Nos. 03-2111; 03-2112

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CHARLESTON COUNTY, SOUTH CAROLINA, ET AL.,

Defendants-Appellants

and

LEE H. MOULTRIE, ET AL.,

Plaintiffs-Appellees

v.

CHARLESTON COUNTY COUNCIL, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the district court correctly found that Charleston County, South Carolina, experienced legally significant white racial bloc voting in elections for County Council.

2. Whether the district court correctly found that the County's at-large

electoral system dilutes minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973.

3. Whether the district court correctly found that the County's evidence of partisanship did not rebut the United States' showing that the at-large electoral method diluted the voting strength of minority voters in Charleston County, in violation of Section 2.

STATEMENT OF THE CASE

On January 17, 2001, the United States filed suit against Charleston County, South Carolina; the Charleston County Council and its members in their official capacity; and the Charleston County Election Commission (the County) alleging that the at-large method of electing the nine-member Charleston County Council violates Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 (Section 2), because it dilutes minority voting strength. On February 28, 2001, four Charleston County voters (Lee H. Moultrie, *et al.*) filed a similar suit, alleging that the election of the Charleston County Council violates both Section 2 and the Equal Protection Clause. The district court consolidated the cases. R. 15.[1]

Both the United States and the private plaintiffs moved for partial summary

[1] Citations to "R.__" refer to the docket sheet in No. 01-CV-155. Documents in No. 01-CV-562 (Moultrie plaintiffs) have different docket numbers.

judgment as to the three preconditions that *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), sets forth for establishing a Section 2 violation. The County filed a motion for partial summary judgment as to the third *Gingles* precondition. It also sought summary judgment on its contention that the electoral defeat of minority and minority-preferred candidates is caused by political partisanship rather than race.

On April 26, 2002, the magistrate recommended that the United States' motion for partial summary judgment on the *Gingles* preconditions be granted and defendants' motion for partial summary judgment be denied. R. 105.

The County objected to the magistrate's recommended grant of summary judgment only as to the third *Gingles* precondition. On July 10, 2002, the district court adopted the magistrate's Report and Recommendation in its entirety and granted summary judgment for the United States and private plaintiffs as to the three *Gingles* preconditions. R. 134.

Following trial on the remaining issues, the district court, on March 6, 2003, held the at-large system of election for the County Council dilutes minority voting strength in violation of Section 2, and enjoined any future use of the at-large election system for County Council elections. R. 167 at 67.

The County filed notices of appeal on September 3, 2003. R. 190. The appeals were consolidated by this Court.

STATEMENT OF THE FACTS

I. *Method Of Election For County Council*

The Charleston County Council consists of nine members elected at-large to four-year staggered terms. R. 167 at 8. Elections are conducted every two years on a partisan basis (*ibid.*); candidates run from four residency districts (*ibid.*).

In 1989, a referendum proposal to change to single-member districts was defeated. Expert witnesses for the United States and the County agreed that voting on the referendum was racially polarized. U.S. Exh. 14 at 63-64; Jt. Exh. 2C, at Exh. A thereto. At least 98% of black voters voted to change to single-member districts, and at least 75% of the white voters voted to retain at-large elections. *Ibid.*

II. *Demographics*

According to the 2000 Census, Charleston County has a total population of 309,969, making it the third most populous county in South Carolina. R. 167 at 7. The voting age population is 236,395, 64.8% of which is white and 30.6% of which is black. *Ibid.*

As of November 2000, 177,279 persons were registered to vote in Charleston County (*ibid.*), 69.1% of whom were white, and 30.9% of whom were

black (*ibid.*).

Uncontroverted socio-economic data from the 1990 Census show "dramatic" (R. 167 at 27) disparities in the socio-economic conditions of whites and blacks in Charleston County (*id.* at 27-29; U.S. Exh. 68D). For example, the median family income of black residents ($18,603) was less than half that of the median family income of white residents ($38,052). Table, R. 167 at 28. While only 5% of white families are below the poverty line, over one-third of black families (34.2%) are. *Ibid.* In addition, while 83.6% of white county residents had graduated high school, only 57.6% of black county residents had done so.[2] *Ibid.*

III. *Pre-Trial Proceedings*

On January 17, 2001, the United States filed suit, alleging that the at-large method of electing the nine-member Charleston County Council violates Section 2. On February 28, 2001, four Charleston County voters also filed suit, alleging that the election of the Charleston County Council violates Section 2 and the Equal Protection Clause. The district court consolidated the cases. R. 15.

Both the United States and the private plaintiffs moved for partial summary

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[2] While socio-economic data from the 2000 Census were not available at the time of trial, they were available before the district court issued its decision, and the court found that those data demonstrate that the disparity persists into the present. R. 167 at 28-29, n. 21 & Table.

judgment as to the three preconditions that the Supreme Court identified in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), as necessary to establish a Section 2 violation. On April 26, 2002, the magistrate issued a report, recommending that the United States' motion for partial summary judgment on the *Gingles* preconditions be granted.

A. *The First Gingles Precondition – Compactness*

The magistrate's report found that the minority population of Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district. R. 105 at 8-12. That finding was based upon the reports and testimony of Dr. Ronald E. Weber, the County's expert, *(id*. at 9; Jt. Exh. 2A at 6 ¶2), and Dr. Theodore Arrington, the United States' expert, (*ibid.*, citing U.S. Exh. 14 at 43-46, Table 17 & App. D), both of whom conducted similar analyses on comparable data.

B. *The Second Gingles Precondition – Minority Cohesion*

The magistrate judge also relied upon Weber's deposition testimony in finding that black voters in Charleston County are politically cohesive.[3] R. 105 at

[3] Dr. Arrington and Dr. Weber used the same methods of statistical analyses endorsed by the Supreme Court in *Gingles*, 478 U.S. at 52-61 – bivariate ecological regression and homogenous precinct analyses – in determining cohesion and white bloc voting, and weighted ecological regression to take into account precinct population differences. For Charleston County general elections, both experts used turnout data at the precinct level by race. Jt. Exh. 2A at 8-10; U.S. Exh. 14 at 10-11. Because turnout data by race were unavailable for special elections and primaries, the experts used

13-15, citing R. 72 (Weber deposition) at 73-75. Weber's analyses revealed that since 1988 minority voters were politically cohesive in elections for 29 of 31 seats (94%) in Charleston County Council contested special or general elections. Jt. Exh. 2C, Table 9, pp. 26-27. The elections for the two seats in which Weber found minority voters were not cohesive involved multiple candidates, one of whom received the overwhelming support of minority voters in each election (83.4% minority vote for Karnes in 1992 election for the North Area; 79.8% of minority vote for Ganaway in 1996 North Area election). *Ibid.*

C. The Third Gingles Precondition – White Bloc Voting Usually Defeats The Candidate Of Choice Of Minority Voters

Weber's analyses also demonstrated that in contested general and special elections for County Council from 1988, 23 of the 29 candidates (79%) who received cohesive support from minority voters lost, whether the candidates were minority or white. Jt. Exh. 2C, Table 9, at 26-27. In contested elections from 1992 to 2000, all 9 minority candidates cohesively supported by minority voters

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precinct registration data for those elections. *Ibid.*; Jt. Exh. 2C at 21-22). Weber analyzed general elections for County Council from 1988 to 2000. Jt. Exh. 2A at 8-9. Arrington began his analysis with 1984 because voter turnout data by race were readily available starting from that date. U.S. Exh. 14 at 13, ¶ 28.

lost, and 18 of the 21 candidates (86%) of either race who received cohesive minority support lost. Exh. D to Jt. Exh. 2A, at 2-4; Jt. Exh. 2C at 26-27. Two of the three candidates cohesively supported by minority voters who won did so in 1998, when two white Democratic candidates won but two minority Democratic candidates lost. Jt. Exh. 2C at 26-27; Exh. D to Jt. Exh. 2A at 4; Exh. E to Jt. Exh. 2A at 18-21. Based upon his own analyses, Weber conceded in deposition testimony that candidates of choice of minority voters are usually defeated in Charleston. R. 72 at 75, 145-146; see also U.S. Exh. 31, Defendants' Response to USA's Requests for Admission, No. 6 (white and minority voters usually vote differently in Charleston County).

On July 10, 2002, the district court adopted the magistrate's Report and Recommendation in its entirety, incorporated it into its Order, and granted summary judgment for the United States and private plaintiffs as to the three *Gingles* preconditions.

IV. *Trial On Remaining Issues*

The district court then held a trial on the remaining issues. On March 6, 2003, the district court issued its opinion, holding that the at-large system of election for the County Council dilutes minority voting in violation of Section 2, and enjoined any future use of the at-large election system for Council elections.

R. 167 at 67 .

In its opinion, the district court first reaffirmed the findings of its July 10, 2002, Order granting summary judgment to the plaintiffs as to all three *Gingles* preconditions. R. 167 at 13. The court then analyzed whether the evidence had also shown that, under the totality of circumstances, minority voters had less opportunity than white voters to participate in the political process and elect representatives of their choice. In conducting this analysis, the court examined: (1) the extent of racially polarized voting, (2) the extent to which minorities have been elected to public office, (3) the impact of Charleston County's electoral process on the electability of minority-preferred candidates, (4) the extent to which minority group members bear effects of discrimination in education, employment, and health, which hinder their ability to participate in the political process, and (6) the role of partisanship as an explanation for the lack of success of minority-preferred candidates.

A. *Extent Of Racially Polarized Voting*

The court relied largely on the testimony of the County's expert, Dr. Weber, in finding "evidence of significant and pervasive polarization." R. 167 at 16. The court found that the pattern of racially polarized voting outlined in Part II.A.1., *infra,* "is perhaps most dramatically demonstrated by Dr. Weber's findings that, in

general election contests for Charleston County Council with at least one African-American candidate, there was polarization between African-American and white voters 100% of the time." *Id.* at 15, citing Jt. Exh. 2B at ¶ 8 & Figure 5. The court also found that even in general elections not involving African-American candidates, there was racial polarization 87.5% of the time. *Ibid.*, citing Jt. Exh. 2B at ¶ 9 & Figure 6. The court found that this severe racial polarization "has resulted in a legally significant quantum of defeats for minority-preferred candidates," and that "this consistent defeat at the polls" is what "makes such egregious polarization ultimately relevant" under Section 2. R. 167 at 15.

B. *Extent To Which Blacks Have Been Elected To Public Office*

The court found that, of 41 county council members elected since 1970, only three were minorities: Lonnie Hamilton III, Marjorie Amos-Frazier, and Timothy Scott. The court found that the electoral successes of Hamilton and Amos-Frazier "were due, in large measure, to the coalition building that was characteristic of Democratic Party politics in Charleston County throughout the 1970s." R. 167 at 16 n.13, citing Tr. 679-683. The court found, however, that "[w]hite flight" from the Democratic party since the 1970s, due in part to the party's position on civil rights, has weakened "contemporary efforts to build biracial coalitions." *Ibid.*, citing Tr. 229, 2539. In addition, McKinley

Washington, a former State House member and State Senator, testified that once minorities started getting elected as Democrats and gained leadership positions, such as precinct chairmen, Charleston County whites started leaving the Democratic party. Tr. 720-722.

Although minority candidates have enjoyed a handful of victories at the polls, the district court found that these few successes in County Council elections "represent a facially inadequate quantum of endogenous success among African-American candidates."[4] R. 167 at 17. The court also found that minority candidates have "fared no better" in other County elections. *Ibid.* Although four minority-preferred minority candidates were successful in the 1998 election for Charleston County School Board, and one was successful in 2000 (*id.* at 18-19), the court found this evidence of "dubious consequence" and "attributable to special circumstances unique to school board elections" (*id.* at 19). The court found that two of the five minority school board members elected in 1998 were elected in contests in which there were fewer white candidates than contested seats. *Ibid.* The court also noted that, because school board elections are non-

[4] Timothy Scott, a minority Republican candidate who, the court found, "is emphatically not the candidate of choice of the county's African-American voters," was first elected in 1995. R. 167 at 17 & n.14. Scott received unprecedented financial support for a local candidacy. Tr. 2311, 2317-18; Tr. 1791 (testimony of councilmember Charles Wallace).

partisan, they often result in numerous candidates running, creating the opportunity for single-shot voting[5] (see *id.* at 20 n.18) and a plurality win (see *id.* at 20-21), and that when elections involve numerous candidates, the white vote is often split among white candidates (*ibid*). The court found "notabl[e]" that only one African-American, Judge Bernard Fielding, has ever won a county-wide election for any of the single-seat offices in the county. *Id.* at 18.

The court found, in sum, that "there has been only a disproportionately small number of African American persons ever elected to the Charleston County Council under the at-large method of election and throughout the jurisdiction," and the very few individual successes "are an unfortunate and paltry offering for purposes of the Court's Section 2 inquiry." *Id.* at 21.

C. *Impact Of Charleston County's Electoral Process On The Electability Of Minority-preferred Candidates*

The court found that the "sheer size of Charleston County greatly exacerbates the effects of socioeconomic disparities between the races" and makes

[5] Single-shot voting is a technique whereby minority groups may succeed in electing a few candidates of their choice if, in at-large elections, the minority group concentrates its vote behind a limited number of candidates while the majority divides its vote among several candidates. See, e.g., *Thornburg* v. *Gingles*, 478 U.S. 30, 38 n.5.

the County's size "unconventionally significant."[6] R. 167 at 40-41. The court found the size of Charleston County and its unique geographical features impede minority candidates, who typically have fewer financial resources to employ costly television and direct mail advertising needed to reach all county voters. *Id.* at 41.

In addition, although there is no majority vote requirement for County Council elections, the court found that a number of features of the County Council elections create a *de facto* majority vote requirement. The "staggering of terms and the residency requirements ensure that all [County Council] contests are either single-seat or two-seat contests." *Id.* at 43; see Tr. 2180-2181 (testimony of Weber that staggered terms and residency districts limit ability to use single-shot voting). The court found that the only viable candidates come from the primary nominating system, which produces "no more than two viable candidates for a single-seat or four viable candidates for two seats" (*ibid.*), making it "more difficult for the African-American community to employ a traditional strategy of bullet voting in order to improve their chances of electing candidates of their choosing." *Id.* at 44; see also *id.* at 20, n.18.

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[6] Charleston County encompasses 919 square miles (R. 167 at 7), including "a stretch along the Atlantic Ocean of nearly 100 miles and * * * several major waterways" (*id.* at 41).

D. *Extent To Which Minority Group Members Bear Effects Of Discrimination In Education, Employment, And Health, Which Hinder Their Ability To Participate In The Political Process*

The district court concluded that the depressed socio-economic status of Charleston County's minority citizens inhibits their ability "to participate in the political process and elect candidates of choice." R. 167 at 40. The court found that "African Americans in Charleston County suffer disproportionately * * * in education, employment, income level, and living conditions as a result of discrimination" (*id.* at 30), and the "depressed socio-economic status of African-American citizens of Charleston County compared to white citizens is a legacy of the prolonged history of discrimination by Charleston County and South Carolina" (*id.* at 29; see Defs' Exh. 14(A) at 39; Tr. 2979 (report and testimony of Defendants' expert Dr. William V. Moore); Tr. 931-935, 981-982 (expert witness Dr. Dan Carter), Tr. 2655-2658 (county grants administrator)).

The court found that, before the passage of the Civil Rights Act of 1964, the county was "totally segregated" (R. 167 at 24, quoting Tr. 88-89), and that state and county officials resisted desegregation of public facilities and schools for many years (*id*. at 23-26). Recognizing the importance of education to political participation, the court found that the historic segregation of minorities in underfunded county schools "greatly diminished the educational capital inherited

by the present generation of African Americans." *Id.* at 23, citing U.S. Exh. 16; Tr. 928-930 (Dr. Carter). The court found that minority residents of Charleston County experienced further economic disadvantage from racially discriminatory employment practices in both the public and private sectors. R. 167 at 25.

The court found that the continued "stratification" of Charleston County along racial lines in social, civic, and religious activities – a "direct holdover from more institutional discrimination and segregation" – "makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominantly white electorate from whom they must obtain substantial support to win at-large elections." *Id.* at 37-38, citing Tr. 125-126, 189-190, 219-220, 556-557, 733, 816, 1379, 1434, 1443, 1495-1505, 1934, 2328. The separation of the races, the court found, also "exacerbates the socio-economic legacy of past discrimination by denying an African-American candidate full access to the resources of the entire electorate and * * * forcing her to instead rely on the stunted socio-economic development of her own [minority] community." R. 167 at 39. The court stated that the separation between the races "further helps to explain the extent to which race infuses and informs the racially polarized voting patterns in Charleston County." *Id.* at 40.

In this same vein, the court emphasized the long and undisputed history of

official discrimination touching the right of minorities to participate in the electoral process in Charleston County. R. 167 at 30-31, n.23, citing Defs.' Judicial Stip., filed March 5, 2002; Tr. 2215-2216. The district court stated that the United States offered "voluminous testimony" concerning acts of intimidation and harassment by white persons against minority voters at the polls in the 1980s and 1990s, and even as late as the 2000 election. R. 167 at 30-35 n.23. To be sure, the court gave "only marginal weight" to its findings that there were acts of racial discrimination affecting voting because the evidence was "anecdotal," and the court had difficulty determining what effect such incidents have had, or continue to have, on the overall participation of minorities in the political process. *Id.* at 31, n.23. The court did find, however, that "some white candidates in Charleston County have traditionally used pictures of their African-American opponents on their campaign literature to alert white voters to the race of the African-American candidate" (*id.* at 44, citing U.S. Exh. 16; Tr. 97-98, 563-566, 898-899, 949-951, 954-957, 1109-1110, 2921-2923), and that, in a number of instances, those photographs were darkened (*id.* at 45-46). The court noted that while white County Council candidates have used their own photographs in campaign literature, minority candidates do not in order to "de-emphasize[]" their race and thereby "overcome white voter resistance to African-American

candidates." *Id*. at 46, citing Tr. 221, 1493-1494 (white candidates) & Tr. 1367, 1369-1371, 1399 (minority candidates); see also Tr. 727-728, 1599-1600.

F. *Partisanship*

Finally, the district court recognized that, under this Court's decision in *Lewis* v. *Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997), the County's reliance on partisanship as the cause for racially polarized voting in Charleston County Council elections may be considered within the context of the "totality of the circumstances." R. 167 at 49 n.33, 52. After analyzing the record with respect to partisanship, the court concluded that "the influence of race and party on voting patterns in Charleston County, on the facts of this case, are too closely related to isolate and measure for effect," and therefore held that the County failed to "demonstrate that race-neutral factors explain the voting polarization." *Id.* at 61. Indeed, the court cited to Arrington's testimony that race and partisan affiliation are "multi-colinear," thereby making it impossible "statistically to separate them out and tell which of those two affects the dependent variable; which of those two is the cause." *Id.* at 53-54 & n.36, citing Tr. 310. The court also noted that Weber agreed that "race and partisanship are 'inextricably intertwined'" and "could not be separated statistically." *Id.* at 54, citing Tr. 2220-2221.

The court noted that the evidence Weber stated would be needed to determine whether partisanship is a better explanation than race for racially polarized voting patterns – the nature of the campaigns, campaign issues, endorsements, voter interviews, and mobilization efforts – were not developed here. *Ibid*., citing Tr. 2054-2065, 2082, 2093, 2168, 2170-2171, 2994-2996. Moreover, the court found that neither party registration data nor survey research, "the primary sources of data relied on by political scientists in drawing conclusions concerning the effect of political partisanship on election results," were available for Charleston County. *Id.* at 54, citing Tr. 309-310, 1992-1993.

The court rejected Weber's conclusion that the school board elections demonstrate that partisanship is the cause of polarization, finding that the success of minority candidates in the non-partisan Charleston County school board elections was "explained by special circumstances unique to those elections." R. 167 at 57. Indeed, the statistical evidence shows that in school board elections in which one or more minority candidates were running against one or more white candidates, minority voters prefer minority candidates and white voters prefer white candidates. U.S. Exhs. 24, 25, 68-C; see also Tr. 319-322 (Dr. Arrington); 411-412 (Dr. John Ruoff).

The court similarly discounted Weber's analysis of the effect that switching

parties had on candidates' electoral success. R. 167 at 55-57. The court found that Dr. Wallace's loss of minority voter support after he moved from the Democratic to the Republican party "only tends to reinforce that which the Court already knows - - cohesion in Charleston County is stalwart" (*id.* at 57), but does not answer the question whether "such unbending correlation between race and party is driven by race or ideology or * * * some cross-pollenization of both" (*ibid.*).

The court also rejected the County's contention that minority voters' use of the master lever to vote a straight Democratic ticket proves that party is the reason for polarization. *Id.* at 59, n.40. The court noted that the County provided no evidence of the extent to which minority voters used the master lever, and stated that, even if minority voters consistently did so, it would not answer the question whether such behavior was for racial or non-racial reasons. *Ibid.*.

The court therefore concluded that "evidence under Senate factors seven, two, and three of severe voting polarization, minimal minority electoral success, and an uncommonly large electoral district decisively points towards a violation of Section 2," and that the combined strength of "depressed political participation as a result of pervasive past discrimination in education and employment" (Senate factor 5) and "past discrimination touching the right to vote" (Senate factor 1)

"also weighs in favor of" a Section 2 violation. *Id.* at 61. Finding no evidence that anything other than race explains the "severe voting polarization," the court concluded that the at-large system of election for the Charleston County Council unlawfully dilutes minority voting, in violation of Section 2 of the Voting Rights Act. *Id.* at 61.

SUMMARY OF ARGUMENT

This case presents a routine application of Section 2 of the Voting Rights Act, which prohibits electoral systems that dilute the voting strength of minority voters. Charleston County's at-large election of its Council is exactly the type of electoral system Congress sought to eliminate through the Voting Rights Act because it carries forward the effects of past racial discrimination by diluting minority voting strength.

The district court correctly held, on summary judgment, that the United States had satisfied the three *Gingles* preconditions, establishing a presumption that the at-large method of electing County Council members violates Section 2. The County does not challenge the district court's findings as to the first and second *Gingles* preconditions. Nor does it challenge the evidence in support of the third precondition. Instead, the County challenges only the district court's *conclusion* as to the third *Gingles* precondition and the court's finding, under the

totality of circumstances operating in Charleston County Council elections, that the at-large electoral system violates Section 2. These findings and conclusions, however, are based on largely uncontested statistical analyses, testimony, and empirical evidence.

The district court correctly found, on summary judgment, that Charleston County Council elections experience legally significant racial bloc voting: the third *Gingles* precondition. Both parties' experts, reaching nearly identical results by using nearly identical election data and statistical methodologies, agreed that white voters in Charleston County usually voted as a bloc to defeat the candidate of choice of minority voters. As such, no material facts were in dispute. The district court then correctly applied this Court's decision in *Lewis* v. *Alamance County*, 99 F.3d 600, 615 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997), declining to consider at this stage of the analysis the County's position that partisanship, rather than race, best explains the racially divergent voting patterns in Charleston County Council elections.

The district court's finding that, based on the totality of the circumstances, the at-large method of electing Council members results in unlawful vote dilution, is amply supported. The evidence shows that the at-large electoral scheme "interacts with social and historical conditions" in Charleston County, "caus[ing]

an inequality in the opportunities enjoyed by [minority Charleston County voters] * * * to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Specifically, the district court properly found that "severe voting polarization, minimal minority electoral success, and [an] uncommonly large voting district" decisively support a finding that Section 2 has been violated. R. 167 at 61. The court also correctly found that "depressed political participation [by Charleston County minority voters] as a result of pervasive past discrimination in education and employment and past discrimination touching the right to vote" further contributes to a Section 2 violation. *Ibid.* The district court properly applied well established legal principles to largely uncontested facts.

The court correctly rejected Defendants' unsupported assertions that partisanship best explains the racially divergent voting patterns. While that explanation is certainly true in some jurisdictions, the evidence does not support such a finding here. First, the government's expert established through unrebutted evidence that race, more so than partisanship, affects voting patterns in Charleston County. Evidence from elections without partisan cues demonstrates that voting patterns among whites and minorities remain polarized regardless of partisan identification. Thus, even if partisanship differences contribute in part to the divergent voting patterns in Charleston County, these differences in no way

disprove the existence of racial bloc voting and therefore cannot rebut the finding, firmly supported by the *Gingles* and Senate factors, of vote dilution in Charleston County.

Second, the County did not offer a causation analysis to determine whether partisanship, race, or a combination of those two factors explains Charleston County's racially polarized voting patterns. Moreover, the data required to perform the analyses that could possibly support a partisanship defense are either unavailable in Charleston County or were not collected by the County. And even if a statistical analysis (i.e., multi-variate regression analysis) had been performed here, the fact that race and party affiliation are inextricably intertwined in Charleston County limits any conclusions that may be drawn from such an analysis.

ARGUMENT

I

THE UNITED STATES SATISFIED THE THREE *GINGLES* PRECONDITIONS, ESTABLISHING THAT THE AT-LARGE METHOD OF ELECTING THE CHARLESTON COUNTY COUNCIL IS PRESUMED TO VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT

A. Satisfying The Three *Gingles* Preconditions Creates A Presumption That The At-Large Electoral System Is Diluting Minority Voting Strength

Section 2 prohibits States or localities from imposing or applying 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 plaintiff may establish a violation of this provision by proving "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). A plaintiff need not prove that a voting process or structure was adopted or maintained with discriminatory intent; rather, a Section 2 violation occurs when a voting standard, practice or procedure interacts with the effects of past discriminatory practices to result in "the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong. 2d Sess. 30 (1982); see also *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991).

Section 2 claims against at-large districts are governed by the framework set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). Plaintiffs must demonstrate that (1) the protected minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the protected minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate. *Id.* at 50-51; *Growe* v. *Emison*, 507 U.S. 25, 39-40 (1993). This portion of the *Gingles* inquiry, if satisfied, establishes a strong presumption that the challenged electoral structure itself is affecting voting patterns in a manner to "minimize or cancel out" the potential of minority voters because of race. 478 U.S. at 48.

While Section 2 does not guarantee success at the polls for minority voters or minority candidates, see *Johnson* v. *De Grandy*, 512 U.S. 997, 1014 n.11 (1994), it does guarantee minority voters a fair electoral process. Both the Supreme Court and this Court have long recognized that at-large voting schemes may "operate to minimize or cancel out the voting strength of racial [minorities in] the voting population" who are placed among a numerical majority of white voters. *Gingles*, 478 U.S. at 47-48 & n.13; *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1236 (4th Cir.), cert. denied, 498 U.S. 938 (1990). Such voting practices are not, however, always unlawful. *Gingles*, 478 U.S. at 46. Rather, plaintiffs who

challenge multimember districts under Section 2 must prove that the multimember electoral structure, and not its interaction with race-neutral considerations, denies minority voters a fair opportunity to elect candidates of their choice. *Id.* at 48.

B. The United States Satisfied The Third *Gingles* Precondition

1. *Uncontested Evidence Supports The District Court's Finding*

The County does not challenge the district court's finding that the United States established the first two *Gingles* preconditions: the evidence shows that minority voters in Charleston County are sufficiently large and geographically compact to constitute a majority in a single-member district, and that minority voters in Charleston County are politically cohesive. The record also contains plentiful evidence to support the district court's finding of legally significant white bloc voting to satisfy the third *Gingles* precondition. In fact, the County does not challenge the government's evidence or that of its own expert, establishing that the white electorate usually votes as a bloc to defeat minority-preferred candidates. The County merely claims this is due to partisanship, not race.

In granting summary judgment to the United States, the district court relied on the statistical analyses provided by the County's own expert, Dr. Weber.[7] See

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[7] The government acknowledged that the results of its own expert were "virtually the same" as Weber's. R. 41 at 12. The government therefore relied exclusively on the County's analyses to satisfy its burden of demonstrating that "there are no genuine issues of material fact related to proving the *Gingles* preconditions." *Ibid.*

R. 134 at 7-12. According to Weber's report, in Charleston County Council general elections from 1988 to 2000, white voters cohesively supported a candidate in 31 of 33 (94%) elections. Jt. Exh. 2A at 42. Weber also concluded that minority voters "were usually cohesive in support of candidates of choice * * * in 28 of the 33 elections (or 84.8%)." *Id.* at 53. He stated that "in 25 of the 33 elections, there was evidence of polarization in voting (about 75.8% of the elections were polarized)," in that white voters preferred candidates other than the minority voters' candidates of choice. *Id.* at 53-54. Finally, Weber concluded that "in 78.6 percent of elections where [minority] voters acted cohesively, the group was defeated in electing a candidate of choice to the County Council office." *Id.* at 54).

This evidence, *provided by the County's own expert*, thus establishes that white and minority voters are usually cohesive in support of different candidates, and that white voters' preferred candidates usually defeat minority voters' preferred candidates.

2. *The District Court Properly Applied This Court's Precedent In Refusing To Consider The County's Partisanship Evidence In Its Analysis Of The Three* Gingles *Preconditions*

Rather than contesting the experts' findings of racially divergent voting patterns, the County argues that these election results are the product of partisanship differences between voters, rather than indicative of racial bloc voting. The County argues that the district court erred in failing to consider the "cause" of racially divergent voting patterns in its analysis of the three *Gingles* preconditions. The County's argument is in direct conflict with this Court's precedent.

The district court properly applied this Court's decision in *Lewis* v. *Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997), when it declined to consider the County's argument about partisan effects on voting in its precondition analysis. *Alamance County* is clear: "[O]ne treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of the circumstances inquiry." *Ibid.* (citations omitted). Thus, under this Court's unambiguous precedent, a district court, when assessing the *Gingles* preconditions, should not consider *why* minority-preferred candidates are usually defeated by white bloc voting. As stated in *Sanchez* v. *Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997), the third

Gingles precondition asks "*how* voters vote, not *why* voters voted that way" (emphasis in original). The majority of Circuits agree with this Court that causation evidence is relevant only to a court's totality of the circumstances analysis. *Alamance County*, 99 F.3d at 615 n.12; *Goosby* v. *Town of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999), cert. denied, 528 U.S. 1138 (2000); *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997), cert. denied, 522 U.S. 1076 (1998); *Uno* v. *City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995); but see *Clarke* v. *City of Cincinnati*, 40 F.3d 807, 812-814 (6th Cir. 1994), cert. denied 514 U.S. 1109 (1995); *LULAC* v. *Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994).

Even if it were appropriate to consider causation evidence at the "precondition" stage of a Section 2 case, the County has offered no evidence either to rebut the United States' evidence that race defines voting patterns or to support the County's assertion that partisan affiliation provides the best explanation for the persistent inability of minority voters to elect candidates of their choice to the Charleston County Council. As explained in Part III, *infra*, the data the County's expert explained would be necessary for him to perform a multi-variate regression analysis to isolate partisanship from race was either unavailable or uncollected.

Properly applying *Alamance County*, and relying on statistical evidence upon which each party's experts agreed, the district court was clearly correct in finding that there is no dispute over the fact that the white majority in Charleston County Council elections votes "sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

II

THE DISTRICT COURT CORRECTLY FOUND UNDER THE TOTALITY OF THE CIRCUMSTANCES THAT CHARLESTON COUNTY'S AT-LARGE VOTING SCHEME VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT

Satisfying the *Gingles* preconditions is necessary to, but does not independently establish, a successful Section 2 vote dilution claim. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1011 (1994). Minority voters must also show that, under the totality of circumstances operating in a particular jurisdiction, they have less opportunity than white voters to participate in the political process and elect representatives of their choice. *Thornburg* v. *Gingles*, 478 U.S. 30, 63 (1986); see also *Collins* v. *City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987) (*Collins I*) ("[The] ultimate determination [of vote dilution under the Voting Rights Act] still must be made on the basis of the totality of the circumstances."). The Senate Report accompanying the 1982 amendments lists a number of factors to guide

courts in this analysis.[8]

The Supreme Court has identified the two most important factors as (a) the extent to which voting in that political subdivision is racially polarized, and (b) the extent to which members of the minority group have been elected to public office in the jurisdiction. See *Gingles*, 478 U.S. at 48 n.15. Once these two Senate factors are established, the other factors are merely "supportive of, but not essential to" a plaintiff's Section 2 claim. *Ibid.*

A district court's finding of vote dilution based on the totality of circumstances is a factual finding reviewed for clear error. See *Cane* v. *Worcester County*, 35 F.3d 921, 925 (4th Cir. 1994); see also *Gingles*, 478 U.S. at 78-79. Thus, a reviewing court should not disturb this finding unless there is minimal record evidence to support it, or if, despite some evidence substantiating the

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[8] These factors include the history of voting-related discrimination in the relevant political subdivision at issue; the extent to which voting in that political subdivision is racially polarized; the extent to which the relevant political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political processes; the use of racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. S. Rep. No. 417, *supra*, at 28-29. The Senate also recognized that a lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group, as well as whether the policy underlying the political subdivision's use of the contested electoral practice or procedure is tenuous, may be valuable to a plaintiff's case. *Id.* at 29.

finding, the reviewing court is left with a "definite and firm conviction" that a mistake has been made. See *Sanchez* v. *Colorado*, 97 F.3d 1303, 1309 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). The record before the district court here was more than sufficient to demonstrate that the totality of circumstances established that Charleston County's at-large method of electing County Council members diluted minority voting strength in violation of Section 2.[9]

A. The United States Presented Undisputed Evidence Establishing The Two Most Important Senate Factors

1. *Voting In Charleston County Elections Is Racially Polarized*

Racially polarized voting occurs when there is a "'consistent relationship between the race of the voter and the way in which the voter votes,' or to put it differently, where 'black voters and white voters vote differently.'" *Gingles*, 478

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[9] The County cites two cases, *NAACP* v. *Niagara Falls*, 65 F.3d 1002 (2d Cir. 1995) and *Little Rock School District* v. *Pulaski County*, 56 F.3d 904 (8th Cir. 1995) to demonstrate that satisfaction of the three *Gingles* preconditions does not ensure a finding of dilution. We do not dispute that contention. In both those cases, the district courts determined, after a searching review of the record, that plaintiffs did not demonstrate that they were excluded from political participation, and the courts of appeals upheld those findings of fact. This case, however, presents the reverse; the district court made extensive findings that minorities had been excluded from political participation on the basis of race, and those findings of fact have ample support. Recognizing, however, that proof of the three *Gingles* preconditions does establish a strong presumption of liability, the Second Circuit in *NAACP* stated that it is only the "unusual case" in which satisfaction of the three *Gingles* preconditions is not followed with evidence sufficient to demonstrate a violation of Section 2. 65 F.3d at 1019 n.21 (quoting *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994)).

U.S. at 53 n.21 (citations omitted). The degree of racially polarized voting[10] that is "legally significant" under Section 2 varies according to the factual circumstances of the case. See *id.* at 55. In general, however, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Id.* at 56.

Here, the record amply supports the district court's finding that, based on the similar statistical analyses of both parties' experts, voting in Charleston County elections – particularly County Council elections – is racially polarized. See also *Colleton County Council* v. *McConnell*, 201 F. Supp. 2d 618, 641 (D.S.C. 2002) ("Voting in South Carolina continues to be racially polarized to a very high degree, in all regions of the state and in both primary elections and general elections. Statewide, black citizens generally are a highly politically cohesive group and whites engage in significant white-bloc voting."). As summarized above (Part I.B.1., *supra*), the County's expert found that white and minority voters were cohesive in support of different candidates for County Council elections in the overwhelming majority of elections, and that the "two groups of voters were either moderately or strongly polarized" 75.8% of the time. Jt. Exh.

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[10] The *Gingles* court treated the terms "racially polarized voting" and "racial bloc voting" interchangeably. 478 U.S. at 52 n.18.

2A at 45; see also *id.* at 53. The government's expert reached similar results. Arrington's analyses showed that voting was racially polarized in all but one County Council election from 1984 to 2000. See U.S. Exh. 14 at Tables 6-9; Tr. 295. The County cannot deny that this evidence demonstrates a "'consistent relationship between the race of the voter and the way in which the voter votes,' or to put it differently," is evidence that "black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (citations omitted).

The County denies this polarization is "legally significant" and asserts that racially divergent voting patterns are the result of partisanship differences between white and minority voters. As we discuss below (Part III., *infra*), this argument is unsupported by the evidence.

The County also attempts to discredit the district court's polarization analysis by alleging that the court focused only on elections involving minority candidates. See, e.g., Appellant's Br. 38-39, 56-58. This assertion is false. While the court acknowledged that it was focusing primarily on black-white elections for the issue of polarization in its totality of the circumstances analysis, see R. 167 at 15 n.11, it did so based on this Court's suggestion in *Alamance County* that election contests involving minority candidates may be given more weight "on the question of whether racial polarization exists" than elections without a minority

candidate. R. 167 at 15 n.11; *Lewis* v. *Alamance County*, 99 F.3d 600, 610 n.8 (4th Cir. 1996). Other Circuits also rely more heavily on elections with minority candidates. *Ruiz* v. *City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); *Uno* v. *City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995); *NAACP* v. *Niagara Falls*, 65 F.3d 1002, 1017 (2d Cir. 1995); *Nipper* v. *Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995); *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *LULAC* v. *Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994). The court also considered, however, Weber's finding that voting was racially polarized even in 87.5% of County Council general elections *without* minority candidates. See R. 167 at 15; Jt. Ex. 2B at ¶ 9. Moreover, the court relied on Arrington's analyses of data from all County Council elections that showed that, *regardless of the race of the candidate*, from 1984 to 2000, voting was racially polarized in 94% of contested County Council elections. The court's finding that white and minority voters were racially polarized in Charleston County Council elections is fully supported by the evidence.

2. *Minority Candidates' Lack of Success Is Undisputed*

The district court was also clearly correct in finding that the consistent lack

of minority success in at-large County Council elections contributes to a Section 2 violation. Despite the County's protests, see Appellant's Br. 23, 38-39, this factor requires a reviewing court to consider the extent to which *minority candidates* have been elected to office, not, as the County would have this Court consider, only the extent to which *minority-preferred candidates* have been elected. S. Rep. No. 417, *supra*, at 29. Of course, the success of minority-preferred candidates is of central importance to an overall vote dilution claim, as a violation occurs only when minority *voters* "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," whether those candidates are minorities or not. 42 U.S.C. 1973(b). However, for purposes of conducting the totality of the circumstances inquiry, the Senate Report plainly directs a court to consider – as one of many factors – the extent to which minority *candidates* have been elected to office. S. Rep. No. 417, *supra*, at 28-29.

The undisputed, empirical evidence in this case shows that, of the 41 persons elected to the Charleston County Council since 1970, only three were minorities. No minority candidates were elected to the Charleston County Council prior to 1970. For all other exogenous, at-large elections in Charleston County between 1970 and 2000, the court found that, other than in elections for school

board[11], only seven minority candidates have been elected to five political offices – only one of which was a single-seat office elected countywide. R. 167 at 18-21. And in some of these elections, there were fewer white candidates than seats, making the election of a minority inevitable. Given the undisputed evidence before it, the district court did not clearly err in finding that "there has been only a disproportionately small number of [minority] persons ever elected to the Charleston County Council under the at-large method of election and throughout the jurisdiction." R. 167 at 21. This evidence clearly supports the court's finding that minorities suffer unequal access to the electoral process.

B. Evidence Relating To The Other Senate Factors Provides Additional Support For The District Court's Finding Of Unlawful Vote Dilution

Having satisfied the two most important Senate factors, the United States provided ample additional evidence to support the district court's finding of unlawful minority vote dilution.

1. Charleston County's Electoral Process Enhances The Opportunity For Discriminating Against Minority-Preferred Candidates

As shown through direct testimony and statistical evidence presented at

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[11] The record shows that five minority candidates have been elected to the school board since 1998. However, as discussed in Parts III.B. and III.C.2.c., *infra*, evidence of minority success in school board elections is of "dubious consequence." R. 167 at 19.

trial, Charleston County's process for electing council members and its unique geographic features greatly reduce the ability of minority voters and minority candidates to participate equally in the electoral process. U.S. Exhs. 14, at 51; U.S. Exhs. 76, 78, 106-107; Tr. 213, 302-303, 660, 784-786, 1426, 1488-1490. The district court credited testimony that using staggered terms, residency districts, and a primary nominating system creates a *de facto* majority vote requirement that contributes to minority vote dilution and ensures that all Charleston County contests are either single-seat or two-seat contests. Tr. 303, 410, 2022-2023 (Weber); see *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1236 (4th Cir. 1989) (*Collins II*) ("The potential for [minority vote dilution] may be enhanced by staggered terms."), cert. denied, 498 U.S. 938 (1990); cf. *City of Rome* v. *United States*, 446 U.S. 156, 185 (1980). The primary nominating system then produces only two viable candidates for each open seat. This limits the opportunity for minority voters to employ single-shot voting. See *Gingles*, 478 U.S. at 39 n.5; see also Tr. 303-306, 2180-2181 (Arrington); U.S. Exh. 14 at 41-42, 49-50. Minorities cannot single-shot vote in one-seat elections, and single-shot voting does not make sense strategically in two-seat contests. For effective single-shot voting, minority voters must withhold votes they would otherwise cast for their second-choice candidate. In two-seat County Council elections with only

four viable candidates, the minority voters' first-choice candidate rarely is elected due to low white crossover votes; the minority voters' second-choice candidate depends on the second vote of minority voters to be competitive. Tr. 303-306, 2180-2182. If minority voters engaged in single-shot voting in two-seat County Council elections (and thus withheld their votes for their second-choice candidate), neither minority-preferred candidate would be elected. *Ibid.*

The court also credited evidence that the size and geographic features of Charleston County (*e.g.*, the county comprises 99 square miles, includes a 100 mile stretch along the Atlantic Ocean, and contains several major waterways) impede the ability of minority candidates in Charleston County, who typically have fewer financial resources,[12] to reach potential voters throughout the county. See *Goosby* v. *Town of Hempstead*, 180 F.3d 476, 494 (2d Cir. 1999) ("Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts."), cert. denied, 528 U.S. 1138 (2000). The district court also recognized that, due to past discrimination, Charleston County is rigidly separated along racial lines in its social, civic, and religious activities, and that because of this racial separation,

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[12] For a more in-depth discussion of the economic disparities between whites and minorities in Charleston County, see our discussion Part II.B.2., *infra*.

minority candidates face greater obstacles in raising campaign funds – especially from white voters – necessary to support an at-large campaign in such a large county. R. 167 at 37-43; Tr. 128, 659-660, 788-789, 811-812, 1598-1599.

2. *Minorities In Charleston County Bear The Effects Of Discrimination That Hinder Their Ability To Participate Effectively In The Political Process*

A plaintiff satisfies the fifth Senate factor by showing that minorities suffer "disproportionate educational, employment, income level and living conditions arising from past discrimination," as well as depressed levels of minority participation in the electoral process. See S. Rep. No. 417, *supra*, at 29 & n.114. Plaintiffs need not, however, prove a causal nexus between the two, see *ibid*; see also *Teague* v. *Attala County*, 92 F.3d 283, 294 (5th Cir. 1996), cert. denied, 522 U.S. 807 (1997), as Congress has effectively presumed that a record of such historical racial discrimination, and a record of depressed minority political activity, are not unrelated.

The district court, relying on undisputed Census data (R. 167 at 28 (Table) & 29), found a "dramatic" disproportionality in education, employment, income level, and living conditions between minorities and whites in Charleston County. *Id.* at 27. The court determined that these present socio-economic disparities are best considered together with evidence of past official discrimination against

minorities in Charleston County (Senate factor 1), to understand fully the effect of past discrimination on present levels of political participation among minorities. *Id.* at 30 n.23.

The evidence clearly supports the district court's finding that minorities in Charleston County "have suffered a pronounced and protracted history of past discrimination" that affects their present ability to participate fully in the electoral process. *Id.* at 22-30. The County stipulated to a long history of official discrimination in Charleston County that has affected the rights of minorities to vote. *Id.* at 30 n.23; R. 42; Tr. at 2215-2216. Moreover, the County's expert concluded that past discrimination of minorities in Charleston County "impact[s] on their current socio-economic status in Charleston County, [and] in the state of South Carolina * * * ." R. 167 at 30; Def's Exh. 14(A) at 39 & Tr. 2979 (Dr. Moore). The district court considered similar evidence from the United States' expert. R. 167 at 30; Tr. 931-935; 981-982 (Dr. Carter). The court also found that the United States had proven, by a preponderance of the evidence, "significant evidence of intimidation and harassment" by white persons against minority voters in elections from 1980 to the present (R. 167 at 31 n.23) and "individual incidents of subtle or overt racial appeals" in County elections (*id.* at 44). Based on this evidence, the district court correctly found that the past effects of official racial

discrimination against minority voters, combined with overwhelming evidence of discrimination in such areas as education, employment and health, have hindered minority voters' ability to participate effectively in the political process. R. 167 at 27-29; see also S. Rep. No. 417, *supra*, at 29.

The district court did not clearly err in finding that evidence of Senate factors 1 and 5, in combination, support a claim of unlawful vote dilution.

3. *The District Court Properly Considered All Of The Senate Factors In Its Totality Analysis*

The County argues that the district court disregarded evidence of minority-preferred candidate success from earlier Council elections. Appellant's Br. 8, 21-23, 28, 38. This argument should be rejected. First, the district court relied on the County's own expert's statistical findings, and this expert, like the government's, declined to consider earlier elections because of their limited value in detecting present evidence of vote dilution. See Jt. Exh. 2A at 9-10. The court did not consider evidence from elections prior to 1984, as any conclusions drawn from those elections would be speculative. Courts have recognized that evidence from recent elections is more probative of vote dilution. See, e.g., *Ruiz* v. *City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998); *Uno*, 72 F.3d at 990; see also *Gingles*, 478 U.S. at 52 (relying on evidence from the three most recent election cycles in

Section 2 vote dilution claim).

The County also argues that the district court assigned improper weight to the fact that Charleston County no longer has a slating process (Senate factor 4).[13] Appellant's Br. 26. This in no way weakens the court's analysis of all of the circumstances operating in Charleston County to dilute minority voting strength. To show unlawful vote dilution, a plaintiff need not prove a particular number of factors, nor that a majority of them point one way or the other. *Gingles*, 478 U.S. at 45 (citing S. Rep. No. 417, *supra*, at 29). Indeed, each factor must be considered under the totality, "and the absence of one factor doesn't necessarily cancel out the presence of another." *Sanchez*, 97 F.3d at 1324. The Senate Report simply does not require a final score. *Ibid.*

The district court conducted an extensive examination of all of the factual circumstances of this case based on expert statistical analyses, direct testimony, and empirical Census data submitted by both parties, and made specific factual findings as to each of the Senate factors. The statistical analyses were comparable,

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[13] The County also argues that the court "disregarded" evidence of the County's responsiveness to the minority community. Appellant's Br. at 32-33. The court, however, "considered all of the evidence related to * * * responsiveness," but found it did not "materially contribute" to its conclusion. R. 167 at 49. See, e.g., *Campos* v. *City of Baytown*, 840 F.2d 1240, (5th Cir. 1988) (rejecting argument that evidence of responsiveness precludes Section 2 violation), cert. denied, 492 U.S. 905 (1989); *Sanchez*, 97 F.3d at 1325.

the direct testimony was consistent, and the empirical data were undisputed. The court correctly found that five of the seven Senate factors weigh heavily in favor of a Section 2 violation, including the two factors that the Supreme Court considers most important (*i.e.*, racially polarized voting and lack of minority candidate success).

III

THE DISTRICT COURT CORRECTLY WEIGHED THE ISSUE OF CAUSATION IN ITS TOTALITY ANALYSIS AND PROPERLY FOUND THAT RACIALLY POLARIZED VOTING PATTERNS IN CHARLESTON COUNTY COULD NOT BE EXPLAINED BY PARTISANSHIP

The County attempts to rebut the United States' evidence of a Section 2 violation by asserting, without any measurable or reliable evidence, that the racially divergent voting patterns in Charleston County elections are the result of race-neutral reasons. Specifically, the County asserts that partisanship differences, rather than race, cause the racially divergent voting patterns, and that minority voters lose because Democratic candidates no longer win elections in Charleston County. This argument fails for several reasons.

A. Partisanship Is But One Factor To Be Considered In The Totality Of The Circumstances Analysis

The United States does not dispute that partisanship can be a defense to a Section 2 claim. After all, Section 2 is violated when a voting standard, practice

or procedure denies a citizen the right to vote "on account of race or color." 42 U.S.C. 1973(a). Thus, this Court considers race-neutral factors, like partisanship, along with the Senate factors in its totality analysis. *Alamance County*, 99 F.3d at 615. But if a race-neutral factor fails to explain fully the racially divergent voting patterns operating in a jurisdiction, and also fails to rebut evidence of the *Gingles* and Senate factors, it cannot be a defense to a Section 2 violation. The County's partisanship evidence here, at best, merely *corresponds* with evidence of racial bloc voting. It does not show that partisanship, independent of race, affects voting patterns. And, it does not overcome evidence, considered by the district court in totality, that the at-large system, superimposed on racial bloc voting and disadvantages caused in part by a history of racial discrimination, results in the inability of minority voters to elect candidates of their choice.

The County argues at some length (Appellant's Br. 45-48) that Congress's amendment in 1982 was intended to restore to Section 2 the standards of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973). The County then argues that the 1982 amendments introduced a causation requirement that the district court did not acknowledge. In the first place, Congress's intention in 1982 was simply to restore to Section 2 the "results" test eliminated by the decision in *Mobile* v. *Bolden*, 446 U.S. 55 (1980). See *Gingles,*

478 U.S. at 35. And, as explained *infra*, contrary to the County's argument the district court's analysis here is precisely the one contemplated by *White* v. *Regester* and amended Section 2, as well as affirmed by this Court in *NAACP* v. *City of Columbia*, 859 F. Supp 404 (D.S.C.), aff'd 33 F.3d 52 (1994), cert. denied, 513 U.S. 1147 (1995). (In fact, in *City of Columbia* plaintiffs lost because the court found that blacks were not cohesive, and so the *Gingles* preconditions were not satisfied. *City of Columbia* is largely irrelevant to the County's position here.)

In *LULAC* v. *Clements*, a case the County relies on heavily, the Fifth Circuit held that the evidence before it "*indisputably prove[d]* that partisan affiliation, not race, *best explain[ed]* the divergent voting patterns among minority and white citizens" in Texas judicial elections.[14] 999 F.2d 831, 850 (1993) (emphasis added). There, the record contained "*no evidence* that past or present discrimination [had] affected minorities' political access in any way," *id.* at 853 (emphasis added), and the *LULAC* plaintiffs failed to provide evidence to suggest that race, rather or in addition to political preferences, affected voting patterns, *id.* at 855. Nor did they provide evidence that past discrimination had affected minorities' ability to participate in the political process or that minority candidates

[14] The *LULAC* court considered evidence of partisan differences in its *Gingles* analysis. As discussed *supra*, Part I.B.2, this Court considers partisan differences in its totality analysis. *Alamance County*, 99 F.3d at 615 n.12.

lacked the financial resources to run creditable county-wide campaigns. *Id.* at 867. The *LULAC* plaintiffs failed to show that minority voters had less opportunity to participate in the political process and to elect candidates of their choice on account of race.

The County is correct that if the dilution of minority voting is caused by factors other than race, like partisanship, Section 2 has not been violated. In this case, however, the County simply failed to show that partisanship is a better explanation than race for racial bloc voting and the lack of minority electoral success.

The record here, as set forth above, see Part II.B.2., is rich with evidence that minority voters were disadvantaged because of their race. In fact, the County failed to provide any reliable, measurable evidence that proves the divergent voting patterns in Charleston County "owe more to party than race." *Id.* at 860; see Part III.C., *infra*. The district court, after performing a "searching practical evaluation of the past and present reality" of Charleston's electoral structure, and after conducting an "intensely local appraisal of the design and impact" of that structure on minority voters, correctly found that the systemic defeat of minority-preferred candidates in Charleston County elections is not explained by partisanship differences. *NAACP* v. *City of Columbia*, 850 F. Supp. at 421. As

explained below, the record here does not include a reliable measure of partisan influence on voting.

B. Race Affects The Voting Patterns Of White And Minority Voters In Charleston County

The County has not rebutted the United States' evidence that race affects the voting patterns of white and minority voters in Charleston County. In an attempt to isolate partisanship differences in Charleston County elections and highlight the effect of race on voting patterns, the United States' expert examined data from elections in which partisan cues are absent or minimized. Specifically, Arrington considered the differences in votes received by minority and white Democratic candidates in partisan Council elections, and in non-partisan school board elections. Based on the same type of statistical analyses employed in *Gingles*, the United States showed that, in partisan Council elections, minority voters provide slightly more cohesive support to minority Democratic candidates than white Democratic candidates, and white voters provide slightly less support to minority Democratic candidates than white Democratic candidates. See U.S. Exh. 14, Table 9. These data also show that this difference in white voter support for minority candidates results in minority-preferred *minority* candidates being defeated more often than minority-preferred *white* candidates. U.S. Exh. 68A; Tr.

316-318; U.S. Exh. 14 at 28-29. The County expert's data show similar results. Jt. Exh. 2B at Figure 8. Thus, even when partisanship differences are controlled for in County Council elections, racially divergent voting patterns exist. Here, minority "Democrats lose because they are black," not, as the County asserts, "because they are Democrats." *LULAC*, 999 F.2d at 854.

The United States provided evidence that in non-partisan school board elections involving minority and white candidates, white voters provide more cohesive support for white candidates than for minority candidates, and minority voters provide more cohesive support for minority candidates than for white candidates. U.S. Exh. 14, Table 16. Weber's analyses show that white voters are cohesive in their refusal to support minority candidates. Jt. Exh. 2B at Figures 11, 12, 13. The undisputed evidence shows that, between 1990 and 2000, in all ten of the contests in which a minority candidate was running against a white candidate, or where one or more minority candidates were running against one or more white candidates, the minority candidate finished first among minority voters and a white candidate finished first among white voters. U.S. Exh. 25. These data *cannot* be explained by party affiliation – only by divergent voting patterns between minority and white voters. The district court did not clearly err in finding that voting patterns in Charleston County are affected by the race of the voter.

C. The District Court Properly Assigned The County's Partisanship Evidence Little Probative Value

1. *The County's Argument Is Unsupported By Reliable, Statistical Evidence*

The County's attempt to rebut the United States' evidence of the effect of race on divergent voting patterns is not based on a statistical causation analysis; rather, it is an assumption based on unscientific observations of a few endogenous and exogenous elections in Charleston County. Both parties' experts conducted identical statistical analyses: bivariate ecological regression analyses and extreme case analyses. See *Gingles*, 478 U.S. at 52-53. Yet these types of analyses are limited to showing *how* voters vote, not *why* they vote for a particular candidate. Tr. 308 (Arrington: "[W]e can figure out from ecological regression estimates of how people voted, but that doesn't tell us anything about their motivations."). Indeed, the County did not offer a causal analysis that could isolate the effects of partisanship from race on voting behavior. Tr. 2037-2038 (Weber: "I did not submit a causal analysis, no."); Tr. 2065 (Weber: "I can't deal with cause."); Tr. 2067 (Weber admitting that he did not do the type of statistical study that is necessary to opine on causation).

To perform a multi-variate regression analysis of the causal effect of partisanship on voting behavior requires an accurate measure of partisanship. In

Charleston County, however, such a measure is unavailable because voters do not register by party. Nor are there survey data from exit polls that could be used to inform a causation analysis – indeed, Weber admitted that the type of data that would enable him to determine whether partisanship or race provides a better explanation for divergent voting patters are simply not available for Charleston County. Tr. 1991-1992, 2060-2061, 2065-2067.

Moreover, both parties' experts agree that, in Charleston County, race and partisanship are highly correlated. Tr. 310-314; 367-369; 2038-2039; 2220. Even if a reliable measure of partisanship was available, Arrington explained that the "multi-colinearity" that exists between the two variables means it is "not possible statistically to separate them out and tell which of those two affects the dependent variable; *which of those two is the cause*." Tr. 310 (emphasis added). Given this multi-colinearity, Weber admitted that he did not conduct an analysis that would have permitted him to determine the extent to which either racial attitudes or partisan attitudes have caused polarized voting patterns in Charleston County. Tr. 2039. Without this evidence, the district court could not conclude that partisanship differences, instead of race, best explains the divergent voting patterns in Charleston County. *Cf. LULAC*, 999 F.2d at 861. It was thus not clearly erroneous for the district court to assign little weight to the County's

partisanship defense.

2. *The County's Partisanship Evidence Is Anecdotal*

Absent scientific, statistical analyses to support its claim that divergent voting patterns are simply the result of partisanship differences, the County relies solely on anecdotal evidence to support its theory. This evidence is unpersuasive. First, the County's evidence ignores the continued role that race plays in County Council elections. For example, the County relies on the election of two minority-preferred white Democrats to the County Council in 1998 to suggest that if minority voters registered and turned out in greater numbers, they would be able to elect their preferred candidates despite the increasingly Republican electorate.[15] See Appellant's Br. at 29-31. This argument paints an incomplete picture of the 1998 County Council elections: While it is true that two minority-preferred white candidates were elected, it is also true that the two minority-preferred minority candidates *lost*. Partisanship differences do not explain these results.

Second, the County's partisanship theory relies almost exclusively on the outcomes of a few endogenous and exogenous elections rather than the totality of circumstances operating in Charleston County. The County's limited partisanship

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[15] The United States acknowledges that a minority group's low voter turnout, which is not the result of racially discriminatory barriers, is generally irrelevant to the analysis of whether that group has the ability to elect a candidate of its choice.

evidence, while raising the question of whether partisanship differences might contribute *in part* to divergent voting patterns in Charleston County, fails to disprove the evidence of rigid racial bloc voting, especially given that race and party affiliation in Charleston County are "inextricably intertwined."

a. Scott Election

The County's partisanship theory is based almost entirely on the election of Timothy Scott, a minority Republican candidate, to the Charleston County Council in the 2000 general election. Tr. 2097. Mr. Scott was first elected to the County Council in a 1995 special election. After losing a race for the South Carolina Senate in 1996, he was again elected to the County Council in a 1997 special election. The County argues that when "a minority Democratic candidate loses in a conservative county but a minority Republican candidate wins in the same county, it is [the candidate's] political ideology rather than [his] race that has been rejected or accepted by the majority voters." Appellant's Br. 59. The County further states that "[a] racist white electorate does not elect minority Republican candidates." Appellant's Br. 22.[16]

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[16] This argument misinterprets the test for determining a Section 2 violation, that is, whether a particular electoral practice results in minority voters having less opportunity than other voters to participate in the political process and to elect representatives of their choice, *not* whether the electorate is motivated by racial animus. *Gingles*, 478 U.S. at 43-44. The County previously acknowledged that to

The County's argument "represents a fundamental misunderstanding of what [the United States] alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their *preferred candidates*." *Goosby* v. *Town of Hempstead*, 180 F.3d 476, 495 (2d Cir. 1999) (emphasis in original), cert. denied, 528 U.S. 1138 (2000). Like the defendants' argument in *Goosby*, the County's argument here "implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer." *Ibid.* But as explained by the Second Circuit, "blacks should not be constrained to vote for Republicans who are not their preferred candidates." *Id.* at 495-496.

Moreover, the Supreme Court has recognized that the election of a minority candidate without minority voting support was never intended to prove that vote dilution has *not* occurred. See *Gingles*, 478 U.S. at 75. For example, minority candidate success resulting from questionable circumstances (*e.g.*, success following the initiation of a Section 2 lawsuit) may properly be discounted. *Id.* at 76. Indeed, the Senate Report makes clear that the extent of minority *support* for a candidate remains the critical factor (S. Rep. No. 417, *supra*, at 29 n.115)

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sustain a Section 2 vote dilution claim, the United States does not have to prove divergent voting patterns are the result of racial animus toward minority voters and candidates. See R. 104 at 75-80 (Motion Hearing Transcript).

(citations omitted):

> [T]he election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote in violation of this section. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a "safe" minority candidate.

The County's argument also ignores the fact that decisive evidence regarding voting patterns is what *usually* occurs in a jurisdiction, not aberrational election results produced by special circumstances. See *Gingles*, 478 U.S. at 57 n.26. Scott was first elected to the County Council with the financial backing of the state's Republican party – backing no other current County Council member had ever received from the state party (R. 167 at 58; Tr. 2311, 2317-2318) – and with significant fund raising assistance from a Republican party operative (U.S. Exh. 16 at 34; Tr. 2308-2310). Evidence that Scott, as an incumbent, was the only minority candidate in over ten years[17] to have been elected to the Council in a general election, that Scott received more financial support from a major political party than any other minority candidate to run for Council, and most importantly that Scott is not a minority-preferred candidate, is decidedly *not* evidence that "the political processes leading to nomination or election" are equally open to minority

[17] Lonnie Hamilton was last elected to the County Council, as an incumbent, in 1990.

voters such that they have an equal opportunity "to participate in the political process and to elect *representatives of their choice*." 42 U.S.C. 1973(b) (emphasis added).

b. Party Switching

The County also attempts to support its partisanship theory with evidence that two white candidates received significant minority voter support when they ran as Democrats, but received negligible minority voter support when they ran, successfully, as Republicans. Appellant's Br. 13-14, 37. The court properly dismissed this evidence as lacking any value in explaining *why* "whites consistently identify with the Republican party, and why African Americans so consistently identify with the Democrat party, or why such consistent correlation results in a patterned defeat of African-American preferred candidates in Charleston County." R. 167 at 57. The court noted that determining "whether such unbending correlation between race and party is driven by race or ideology or, as the Court suspects, some cross-pollenization of both [was] frustratingly beyond the capacity of the Court and the evidence before it." *Id.* at 57-58. Given the lack of evidence to explain the "inextricably intertwined" relationship between race and party, and the resulting relationship between race and vote, the district court correctly found that this evidence did not rebut the strong evidence of racial

bloc voting.

c. School Board Elections

The district court likewise properly discounted the County's assertion that the election of minority candidates to the school board was explained by the absence of partisan cues in the election process. As noted by the court, the success of minority candidates in school board elections was largely a function of special circumstances and the absence of the type of procedural barriers present in County Council elections. R. 167 at 57. For example, two of the minority candidates were elected in multi-seat contests in which a minority candidate was guaranteed to be elected because there were fewer white candidates than there were vacancies on the board; one was elected in a contest with no white candidates; and two others were elected because white voters divided their votes among multiple white candidates. U.S. Exh. 23; Tr. 333-334, 413. Without the procedural barriers present in the County Council elections, minority voters and candidates have a greater opportunity to participate fully in school board elections.

In sum, the County's partisanship defense can be reduced to the success of eight candidates – five minority school board candidates who were minority preferred, two white County Council candidates who were not minority-preferred after switching parties, and one minority County Council candidate who was never minority-preferred. This evidence is wholly insufficient to counter the totality of

evidence considered by the district court that includes the pervasiveness of racially polarized voting in County Council and non-partisan school board elections (R. 167 at 14-16, 19-20); limited minority candidate success *(id.* at 16-20); the "pronounced and protracted history of discrimination" suffered by minorities and the socio-economic disparities that have resulted from that discrimination *(id.* at 22-30); the harassment endured by minority voters (*id.* at 30-35 n.23); the recent episodes of racial discrimination against minority citizens attempting to participate in the political process (*id.* at 34-35 n.23); the disparity in political participation resulting from socio-economic inequalities (*id.* at 35-37); the separation of minorities and whites in social, civic, and religious activities in Charleston County and the negative effect such separation has on minority candidates in raising funds and gaining access to white voters (*id.* at 37-43); and the subtle racial appeals by white candidates in recent elections *(id.* at 44-48). The County, in defense, offered the results of eight elections, only three of which were for County Council.

The ultimate question of dilution is one of fact, committed to the trial judge who is to decide it based on "an intensely local appraisal of the design and impact of the * * * multi-member district in the light of past and present reality, political and otherwise." *Gingles*, 478 U.S. at 78 (quoting *White* v. *Regester*, 412 U.S. 755, 769-770 (1973)). The district court conducted a searching, functional analysis of

the at-large electoral process in Charleston County Council elections. It also considered the County's partisanship evidence and explained why that evidence did not disprove racial dilution. Thus, it was not clear error for the district court to find, based primarily on undisputed evidence submitted by both parties, that under the totality of circumstances, Charleston County's at-large method of electing County Council members violates Section 2 of the Voting Rights Act.

CONCLUSION

For the reasons stated, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief for the United States As Appellee complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Rule 32(a)(7). This brief contains no more than 13,159 words, as calculated by the WordPerfect 9 word-count system.

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