No. 10-335

In The
Supreme Court of the United States

PEARL COTTIER; REBECCA THREE STARS,

Petitioners,

v.

CITY OF MARTIN; et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

SARA FRANKENSTEIN
Counsel of Record
DONALD P. KNUDSEN
GUNDERSON, PALMER, NELSON & ASHMORE LLP
440 Mount Rushmore Road
P.O. Box 8045
Rapid City, South Dakota 57709
(605) 342-1078
sfrankenstein@gpnalaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Does the en banc decision present an important question of appellate jurisdiction that calls for this Court's supervisory powers?

II. Is this case moot?

III. Did the Eighth Circuit reject non-statistical evidence and is it therefore in conflict with other circuits?

IV. Is the en banc court's analysis of non-municipal elections in conflict with other cases, and did petitioners invite alleged error by vigorously persuading the district court to determine city voting behavior based on non-municipal election results?

PARTIES TO THE PROCEEDING

Respondents agree with petitioners' listing of the parties to the proceeding, except the current city finance officer is Jean Kirk.

RULE 29.6 STATEMENT

A corporate disclosure statement is not required from the respondents because the City of Martin, Toni L. Ruff, Jean Kirk, David L. Bakley, Gregg A. Claussen, Charles J. Gotheridge, Shirley J. McCue, Cecelia Moffett, and Sherry J. Peck are governmental parties, and are not required to submit a Corporate Disclosure Statement pursuant to Fed. R. App. P. 26.1(a).

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STATEMENT

The City of Martin is an aldermanic form of government under South Dakota statute. S.D.C.L. Ch. 9-8. According to statute, each ward must consist of two alderman, to be elected in staggered terms. S.D.C.L. § 9-8-4.

Following the 2000 decennial census, the city redistricted its three voting wards using the new census data by passing Ordinance 122. This ordinance did not create only one precinct in each of the three aldermanic wards as plaintiffs allege. Rather, state statute requires, and therefore the city wards have always been, three in number with two aldermen from each ward. S.D.C.L. § 9-8-4. There is no evidence whatsoever that the passage of Ordinance 122 is what precluded experts from statistically analyzing city election data, as petitioners purport. Pet. 5.

The City of Martin is extremely well-integrated, in that Indians and whites intermarry, live on the same block, and work amongst each other daily. Trial Transcript 1395-96; 1794-1800; 1986.[1] Native Americans serve on city council and in numerous city employment positions. Trial Tr. Ex. 448; 972; Ex. 449; 974; Ex. 450; 975; 1050-1056; 1615; 1395; Ex. 448, pp. 26-37; 1054; 2126-2127. Native Americans own businesses in Martin, run for office, are elected to office,

[1] Trial Transcript ("Trial Tr.") refers to Docket Entries 346-356; entered 8/18/2004.

and participate in all aspects of life in the city. Trial Tr. 1797-1800. It is not uncommon for an Indian candidate to run unopposed for city council, or for two Indians to run against one another without a white contender. Trial Tr. 1068. It is also common for the city council to appoint an Indian to a vacancy on the council.

The ACLU, on behalf of two Indian voters from the City of Martin, brought suit against the city alleging that the city's redistricting plan, Ordinance 122, violated § 2 of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the United States Constitution. *Id*. at 18-24; Pet. 4. An 11-day bench trial was held on the plaintiffs' claims in June and July 2004. *Id*. at 98-123.

While city politics and city residents see little to no racial animus, a small number of Indian activists living on reservation land testified to their perceived racial animus in the city. Trial testimony produced a marked difference in perspectives between the handful of Indian activists on reservation land as opposed to Indian people residing in Martin. Indian activists on reservation land testified to white bloc voting and "Indian issues," whereas Indians in Martin did not agree with the activist mentality, the activists' "Indian issues," or white bloc voting. Trial Tr. 249:24-250:4; 253-254; 258-259; 269-270; 567:10-22; 607:16-22; 1403-1404; 1580-1581; 1618; 1693; 1801-1803; 1988; 2064:8-2067:21; 2104.

Only one of plaintiffs' five Indian activist witnesses (lead plaintiff Pearl Cottier) who testified about city white bloc voting actually lived in Martin and could vote in city elections. The remaining 4 plaintiffs' witnesses lived on reservation land and speculated on how they thought city residents voted in city elections.

The trial court and en banc court found more credibility and persuasiveness in the testimony of the many city residents, both Indian and white alike, who testified that Indians did not have a preferred candidate in the nonpartisan city elections. Rather, city residents testified that Indians differed on city politics and city candidates, sometimes agreeing but often disagreeing with the candidates espoused by the outside Indian activist group the LaCreek District Civil Rights Committee, members of which served as plaintiffs' five witnesses.

Plaintiffs often argue that defendants' expert, Dr. Ronald Weber, analyzed the same elections using the same techniques and found similar results. Plaintiffs always fail to mention that Dr. Weber was adamantly opposed to the plaintiffs' method of using ecological inference ("EI") in a manner never used before in a voting rights case or in any other manner for any purpose. Trial Tr. 712-13; 716; 722; 1013; 1029-32; 1308-1310; 1315; 1321-22. Dr. Weber ran his own EI calculations in the same manner as did plaintiffs' expert, Dr. Stephen Cole, in order to see if such results could be replicated. Dr. Weber was very clear – he did not use EI in order to proclaim any results he

found as valid, relevant, or reliable. Trial Tr. 1233. Dr. Weber strongly advocated that the trial court not use either expert's EI data as the methodology was untested, not peer reviewed, not published, not accepted in the scientific community, and the results very frequently produced impossibilities (e.g., cohesion over 100%). On some occasions, Dr. Weber's and Dr. Cole's results were wildly inconsistent. For example, Dr. Cole found the Indian-preferred candidate for the 1998 U.S. House contest to be Republican candidate John Thune, at a cohesion level of 71%. Dr. Weber's simulation of this EI method found Democrat candidate Jeff Moser to be the Indian-preferred candidate with a cohesion rate of 86%. Pet. App. 71a. This Court should not use plaintiffs' misrepresentations about Dr. Weber's testimony to buttress Dr. Cole's EI results, as the record is replete with Dr. Weber's criticism of EI and its downfalls when used in this manner. In addition, Dr. Cole testified that he was not an expert in EI a year after conducting EI in this case. Trial Tr. 712-713; Pet. App. 40a. Despite a *Daubert* motion and a great deal of expert criticism of Dr. Cole's use of EI, plaintiffs strenuously fought for its acceptance by the trial court.

Plaintiffs also proffered exit poll results, conducted by Dr. Cole. The evidence reflected numerous methodological problems with Dr. Cole's work. Trial Tr. 1065-1068; 1849-1851. Pet. App. 43a-44a. Numerous witnesses testified regarding the lead plaintiff's relatives serving as the exit poll workers, who only invited certain individuals, mostly Indians, to

participate in the poll. Word had gotten out around town that the exit poll was being conducted by the plaintiffs for use in this case. Trial Tr. 1849-1851. While expert testimony confirmed case law holdings that exit poll returns should mimic actual results, Dr. Cole's results predicted the loser as being the winner of each contest. Pet. App. 43a-44a. Testimony further confirmed case law holdings that high non-response rates can seriously distort inferences. Pet. App. 43a-44a.

Following extensive post-trial briefing and submissions, the district court issued a Memorandum Opinion and Order on March 22, 2005. The district court found that Ordinance 122 did not violate § 2 of the Voting Rights Act because the white majority did not vote sufficiently as a bloc to usually defeat Indian-preferred candidates, a precondition for liability under *Thornburg v. Gingles*, 478 U.S. 30 (1986). Appellants' Addendum 74. Pet. App. 1a. The district court also found that the evidence did not support the plaintiffs' claim that Ordinance 122 was adopted and was being maintained for a discriminatory purpose in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. *Id*. at 75-78.

The plaintiffs filed Notice of Appeal from the district court's judgment on March 24, 2005. Appellants' Sep. App. 246. Petition p. 10. A divided panel reversed the district court's finding under the third precondition of *Gingles*. The Eighth Circuit remanded to the district court, instructing it to determine whether the plaintiffs met their burden under the

totality of the circumstances. If liability was found, the district court was instructed to adopt a remedial plan to cure the Voting Rights Act violation. The city petitioned for a hearing en banc, with five of the eleven judges voting to grant a hearing en banc.

On remand, the district court found for the plaintiffs under a totality of the circumstances determination, and ordered the city to propose a remedial plan. The city declined to propose such a remedy, contending that there was no legally permissible or feasible remedy available. Plaintiffs proposed two redistricting plans and an at-large, cumulative voting scheme as the remedy. The district court found that there was no redistricting plan capable of correcting the violation, and therefore adopted an at-large, cumulative voting scheme for city elections. The district court had initially determined it lacked the authority to create such a remedy, citing *Cane v. Worcester County*, 59 F.3d 165 (4th Cir. 1995) (unpublished), and *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), as it violated numerous state statutes to create such a hybrid species of municipality. On remand, the district court relied on dicta in *Cottier I*, footnote for authority to adopt the at-large, cumulative voting scheme. *Cottier v. City of Martin* ("*Cottier I*"), 445 F.3d 1113, 1123, n.7 (8th Cir. 2006). The district court stated that it was bound to follow the *Cottier I* footnote, which the *Cottier II* three-judge panel and the subsequent en banc panel stated was in fact dicta. *Cottier v. City of Martin* ("*Cottier II*"), 551 F.3d 733 (8th Cir. 2008); Pet. App. 158a-159a.

The city appealed the finding of liability and the imposed remedy. A divided three-judge Eighth Circuit Court of Appeals panel affirmed the district court. *Cottier II*. The city again petitioned for hearing en banc, which the en banc court granted, and vacated *Cottier II*. The en banc court then notified both parties that the court would consider issues in *Cottier I* as well as the issues presented in *Cottier II*. Plaintiffs filed no motion or brief in opposition to the en banc court's notice that *Cottier I* would also be considered by the en banc court.

Neither did plaintiffs oppose the en banc court's choice or ability to review *Cottier I* at oral argument. The following occurred at oral argument en banc:

> Justice Colloton: Before you do that, may I just ask one other question about *Cottier I*?
>
> Do you see any procedural rule that would preclude this Court in the en banc proceeding from going back and revisiting the holding that Judge Schreier was clearly erroneous in finding no liability? I understand on the merits obviously you think the district court was clearly erroneous, but do you see any procedural obstacle to the Court revisiting that if it were so inclined?
>
> Sells: Your honor, I have not been able to find a case that says that. There is one case, I think it's out of the Ninth Circuit, that says en banc court can do whatever it wants, I think that's probably right.

September 23, 2009 Oral Argument at 39:36 available at http://8cc-www.ca8.uscourts.gov/OAaudio/2009/9/071628eb.asx (last visited October 7, 2010).

The en banc court, in a 7 to 4 decision, affirmed the district court's initial determination, finding that plaintiffs had not met their burden under the third prong of *Gingles*. The en banc court found no clear error in the trial court's weighing of the evidence. The en banc court also affirmed the trial court's finding that Ordinance 122 was not adopted or maintained for a discriminatory purpose.

REASONS FOR DENYING THE PETITION

I. Contrary to Petitioners' Urging, the En Banc Decision Does Not Present an Important Question of Appellate Jurisdiction That Calls for This Court's Supervisory Powers.

Plaintiffs cite Sup. Ct. R. 10(a) and (c) for reasons to grant their petition for writ of certiorari, apparently arguing the en banc Eighth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" and "has decided an important federal question in a way that conflicts with relevant decisions of this Court." As neither reason cited by Plaintiffs exists in this matter, writ of certiorari should not be granted.

A. *Cottier I* was properly before the en banc court as a court sitting en banc has the power to consider previous issues.

It is well-settled that the law of the case doctrine does not prevent an en banc court from reconsidering issues previously decided by a panel court. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *Remington v. Central Pacific R.R. Co.*, 198 U.S. 95, 100 (1905).

"Although courts are eager to avoid reconsideration of questions once decided in the same proceeding, *it is clear that all federal courts retain power to reconsider if they wish.*" 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (2d ed. 2002) (emphasis added). The circuits are in accord. See, *e.g., Irving v. United States*, 162 F.3d 154, 161 (1st Cir. 1998) (en banc) ("We hold that neither the law of the case doctrine nor the law of the circuit doctrine disables an en banc court from overruling a panel decision from a prior appeal in the same case."); *Watkins v. U.S. Army*, 875 F.2d 699, 705 n.8 (9th Cir. 1989) (en banc) ("The law of the case doctrine does not, as the Army suggests, prevent us from reconsidering the issues raised in *Watkins I*."); *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc) ("The law of the case doctrine . . . does not impair the power of an en banc court to overrule any panel decision."); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 436 n.9 (2d Cir. 1978) (en banc)

("[law of the case doctrine] cannot immunize panel decisions from review by the court en banc."); *In re Cent. R.R. Co. of N.J.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (en banc) ("it has long been the rule in this Circuit that decisions made in similar cases by panels of this Court are binding on other panels but are not controlling on the Court En Banc.").

Plaintiffs conceded at oral argument that nothing prevents the court sitting en banc from re-determining prior issues. Plaintiffs did not object in any manner when the en banc court indicated it would consider *Cottier I*. There is no authority of which respondents are aware or that petitioners have cited that states an en banc court *cannot* revisit prior panel decisions. Despite their unambiguous concession at oral argument, and failing to object at any point, petitioners now argue the en banc review of the prior panel ruling was inappropriate because neither party requested review and the Court of Appeals did not justify its review on additional criteria.

An en banc court most certainly can revisit previous issues *sua sponte* without requests from the parties. See *In re Byrd*, 269 F.3d 585, 592-93 (6th Cir. 2001) (Cole, J., concurring) ("The power of an en banc court to review its own panel decisions *sua sponte* is inherent to its function as a reviewing court.") Holding otherwise would prevent a court from correcting its own errors simply because neither side thought to challenge them. This would not be in keeping with the spirit of the rule. See *Irving*, 162 F.3d at 161 ("The authority to overrule the decision of

a prior panel in the same case flows logically from the error-correcting function of the full court.")

Further, there is no requirement limiting en banc review of previous panel decisions to situations where there is a change in the facts, a change in the law, or a need to secure or maintain the uniformity of the circuit's decisions. As the majority points out in *Cottier II*, such criteria would give an en banc court virtually no ability to correct a panel's previous error. *Cottier v. City of Martin* ("*Cottier II*"), 604 F.3d 553, 557 n.2 (8th Cir. 2010) (en banc).

B. No jurisdictional issue exists warranting a grant of writ of certiorari

Petitioners next claim the en banc court did not have *jurisdiction* to review the panel court's prior decision because the district court's original finding did not "merge" into its final judgment. Petitioners' reliance on the final judgment rule is entirely misplaced. Whether or not the district court's original finding merged into its final judgment is completely irrelevant because the district court's original finding – that the third *Gingles* precondition had not been met – most certainly is a final decision capable of review by an en banc court under 28 U.S.C. § 1291. Moreover, while it is well settled that appeals may be taken only on final decisions, there is absolutely nothing in 28 U.S.C. § 1291 preventing a court en banc from reviewing previously decided issues.

Petitioners' citation to *Ortiz v. Jordan*, 316 Fed. Appx. 449 (6th Cir. 2009), *cert. granted*, 130 S.Ct.

2371 (Apr. 26, 2010) is irrelevant, because the *Cottier* case does not concern whether a party must seek interlocutory appeal on a summary judgment denial regarding qualified immunity lest they be precluded from appealing the issue after trial.

C. The en banc court's reversal of *Cottier I* was not inconsistent with this Court's precedent

Finally, petitioners argue the writ of certiorari should be granted because the en banc court did not use the clearly erroneous standard when reviewing *Cottier I*. Petitioners complain that the en banc court set aside the district court's ultimate finding of vote dilution without determing that the ultimate finding was clearly erroneous. Petitioners misunderstand the decision in *Cottier II*. The en banc court revisited *Cottier I* and found that the district court was not clearly erroneous in its finding that the third *Gingles* precondition was not met. The en banc court did not reach the issue of whether the district court's ultimate finding was clearly erroneous because it "would not overlook the error in *Cottier I* and proceed to contemplate an order directing the City of Martin to implement a remedy for a non-existent violation of the Voting Rights Act." *Cottier II*, 604 F.3d at 557.

The en banc court's decision is not inconsistent with Fed. R. Civ. P. 52(a) as the en banc court did not set aside the district court's ultimate finding without using the clearly erroneous standard of

review – it did not even address the district court's ultimate finding. Rather, the en banc court revisited the panel court's prior ruling, which it is entirely at liberty to do, and found the district court was not clearly erroneous in finding the third *Gingles* pre-condition was not met.

There is no jurisdictional issue or a departure so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Nor have petitioners shown the en banc court's decision conflicts in any way with relevant decisions of this Court. In fact, petitioners fail to cite any United States Supreme Court case law on the subject. Accordingly, the petition should be denied.

II. This Case Is Moot

Petitioners request this Court overturn the en banc decision regarding the City of Martin districting plan for this decade ending in December 2010. This decade has nearly expired, and the next decade's census data has already been compiled and is set for release in March 2011. The next City of Martin council election will be held in the spring of 2011, likely June. The new census data released for the new decade will be utilized in redistricting the City of Martin's voting wards for use in all future city council elections. Further determinations of this case cannot affect any future elections. This appeal is moot.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Schanou v. Lancaster County Sch. Dist.*, 62 F.3d 1040, 1043 (8th Cir. 1995) (quoting *Render v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 540 (1986)). Article III requires a "case or controversy" to exist at every stage in the litigation before the court can reach the merits of a case. *Alvarez v. Smith*, 130 S.Ct. 576, 580 (2009). A "case or controversy" requires "a definite and concrete controversy involving legal interests at every stage in the litigation." *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992). "Occasionally, due to the passage of time or a change in circumstances, the issues presented in a case will no longer be 'live' or the parties will no longer have a legally cognizable interest in the outcome of the litigation." *Arkansas AFL-CIO v. Federal Communications Comm'n*, 11 F.3d 1430, 1435 (8th Cir. 1993). Where a case "is no longer embedded in any actual controversy about the plaintiff's particular legal rights," but rather, "it is an abstract dispute about the law, unlikely to affect these plaintiffs any more than it affects other [ ] citizens," the case is no longer "live" *Alvarez,* at 580-81.

In a similar case, the State of Alabama was sued at the end of the last decade, in which the plaintiffs asked the supreme court of the state to modify a redistricting plan. *Rice v. Sinkfield*, 732 So.2d 993 (Ala. 1999). The Alabama Supreme Court found that

the plaintiff's request for modification of a 1993 consent judgment redistricting plan, based on the 1990 federal census, was moot. *Id*. The court found that any modification of the current plan could not affect future legislative elections, as the 2000 federal census was scheduled to be released prior to the next legislative election. *Id*. Similarly, this Court must conclude that Martin city elections held in the spring of 2011 and subsequent years will be governed not by Ordinance 122 or 2000 census data, but by a new districting plan based on 2010 federal census data. See *Rice*, 732 So.2d at 993-994.

In a recent case, the Fifth Circuit held in accord. *Lopez v. City of Houston*, ___F.3d ___, 2010 WL 3341643 (5th Cir. 2010). The *Lopez* court found that voters' claims were moot, in that the impending 2010 census would prompt the City of Houston to add seats to its council. *Id*. at *3. The *Lopez* court found that the claim could not be saved from mootness because it was "capable of repetition yet evading review." *Id*. at *2. The exception to the mootness doctrine has two prongs: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id*., citing *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975). The second prong requires, however, that the party invoking jurisdiction show a "demonstrated probability" or "reasonable expectation" not merely a "theoretical possibility" that it will be subject to the

same government action. *Lopez* at *2, citing *Libertarian Party v. Dardenne*, 595 F.3d 215, 217 (5th Cir. 2010). The *Lopez* court found that the city had not formed a policy that it will follow in future similar circumstances that are likely to repeat. *Lopez* at *3. The *Lopez* court found that the decennial U.S. census will report the population of the city before the next city election, pursuant to 13 U.S.C. § 141(a) (requiring census figures to be released no later than April 1, 2011). *Id*. Merely demonstrating that city government will "have an opportunity to act in the same allegedly unlawful manner in the future" was not enough to satisfy the second prong of the exception absent a reasonable expectation that the government *will* act in that manner. *Id.,* citing *Libertarian Party,* 595 F.3d at 217. The *Lopez* court found the voters' claims moot, and dismissed the action. *Id*.

No future Martin city elections will be held under Ordinance 122. Petitioners' claim has become moot. The writ of certiorari should not be granted prompting further litigation of a moot issue.

III. The Eighth Circuit Did Not Reject Non-statistical Evidence and Therefore Is Not in Conflict With Any Other Circuit or Court.

The en banc court granted judgment in favor of the City of Martin because the plaintiffs had failed to carry their burden of proof on the third element of a § 2 voting rights claim – whether the white majority

"votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate." Appellants' Addendum 51-75. See *Thornburg v. Gingles*, 478 U.S. 30, 51, 106 S.Ct. 2752, 2763, 92 L.Ed.2d 25 (1986). Plaintiffs argue that the en banc court erred by categorically rejecting lay-witness testimony, rather holding that only statistical evidence can prove the third *Gingles* prong. The en banc court's opinion makes clear, however, that it gave plaintiffs' evidence due consideration and simply found it to be disputed by more reliable and credible lay-witness testimony and overshadowed by statistical evidence. Nowhere in the en banc's opinion does it conclude that statistical evidence is required as plaintiffs contend.

To ascertain the existence of white bloc voting in a particular contest, the district court must determine: (1) the candidate who the minority voters preferred; and (2) whether whites voted as a bloc to defeat the minority-preferred candidate. *Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000). The inquiry generally focuses on statistical evidence to discern the way voters voted. *Gingles,* 478 U.S. at 57, 106 S.Ct. at 2769.

Plaintiffs' expert opined and plaintiffs concede that statistical analysis of Martin city elections (mayor and city council elections) is not reliable due to the small number of precincts within the city and because none of the three wards is racially homogeneous. Appellants' Sep. App. 530, Appellants' Brief 35 (*Cottier I*). See also Appellants' Addendum 27 (*Cottier I*) (district court agrees with plaintiffs' expert

that "City of Martin endogenous election data cannot be analyzed in a scientifically valid manner using [various statistical methodologies]."). Because plaintiffs were unable to use statistical evidence from city elections in an effort to prove the third *Gingles* factor, plaintiffs attempted to meet their burden of proof using lay-witness testimony, expert witness analysis of other elections, documentary evidence and the results of an exit poll. Appellants' Brief 35. There is substantial discussion of such evidence in the district court's Memorandum Opinion and Order as well as the en banc decision. Appellants' Addendum 43-48, Pet. App. 165a, 168a-170a.

Plaintiffs' claim their lay-witness testimony, which purportedly identified who the Indian-preferred candidates were in Martin city elections, was undisputed. Quite to the contrary, defendants supplied significant lay-witness testimony which disputed whether Indians in Martin had a preferred candidate at all, and if so, which candidate that was. The en banc court stated the following:

> Other than the 2003 exit poll that the district court permissibly found unreliable, there was no statistical evidence regarding these elections. The only other evidence about these contests was the testimony of lay witnesses who expressed an opinion about which candidates were preferred by Indian voters, and whether those candidates won or lost. This testimony was disputed. Some witnesses presented by the plaintiffs did not even live in Martin. The defendants introduced

> testimony from Indian voters who did reside in Martin, and this evidence tended to show that Indians, in fact, have varied opinions on the issues of the day and on preferred candidates for elective office. The district court considered the lay testimony, but found that it did not show that Indian-preferred candidates lost because of white bloc voting. The court concluded that in view of the statistical evidence, the testimony was insufficient to meet the plaintiffs' burden to satisfy the third *Gingles* precondition. This is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs. There is no clear error in the district court's weighing of the evidence.

Pet. App. 172a-173a.

The record buttresses the en banc court's findings. The city introduced lay testimony from Indians living within the City of Martin demonstrating that Indians disagree on a wide variety of political issues, including which candidates were the Indian-preferred candidates, or even whether there were Indian-preferred candidates in nonpartisan city elections. Trial Tr. 2094:20-21; 2095:12-13; 2102:19; 2106:12; 1403-04; 1569:12-24; 1520:16-20; 1574:18; 1580-81; 1585:18; 1801:9-10, 18-19; 1295-1808; 1614:22-25; 1615:2-3; 1618; 1620:2; 1623:12; 1632; 1634-35; 1690:1-4; 1691:12; 1693; 1694:4; 1797-98; 1801-03; 1805-06; 1819; 1815; 2064-67; 2100; 2104.

Lay-witness testimony offered by the plaintiffs was not nearly as reliable. First, only one of the plaintiffs' witnesses who attempted to identify the Indian-preferred candidates in Martin city elections actually lived in the City of Martin. The four other witnesses called by plaintiffs were Indian activists living on reservation land. Trial Tr. 540:2-6; 547:15-17; 849:13-18; 880:19-25; 898:2-5; 1518:7-12. Plaintiffs' witnesses were solely Indian, fewer in number, did not live in the city, and were not eligible to vote in city elections. Trial Tr. 523-524; 540; 547-548; 849; 880; 898 and 1488.

There was a marked difference between the testimony of Native American people who lived and voted in the city as opposed to Native Americans who lived in Indian country. The lay testimony demonstrated a division between Indian members of the LaCreek Civil Rights Group and Indian people who lived in Martin. Trial Tr. 1620; 1634-35; 1694; 1802-03; 1805-06; 1808; 1819; 1828-31; 1834; 1994; 2054-2059; 2062-2066; 2097-2109. Evidence indicated that the LaCreek Civil Rights Group met on Indian trust land and was comprised of nearly all Indian people living in Indian country. Indian defense witnesses testified that they found the LaCreek Civil Rights Group's positions offensive to their own values. Trial Tr. 1802; 2063-2066. Defendants' Indian lay testimony demonstrated that Indians in Martin have varied political opinions and varied candidate preferences for elected office, negating white bloc voting. Trial Tr.

1403-1404; 1580-1581; 1618; 1693; 1801-1803; 2064-2067; 2104.

Second, the plaintiffs' lay testimony regarding who was considered to be truly "Indian" rendered their opinion as to the Indian-preferred candidate inherently suspect. Lead plaintiff, Pearl Cottier testified that some Indians become too "acculturated" and are not considered "Indian" by other Indians. Trial Tr. 249-250; 253-254; 258-259 and 269-270. Therefore, her testimony regarding the "Indian vote" excluded such "acculturated" Indians. *Id*. Plaintiffs' citations to Pearl Cottier's testimony about who Indians voted for is fraught with problems, as her definition of who is Indian differs from those who self-identify as Indian on census forms.

The district court found that the lay testimony did not show that Indian-preferred candidates lost because of white bloc voting. As the en banc court recognized, "[t]his is a factual finding that addresses the relative persuasiveness of disputed lay testimony and statistical evidence unfavorable to the plaintiffs." *Cottier II* at 561; Pet. App. 172a. It was reasonable for the lower courts to give more weight to testimony of Indian and white witnesses who did live and vote in the City of Martin over testimony of Indians living outside the city on reservation land.

In addition to disputed lay testimony, the district court and en banc court also thoroughly considered the non-statistical evidence of a 2003 exit poll.

Dr. Cole conducted an exit poll in Martin on June 3, 2003. Pet. App. 32a. Dr. Cole elicited a response rate of only 38.5% of the city voters who voted that day. Pet. App. 32a. Dr. Cole's response rate among Native Americans was 78.2%. Pet. App. 33a. His response rate among white voters was 20.9%. Pet. App. 33a. Dr. Cole significantly underrepresented white voters in his exit poll, and therefore the exit poll results are suspect. Pet. App. 43a.

One method to determine the accuracy of an exit poll is to ascertain whether the exit poll predicted the correct winner in each race. *Hall v. Holder*, 757 F. Supp. 1560, 1577 (M.D. Ga. 1991). In Ward Three, Dr. Cole's exit poll predicted that Doug Justus was the winner, when in fact Todd Alexander won the seat. Dr. Cole's exit poll report also concluded that the *loser* of the race, Doug Justus, was the preferred candidate by both Native American voters *and* white voters, further throwing suspicion over the validity and accuracy of the exit poll results. Pet. App. 44a. In addition, Dr. Cole's exit poll was not conducted properly so to eliminate biased results. Trial Tr. 286-287; 794-795; 802-803; 1065-1069.

The district court found serious shortcomings in the methodology used by plaintiffs' expert in conducting the exit poll. Pet. App. 42a-44a. The en banc court found that it was not clear error for the district court to consider the exit poll findings and ultimately determine its data was unreliable. Pet. App. 166a-168a.

In no instance did the en banc court hold that statistical evidence was required or categorically reject plaintiffs' non-statistical evidence. Rather, both the district court and en banc court reviewed and discussed plaintiffs' proffered statistical evidence, lay-witness testimony, and 2003 exit poll data. Pet. App. 164a-173a, 52a-76a. After weighing the reliability and persuasiveness of the contested data and testimony, the district court found the plaintiffs failed to prove their burden under the third *Gingles* prong. The en banc court found no clear error in the district court's weighing of the "relative persuasiveness of disputed lay testimony and disputed statistical evidence unfavorable to the plaintiffs." Pet. App. 173a. Far from "rejecting" plaintiffs' non-statistical evidence, the district court and en banc court considered the evidence, but found plaintiffs' statistical evidence more reliable and compelling than the heavily-disputed lay-witness testimony.

Petitioners assert that the en banc court held that statistical evidence is required to prove the third *Gingles* precondition, and that the en banc court rejected the non-statistical evidence, creating a circuit split. This court could only find a circuit split if in fact the petitioners' assertion is true – that the en banc court rejected non-statistical evidence. To the contrary, the en banc court, as well as the district court, considered and reviewed lay-witness testimony as well as exit poll data and other non-statistical evidence. Accordingly, there is no circuit split created by the en banc decision.

Petitioners assert that a circuit split is created by the en banc court's "holding that a district court need not even make findings identifying the minority-preferred candidates in the absence of statistical evidence." Pet. 27. There was no "absence of statistical evidence" for Martin city residents' voting behavior. To the extent that plaintiffs argue their lack of statistical evidence for city council elections, this argument misses the point. The district court and en banc court found that the non-statistical evidence shows that there was no discernable Indian-preferred candidate for city elections. *Cottier II* at 561; Pet. App. 172a. The lay testimony disputed whether Indians in Martin preferred particular candidates.

IV. The En Banc Court's Analysis of Non-municipal Elections Is Not in Conflict With Other Cases, and Petitioners Vigorously Persuaded the District Court to Determine City Voting Behavior Based on Non-municipal Election Results.

First, plaintiffs allege it error for the en banc court to count Indian-preferred candidate victories in county-wide elections. In other words, the plaintiffs argue that the court erred when it used countywide vote totals to reach conclusions regarding voting behavior in the city. Appellants' Brief 50-54. It is astounding that plaintiffs now take this position, because at trial plaintiffs took the opposite position

inviting the court to determine city voting behavior based on non-city election results.

Both sides' experts agreed that traditional statistical analysis of city council election results could not be completed because there are only three precincts within the City of Martin, and none of the precincts are largely all Indian or all white. Pet. App. 57a-75a. The plaintiffs introduced evidence prepared by their expert witness, Dr. Cole. Dr. Cole claimed to be able to statistically project *city* voting behavior based on the voting behavior of all residents in Bennett County. Appellants' Sep. App. 531-532. Permeating Dr. Cole's report are repeated statements attempting to bolster the strength of his opinions by finding that his opinions about the voting patterns in the city are consistent with voting patterns within the county. *Id*. at 535-536, 538 ("[T]he three city precincts usually fell very close to the regression line indicating that there is evidence for polarization *in the city* as well as in the county." (emphasis added)).

Furthermore, in head-to-head contests, Dr. Cole claimed to be able to estimate voting behavior in the City of Martin based on aggregate data from exogenous races. Appellants' Sep. App. 531-532. Dr. Cole analyzed twenty-eight exogenous elections, and by performing EI, claimed to generate estimates of voting behavior in the City of Martin. *Id*. at 545, 573-577. Thus, plaintiffs introduced expert evidence attempting to convince the district court that voting behavior within the City of Martin could be statistically

estimated based on election results from election contests outside the City of Martin.

Plaintiffs also fought for acceptance of their county-wide election data in briefing. Doc. Entry # 360 ¶ 243-246. In fact, plaintiffs argued that the district court should find the county-wide races more probative than non-local elections. Doc. Entry # 360, ¶ 246. Plaintiffs now claim the court erred when it found county races the most probative.[2] Plaintiffs may not claim reversible error when the error is by their own invitation. See *Arkansas State Highway Commission v. Arkansas River Co.*, 271 F.3d 753, 760 (8th Cir. 2001); *Dillon v. Nissan Motor Co.*, 968 F.2d 263, 269 (8th Cir. 1993). Nor is it error to consider the most "local" of races with statistics available. See, e.g., *Sanchez v. Colorado*, 97 F.3d 1303, 1317 (10th Cir. 1996) (considering exogenous elections); *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989) (same); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987) (exogenous elections are probative "because they reflect local voting patterns"); *Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 29 F. Supp. 2d 448, 455 (W.D. Tenn. 1998) (considering exogenous elections), aff'd 209 F.3d 835 (6th Cir. 2000); *Cofield v. City of LaGrange*, 969 F. Supp. 749, 760 (N.D. Ga. 1997)

[2] Plaintiffs did not submit statistical data for city elections. County elections were the most "local" of all statistical data presented.

(exogenous elections are relevant to the extent that they allow an inference of voting behavior). *Gingles*, 478 U.S. at 57 n.25 (in the absence of ideal data, "courts must rely on other factors that tend to prove unequal access to the electoral process"); see also *Id*. at 45 (requiring a "searching practical evaluation") *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("*Gingles* . . . suggests flexibility in the face of sparse data.").

Plaintiffs claim that "county results showed Indian-preferred candidates winning the county only 7 out of 15 (47%) times." Plaintiffs fail to point out that 2 of the 15 races had no discernable Indian-preferred candidate. By definition, a contest with no Indian-preferred candidate is not polarized, and cannot be counted as an Indian-preferred candidate defeat. Using far more accurate and appropriate figures, county results showed 7 Indian-preferred candidate wins, 2 non-polarized contests, and 6 Indian-preferred candidate losses. Six losses out of 15 total contests is a 40% Indian-preferred candidate loss rate. Using appropriate numbers, one cannot possibly contend that the Indian-preferred candidate losing 40% of the time satisfies the third *Gingles* prong, which requires that the minority-preferred candidates *usually* lose due to white-bloc voting.

Plaintiffs next state that "election returns on file with the court showed the same Indian-preferred candidates winning the city only 1 out of 15 times (7%)." Plaintiffs' Brief p. 30. Plaintiffs are describing three documents that they disclosed for the first time

on appeal, attaching them to their addendum to their appeal brief filed with the Eighth Circuit twelve months after trial. Plaintiffs asked the court to judicially notice the three documents to buttress their claim that they met the third *Gingles* prong. These documents only provide information regarding 8 contests, not 15 as plaintiffs claim. The en banc court rejected plaintiffs' suggestions that it should take judicial notice of additional election data when disclosed for the first time on appeal. The en banc court stated that "[a]side from whether the documents are properly authenticated, we decline through judicial notice to allow one party to augment its evidentiary presentation in a case involving extensive statistics that were the subject of complex analysis by experts for both parties." Pet. App. 171a. n.4. In like token, this Court should not grant writ of certiorari based on an argument submitted though documents which escaped both sides' experts' statistical analysis and consideration by the trial court.

The nexus of plaintiffs' argument is that the lower courts should not have used county election data, since the plaintiffs allege that "Indians constitute a sizable majority of the population" of the county. Plaintiffs' Brief p. 27. Plaintiffs later concede that Bennett County is only 50% Indian voting-age population. Voting age population is the proper data used when calculating voter behavior, since only those of voting age may in fact vote. *Johnson v. Miller*, 922 F. Supp. 1556, 1568 nn.18 & 19 (S.D. Ga. 1995) (noting that minority voting age population is

the appropriate measure for analyzing vote dilution), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997). Plaintiffs' citations to case law discussing majority-minority districts are irrelevant, as Bennett County is not majority-Indian in its voting age population.

Next, plaintiffs allege that the lower courts gave the same probative value to elections in which the Indian-preferred candidate was white as it did to elections in which the Indian-preferred candidate was Indian. The record is quite clearly to the contrary.

The trial court found that interracial elections are more probative than racially homogenous ones. Pet. App. 26a, 55a, 56a, 57a. The trial court found endogenous elections are more probative than exogenous elections, and recent elections are more probative than elections in the distant past. Pet. App. 26a, 55a, 56a. The trial court also found the exogenous elections for offices with comparable levels of importance within the community are entitled to more weight than dissimilar contests. Pet. App. 26a, 56a, 57a. The trial court stated that "[h]ere, the court will give more weight to local county-wide elections than state legislative, statewide or federal elections." Pet. App. 26a, 56a, 57a. The trial court also recognized that while interracial elections are highly probative of minority voting patterns, minority-preferred candidates may not always be a minority. Pet. App. 27a. citing *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 605-06 (4th Cir. 1996). Therefore, the court did not

limit its consideration to interracial elections. Pet. App. 27a.

The trial court set forth charts of voting statistics in the order of the weight given by the court.[3] Pet. App. 57a. The trial court clearly gave the most probative value to interracial county-wide races, which indicated 8 Indian-preferred candidate wins, 5 Indian-preferred candidate losses, and 1 race had no discernable Indian-preferred candidate. Pet. App. 61a. The court found the second most probative set of data to be interracial, state office elections, in which the Indian-preferred candidate lost 3 out of 3 races. Pet. App. 62a. The next most probative data set was white candidates in county-wide exogenous elections, of which 1 Indian-preferred candidate won,

[3] The Court should note that petitioners inaccurately describe the trial and en banc courts' findings in their Table 4. Pet. 15. An accurate table of the en banc court's findings is as follows:

Election Type	W	L	Non-Polarized
Interracial, head-to-head, countywide offices	0	3	1
Interracial, head-to-head, statewide offices	0	3	
White only, state and federal offices	15	10	
White only, countywide offices	1	1	1
Total	16	17	2

The Indian-preferred candidate loss rate for Table 4 is 49%. Adding the Table 4 data to Petitioners' Table 5 data, the total Indian-preferred candidate loss rate is 50%.

1 Indian-preferred candidate lost, and 1 contest had no Indian-preferred candidate. Pet. App. 64a. Fourth in line for probative value, the court analyzed contest between white candidates for state and federal office. Pet. App. 65a. Of this data set, the Court found that Indian-preferred candidates won 17 contests and lost 14 contests. Pet. App. 75a. These numbers certainly support the trial court's finding that white voters did not vote sufficiently as a bloc to usually defeat the Indian-preferred candidate. Pet. App. 61a.

Nor did the en banc court simply group all election results together, giving equal weight to all contests. Rather, the en banc court recognized that the trial court "divided these exogenous elections into several categories and made findings with respect to each." Pet. App. 164a-165a. The en banc court acknowledged that the trial court gave interracial contests more weight, and county-wide elections should receive greater weight than state and federal elections. Pet. App. 165a. The en banc court found the trial court's weighing of the evidence was not clearly in error, citing Justice O'Connor's concurrence in *Gingles* that even where a district court clearly erred by aggregating certain data to find racial bloc voting, a district court's ultimate conclusion is not clearly erroneous in light of other evidence that the court also considered. Pet. App. 172a.

Plaintiffs' complaint of the court's use of county election data is that it was given "the same probative value as victories at the city level." Plaintiffs' Brief p. 33. Again, there were no city election statistical analysis

completed or offered to the court. Plaintiffs are solely relying on their non-statistical evidence for this argument. Plaintiffs' reference to 6 out of 6 Indian-preferred candidates being defeated in city elections is a reference to the lay-witness testimony, for which no statistical analysis could be done. Plaintiffs' Brief p. 33. This lay-witness testimony was seriously disputed, as discussed above. Apparently, Plaintiffs' argument solely rests on the assertion that their five lay witnesses, 4 of which did not live or vote in the City of Martin, whose testimony was disputed by many Indian city residents and city voters, should have been given more probative value than the objective statistical analysis proffered by plaintiffs themselves, showing the Indian-preferred candidate did not usually lose. Such an argument provides no legal issue, but rather a plea for this Court to re-evaluate the persuasiveness and credibility of lay witnesses.

Plaintiffs state that white voters in Martin defeated 12 out of 29 (41%) Indian-preferred candidates when Indian voters preferred a white candidate. Plaintiffs' Brief p. 33. Plaintiffs do not cite the record, and one cannot ascertain where these numbers originate. It does not appear that petitioners have raised these facts before, and they do not appear to be supported by the record. This Court should not consider new facts, unsupported by the record, in considering petitioners' petition.

Petitioners strongly urged the district court to consider their exogenous election data, and in the exact order of probative value as the district court

ultimately adopted. Petitioners should not be granted writ of certiorari on an alleged error that they invited. As indicated above, the court's analysis of such data was not legal error, and it was certainly within the court's discretion to weigh the credibility and persuasiveness of the lay-witness testimony.

V. This Case Does Not Raise Issues of Exceptional National Importance as Asserted by Petitioners.

Again, plaintiffs wrongfully allege that because there was an "absence" of statistical evidence, the district court was able to disregard "stark racial polarization in municipal elections." As indicated above, plaintiffs themselves supplied a great deal of statistical evidence, urged the court to accept it, and now claim error because the court did as they urged. The statistical evidence was unfavorable to the plaintiffs. Now petitioners ask this Court to find error in accepting plaintiffs' statistical evidence, and instead hold that seriously disputed lay-witness testimony satisfies the third *Gingles* prong, despite the lower courts' finding of credibility and persuasiveness of the lay-witness testimony. Asking this Court to find "stark racial polarization" from such disputed lay-witness testimony does not warrant a writ of certiorari from this Court.

Petitioners' attempt to appeal to this Court by purporting that small towns across this country will avoid liability if this Court does not assign guidance

on the probative value of specific elections. Of course, what petitioners are asking for here is that all of their own statistical evidence be found irrelevant in comparison to the few witnesses plaintiffs had take the stand and opine about who they thought people who actually lived in Martin voted for. There is no urgent need for this Court to assign guidance as to how trial courts should weigh mixed lay testimony against mixed statistical evidence, when neither prove polarization. Nothing about the weighing of such factual evidence will lead to different standards used in different circuits, as the plaintiffs assert. Petitioners simply did not meet their burden.

VI. Contrary to the Petitioners' Assertion, the Evidence of Racial Polarization in this Case Is Not "Overwhelming" and the Case Is Poorly Suited to Determine Anything Other Than the Credibility of the Lay Witnesses.

Again, racial polarization was not overwhelming according to the statistical evidence, and the lay-witness testimony was mixed. Unlike as represented by plaintiffs, there would be no way to determine whether plaintiffs' lay-witness testimony substantiated polarized voting without also reviewing the numerous defense witnesses testifying to the contrary. This case certainly does not allow this Court "to address the important underlying legal questions with a minimum of factual complexity" as plaintiffs contend.

There is simply no set of facts to justify plaintiffs' statement that "Indian voters had absolutely no success in electing their preferred candidates except when those candidates were white." Plaintiffs' Brief, p. 38. Evidence indicated numerous Indian candidates winning contests over several years. An election in the city included an Indian versus Indian contest, with no white contenders. Pet. App. 34a. "The absence of white challengers to black incumbent[s] . . . is indicative of the lack of legally significant racial bloc voting." *Mallory v. Ohio*, 38 F. Supp. 2d 525 (S.D. Ohio 1997); *affm'd* 173 F.3d 377 (6th Cir. 1999). From 1981 until trial, the City of Martin elected 12 Indian candidates to city council out of 81 candidacies. Pet. App. 36a. Exhibit 448, p. 26-37. Other elections included Indian candidates running unopposed. Of contested and uncontested races, Native Americans have won 7 times and lost 5 times. Exhibit 448, p. 26-27. Weber p. 1054. Plaintiffs' own expert report indicates numerous Indian-preferred Indian candidates took office.

CONCLUSION

This case turned on the credibility and persuasiveness of lay-witness testimony and statistical evidence, carefully weighed by the district and en banc courts. Petitioners are dissatisfied with the result, but the result hinged upon the persuasiveness of the evidence, not legal error. This case does not call out for this Court's review as no circuit splits were created by the en banc court's holding, and no other issue warrants Supreme Court review.

In addition, petitioners' appeal is moot, and nothing would be gained by granting writ of certiorari only to prompt further litigation of a moot issue.

The Supreme Court should deny writ of certiorari.

Respectfully submitted,

SARA FRANKENSTEIN
Counsel of Record
DONALD P. KNUDSEN
GUNDERSON, PALMER, NELSON
& ASHMORE LLP
440 Mount Rushmore Road
P.O. Box 8045
Rapid City, South Dakota 57709
(605) 342-1078
sfrankenstein@gpnalaw.com