, * * * gave Walker short notice of the meeting and specifically refused Walker's request for a current list of NDEC members and a copy of the State Party Constitution." R.E.4 at 28. That Brown attempted to exclude one black NDEC member, along with two white members, from the meeting on Walker's petition does not render the court's finding erroneous. See Br. 18. This was a minor point in the district court's opinion. Even if Brown's exclusion of the white NDEC members was not itself racially motivated, that would not detract from the court's conclusion that Brown's recruitment of an unqualified black candidate to oppose Walker – in conjunction

with Brown's stated desire to get rid of white officeholders in the county – evidenced racially discriminatory intent.

Appellants also assert (Br. 16) that the United States was required to prove that "white incumbents were responsive to black voters." In fact, the United States did not have to prove anything about officeholders' responsiveness. Cf. *Rogers*, 458 U.S. at 626 n.9 (rejecting lower court's holding that "proof of unresponsiveness" is an essential element of a vote dilution claim). Brown's repeated focus on the *race* of white officeholders in his public statements amply supports the conclusion that he targeted them at least in part because of their race and not solely because of a perceived lack of responsiveness to the black majority. But even if Brown had been motivated in part by his view that white officeholders were unresponsive to black citizens, that would not undercut the district court's finding of intent. See *Velasquez*, 725 F.2d at 1022 ("[r]acial discrimination need only be one purpose, and not even a primary purpose" of a challenged practice).

*5. The District Court Did Not Shift The Burden Of Proof To Appellants*

Appellants suggest (Br. 19-20, 21, 27) that the district court impermissibly shifted the burden of proof to defendants. That assertion is incorrect.

In fact, the district court merely drew reasonable inferences from the evidence presented, sometimes noting that appellants failed to provide an alterative

explanation or that their explanation was not credible. See R.E.4 at 35 n.24, 64-65, 79-80. This is not burden shifting. See *United States* v. *Chagra*, 669 F.2d 241, 258 (5th Cir. 1982) ("The possibility that the evidence in a particular case may be sufficiently persuasive to convince [the factfinder] to draw [one] inference rather than another unless the defendant offers an alternative explanation does not constitute a shift in the burden of persuasion."), overruled on other grounds, *Garrett* v. *United States*, 471 U.S. 773 (1985).

*6. The District Court's Liability Ruling Does Not Prevent Legitimate Advocacy And Political Activity*

Finally, appellants argue (Br. 30) that if the district court's liability ruling is allowed to stand, "many perfectly legal, and indeed noble, activities could be prohibited," including legitimate efforts to enforce the voting rights of African-Americans. This contention represents a fundamental distortion of the court's decision. Contrary to appellants' assertion (Br. 9-10), for example, the district court's liability ruling in no way prevents individuals from engaging in legitimate efforts to help qualified minority voters vote absentee. Indeed, the court's opinion emphasizes that such conduct does not violate Section 2. R.E.4 at 38 ("[F]acilitation of lawful and proper absentee voting would be a legitimate facet of any effort to turn out votes."). Neither does the court's opinion prevent partisan

political activity in racially polarized jurisdictions (Br. 9, 28) or bar individuals from employing legitimate efforts to enfranchize blacks (Br. 12). Individuals in Noxubee County are free to advocate for African Americans and to recruit black candidates. See Br. 14. The court's opinion never suggests that any of these things violate Section 2.

The district court did not find appellants liable because they advocated for the rights of African Americans or engaged in partisan politics. Rather, the court found that appellants violated Section 2 of the Voting Rights Act by diluting the votes of whites in Noxubee County for racially discriminatory reasons. That finding of intentional discrimination is supported by abundant evidence in the record and certainly is not clearly erroneous.[8]

[8] The United States argued below that appellants violated the Voting Rights Act under both an intentional discrimination theory and a discriminatory results theory. R. 1363-1373. While the district court considered this case "an 'awkward fit' for a strictly results standard" (R.E.4 at 102), it did not definitively rule on that claim. Accordingly, if this Court were to conclude that the district court's finding of racially discriminatory intent is clearly erroneous, it should remand for consideration of the results claim.

## II

## APPELLANTS' CONSTITUTIONAL CHALLENGES TO THE REMEDIAL ORDER WERE NOT PROPERLY RAISED BELOW AND SHOULD NOT BE CONSIDERED ON APPEAL; IN ANY EVENT, THE ORDER IS CONSTITUTIONAL

### *A. Appellants' Remedial Arguments Are Forfeited*

"An argument not raised before the district court cannot be asserted for the first time on appeal." *XL Specialty Ins. Co.* v. *Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008). This Court "require[s] a party to do more than just raise an argument; the contention must be pressed so that the district court has an opportunity to rule on it." *Benefit Recovery, Inc.* v. *Donelon*, No. 07-30414, 2008 WL 642972, at *2 (5th Cir. March 11, 2008).

In the district court, appellants failed to press any of the constitutional arguments they now raise on appeal. Consequently, this Court should refuse to consider their challenges to the remedial order.

Appellants now object on First Amendment and other constitutional grounds to provisions of the remedial decree that are identical to those originally proposed by the United States on July 25, 2007 – more than a month before the district court issued its decree. R. 1491-1501. Between the filing of the United States' remedial proposal and the court's remedial ruling, appellants filed two responsive pleadings

on the issue of remedy, R. 1632-1642, 1660-1670, and the district court held two remedial hearings, Docs. 238 & 269.

Appellants did not, in their pleadings or at the remedial hearings, give the district court an opportunity to rule on the constitutional objections they now raise on appeal. Although appellants made a conclusory assertion below that one provision of the proposed remedy – the limitation on Brown's presence at the polls – would "violate their rights under the First Amendment" (R. 1640), they failed to explain this contention or even identify which of the First Amendment protections they were invoking. This conclusory reference to the First Amendment does not qualify as an argument that was "pressed so that the district court ha[d] an opportunity to rule on it," *Benefit Recovery, Inc.*, 2008 WL 642972, at *2, – even as to the provision limiting Brown's presence at polling places. Certainly, this bald invocation of the First Amendment gave the district court no indication of the associational, speech, or prior restraint arguments that appellants raise on appeal concerning numerous provisions of the remedial order. And appellants never asserted below that the remedial order was unconstitutionally vague or violated their equal protection rights. Consequently, this Court should refuse to consider these constitutional issues in this appeal.

Declining appellate review is particularly appropriate here because appellants have the option, which they have not yet exercised, of seeking modification of the remedial decree in the district court. The remedial order provides that "the parties shall be allowed to seek modification of this Order." R.E.6 at 13. If appellants believe the decree impermissibly intrudes on First Amendment protections, is too vague, or otherwise violates the Constitution, they should bring those claims to the district court in the first instance so that a factual record can be made. See *National Soc'y of Prof'l Eng'rs (NSPE)* v. *United States*, 435 U.S. 679, 698 (1978).

### *B. Even If The Issues Were Preserved, Appellants' Constitutional Challenges Are Meritless*

#### *1. The Remedial Order Does Not Violate The First Amendment*

On appeal, appellants raise First Amendment challenges to the following provisions of the remedial order: (1) the assignment of "electoral duties" to the Referee-Administrator (R.E.6 at 2-5) (see Br. 31-39, 42, 44, 46); (2) the restrictions on Brown's access to polling places and the clerk's office (R.E.6 at 9) (see Br. 34-35, 41, 47, 51-52); and (3) the prohibition on Brown's giving "instructions" or "suggestions" to poll officials "regarding their duties as poll officials" (R.E.6 at 9), as well as a related provision banning poll managers from contacting or receiving

communication from Brown "regarding the review of the absentee ballots" (R.E.6 at 6) (see Br. 34-35, 41-42, 46-47).[9]

Appellants argue (Br. 30-45) that these provisions violate their First Amendment rights to free association and free expression. Br. 30-52. As part of their free expression claim, appellants assert that the remedial order imposes an unconstitutional prior restraint and is impermissibly overbroad. All these arguments are meritless.

Appellants overlook a crucial point fatal to their First Amendment claims: where, as here, a court has found a defendant in violation of federal law, the court has broad authority to impose restrictions on that defendant in order to remedy the violation and prevent recurrences of unlawful conduct, even if those restrictions "impinge upon rights that would otherwise be constitutionally protected." *NSPE*, 435 U.S. at 697-698. This principle applies to remedies that otherwise implicate First Amendment rights of free expression and association. See *id.* at 697 n.25.

In *NSPE*, the Supreme Court rejected a First Amendment challenge to an injunction imposed against a professional association that had violated the Sherman

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[9] Appellants also challenge the injunction's prohibition on interfering with the responsibilities of the Referee-Administrator (Br. 46-47, 50-51). Because appellants urged the district court to adopt this "non-interference" provision, compare R. 1652 ¶ 12 with R.E.6 at 5 ¶ 10, they cannot now switch positions and attack a feature of the decree that they advocated below.

Act. The injunction prohibited the organization "from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical." 435 U.S. at 697. In upholding the injunction, the Supreme Court explained that the district court "was empowered to fashion appropriate restraints on the [defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Ibid.* Although acknowledging that the injunction "may curtail the exercise of liberties that the [defendant] might otherwise enjoy," the Supreme Court held that such a remedy was "a necessary and, in cases such as this, unavoidable consequence of the violation." *Ibid*.

The Court explained that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *NSPE*, 435 U.S. at 698. Applying that test, the Court rejected the contention that the remedial order violated the freedom of association or imposed a prior restraint on speech. *Id.* at 697-698 & n.25.[10]

Like the injunction in *NSPE*, the remedial order here is not a prior restraint and does not otherwise violate the rights of free expression and association.

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[10] That the injunction here was implemented to remedy appellants' violation of federal law distinguishes this case from *Davis* v. *East Baton Rouge Parish School Board*, 78 F.3d 920 (5th Cir. 1996) (cited in Br. 45-46), where the injunction was not imposed to remedy a violation of law.

Contrary to appellants' contention (Br. 37-39, 42-44, 48-49), the injunctive provisions need not satisfy strict scrutiny – *i.e.*, they need not be narrowly tailored to serve a compelling governmental interest. Rather, under *NSPE*, the remedy is permissible as long as it is "a reasonable method" (435 U.S. at 697-698) of correcting appellants' violations of federal law and preventing recurrence of their unlawful conduct. The record in this case, particularly the evidence presented during the remedial proceedings, shows the reasonableness and necessity of the injunctive provisions. A robust remedy is especially warranted here, in light of the government's "compelling" interest (Br. 42) in remedying and preventing violations of the Voting Rights Act.

*a. Assignment Of Electoral Duties To The Referee-Administrator*

The assignment of electoral duties to a Referee-Administrator was particularly appropriate because Brown persisted in abusing his electoral duties during the August 2007 primary. See pp. 25-28, *supra*. He did this despite having already been adjudged liable for violating the Voting Rights Act and despite his explicit assurances to the court that he would not repeat his prior conduct. See pp. 24-25, *supra*.

Contrary to appellants' contention (Br. 37-39, 43-44, 48-49, 56), the appointment of federal observers would not have been an adequate alternative

remedy. Brown committed his abuses despite the presence of federal observers at the August 2007 primary. See p. 25, *supra*. In light of Brown's flagrant defiance of the law and the court, the district judge reasonably concluded that merely appointing federal observers would not adequately "prevent a recurrence of past transgressions by NDEC Chairman Brown in the conduct of Democratic primary elections." R.E.6 at 3 n.1.

At any rate, appellants fail to coherently explain how the assignment of electoral duties to the Referee-Administrator interferes with their expression or association. Preventing Brown and the NDEC from performing these electoral duties is a restriction on conduct, not speech. These nuts-and-bolts tasks of running an election – many of which are already circumscribed by state law[11] – are not "inherently expressive" and thus are not protected under the free speech clause. See *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006) (the right of free expression protects only conduct that is "inherently expressive"). The injunction does not prevent Brown and the NDEC from associating with one another, pursuing political goals, or expressing their political message to the world. Simply put, appellants fail to explain what message

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[11] See, *e.g.*, Miss. Code Ann. § 23-15-265 (regulating number of poll workers and requiring that they be appointed no less than two weeks before the primary); *id.*, § 23-15-267 (proscribing rules for handling ballot boxes).

the remedial order prohibits them from expressing. See *id.* at 68 (law that did not impair the group's expressive message was not a violation of freedom of association). Brown may, without violating the order, raise funds for the party, endorse candidates, campaign on behalf of candidates, organize and run party meetings, speak out about political issues on behalf of himself and the NDEC, and represent the NDEC at the state convention. And the NDEC may continue to have Brown as its chairman and spokesperson. Thus, contrary to appellants' assertion (Br. 34), the remedial order does not bar the NDEC from selecting "the leader of its choice."

*b. Restrictions On Brown's Presence At Polling Places And The Clerk's Office*

Appellants also challenge the provisions of the decree limiting Brown's access to the circuit clerk's office and polling places. These are narrow restrictions. Brown may be in the clerk's office without restriction except during the "two weeks prior to any primary election." R.E.6 at 9. Even during that two-week period, Brown may conduct business in the clerk's office "pertaining solely to him or his immediate family." R.E.6 at 9. The restriction on his presence at polling places is also narrow: Brown is permitted to be at polling places if "he is

voting, has been appointed as a poll watcher for a candidate, or the Referee-Administrator has appointed him to work as a poll official." R.E.6 at 9.

Placing limited restrictions on Brown's access to these locations is a reasonable means of preventing a recurrence of appellants' violations of the Voting Rights Act. Brown had previously used his access to the clerk's office and polling places to perpetrate his vote dilution scheme. See, *e.g.*, R.E.4 at 44-45 (Brown accessed absentee ballot records in the clerk's office multiple times a day before the 2003 primary election as part of his illegal scheme); R.E.4 at 52-53 (Brown entered polling places to ensure that absentee ballots were counted and challenges were ignored); R.E.4 at 55, 63-64 (Brown used access to the clerk's office and polling places to ensure that absentee ballots of white voters would be rejected while materially similar ballots of black voters would be counted).

At any rate, appellants have not cogently explained how these narrow restrictions interfere with Brown's ability to express his political views or associate with the NDEC or others to promote his political goals. Brown has not explained, for example, what expressive activities or political associations he wants to engage in at the clerk's office that would not already be permitted by the exception for personal and family business. Moreover, the limitation on Brown's presence at polling places is hardly a limitation at all; it essentially tracks the restrictions

imposed by Mississippi law. See R.E.4 at 70 ("Under Mississippi law, the only persons allowed within thirty feet of the polling place are voters, poll workers and no more than two poll watchers for each candidate.") (citing Miss. Code Ann. § 23-15-245).[12]

*c. Limitations On Brown's Communications With Poll Officials About Their Duties*

Finally, the restriction on Brown's communicating with poll workers about their duties is also a reasonable remedy because Brown repeatedly used such communications to accomplish his Voting Rights Act violations. Brown's commands to the poll officials to count ballots rejected as legally deficient, ignore valid challenges, and reject ballots of white voters while counting materially similar ballots of black voters directly accomplished vote dilution. The limited restrictions on communicating with poll officials is particularly appropriate in light of Brown's persistence during the August 2007 primary in interfering with the absentee ballot process. For example, during that primary, he instructed a poll manager to shut down the absentee ballot review process, thereby preventing challenges to absentee ballots. See p. 26, *supra*.

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[12] Appellants' conclusory argument about the "right to travel" (see Br. 51-52) is not properly developed by appellants' opening brief and thus would be waived even if it had been raised below. See *Procter & Gamble Co.* v. *Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004).

Although these provisions restrict Brown's *communications* with poll workers, the prohibitions are aimed at preventing unlawful *conduct*, not speech *per se*. "[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *FAIR*, 547 U.S. at 62 (citation omitted). Thus, the First Amendment permits a court to bar a defendant from engaging in certain communications if such words – whether written or spoken – are the means by which the defendant committed the unlawful conduct. For example, although a statute prohibiting racial discrimination in hiring "will require an employer to take down a sign reading 'White Applicants Only,'" that "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Ibid.*

At any rate, the restrictions imposed here are narrow ones. Brown may talk to poll workers about his political views or any other subject as long as he does not make suggestions or give instructions about their "duties as poll officials," including their "review of absentee ballots." R.E.6 at 6, 9. He has failed to explain how this limited restriction on his communications with poll officials meaningfully impedes his ability to express his political views or associate with others to promote his political goals. And even if this provision proscribed some speech that

would normally be constitutionally protected, it is a valid exercise of the court's remedial discretion occasioned by appellants' illegal conduct, and thus not a violation of the First Amendment. See *NSPE*, 435 U.S. at 697-698 & n.25.

*2. Appellants' Other Constitutional Arguments Are Meritless*

Appellants contend (Br. 55-56) that the decree violates equal protection because it imposes burdens on Democrats but not Republicans. This argument is meritless. To establish an equal protection violation, a party must show that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000). The Noxubee County Republican Party and the NDEC are not similarly situated. Unlike the NDEC, the County's Republican Party is not a party in this case and has not been found to have violated the Voting Right Act.

Finally, appellants assert (Br. 54) that two provisions of the remedial order are unconstitutionally vague: (1) the one assigning all "electoral duties" to the Referee-Administrator (R.E.6 at 2-3); and (2) the requirement that state law limitations on electioneering and campaigning be enforced "equally" (R.E.6 at 11). This vagueness challenge is meritless.

The relevant question is whether the injunction is "framed so that those enjoined will know what conduct the court has prohibited." *Martin's Herend*

*Imports, Inc.* v. *Diamond & Gem Trading U.S. of Am. Co.*, 195 F.3d 765, 771 (5th Cir. 1999) (citations omitted). "The mere fact that * * * interpretation is necessary does not render the injunction so vague and ambiguous that a party cannot know what is expected of him." *Ibid.*

Both of the challenged provisions are sufficiently specific to give appellants fair notice of the prohibited conduct. The term "electoral duties" is sufficiently specific, particularly in light of the numerous examples set forth in the district court's opinion. And the requirement to enforce election laws "equally" is easily understood by reasonable persons of common intelligence. The challenged terms are certainly less ambiguous than other provisions that have survived vagueness challenges. See *Cameron* v. *Johnson*, 390 U.S. 611, 615-616 (1968) (rejecting argument that the term "unreasonably interfere" was unconstitutionally vague).

## CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complied with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 12.0 and contains 13938 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

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Date: May 16, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on May 16, 2008, a copy of the BRIEF FOR THE UNITED STATES AS APPELLEE was sent, along with a computer disk containing an electronic version of the brief, by prepaid, overnight delivery on each of the following persons:

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