Appeal No.15-60637

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KENNETH FAIRLEY, SR., *et. al.*,

Plaintiffs-Appellants,

v.

HATTIESBURG, MISSISSIPPI, *et. al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi, Eastern Division

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BRIEF FOR PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Hattiesburg Mississippi, *et. al.*,

Defendants-Appellees,

v. No.15-60637

Kenneth Fairley, Sr., *et. al.*,

Plaintiffs-Appellants.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Archer, Deborah N., Attorney for Plaintiffs-Appellants;
2. Arrington, Derek Royce, Attorney for Defendants-Appellees (Jackson & Arrington, PLLC);
3. Bartley, Charles, Plaintiff-Appellant;
4. Brown, D. Franklin, Plaintiff-Appellant;
5. Burns, Fred, Plaintiff-Appellant;
6. Fairley Sr., Kenneth E., Plaintiff-Appellant;
7. Hattiesburg, Mississippi, Democratic Executive Committee, Defendant-Appellee;
8. Hattiesburg, Mississippi Election Commission, Defendant-Appellee;
9. Hebert, J. Gerald, Attorney for Plaintiffs-Appellants;

10. Henderson, Dennis D., Plaintiff-Appellant;

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12. Magee, Clarence, Plaintiff-Appellant;

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs, Kenneth E. Fairley, Sr., *et al*., Appellants in this case, respectfully request oral argument. This appeal raises important and complicated legal issues regarding the vital protections of Section 2 of the Voting Rights Act.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Southern District of Mississippi. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

INTRODUCTION

The facts of this case are largely uncontested. Hattiesburg, Mississippi has undergone significant demographic changes in recent years. As a result, Black voters now comprise a majority of the population (53.04%) and a plurality of the voting age population (47.9%). Meanwhile, only 40.48% of the population is non-Hispanic White and non-Hispanic White voters comprise 45.98% of eligible voters. Elections in Hattiesburg are characterized by extremely racially polarized voting patterns such that White voters, in wards where they comprise the majority, "vote[] sufficiently as a bloc . . . to defeat the [Black] preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986). Indeed, the racial polarization in Hattiesburg, at least in some elections, is at the mathematical maximum.

Nonetheless, the majority-White Hattiesburg City Council voted, along racial lines, to enact a City Council ward plan that continues to under-represent Black voters, consisting of three safe majority-White wards and only two Black majority wards. No Black preferred candidate has ever been elected from the majority-White wards and, given racially polarized voting in Hattiesburg, the probative evidence demonstrates that no Black preferred candidate can be elected in these wards.

The City Council could have enacted a plan that included a third majority-Black ward or a competitive ward that would allow both Black and White voters in

the ward an equal opportunity to compete on a level playing field to elect their candidate of choice. Instead, the City Council enacted a plan that guarantees that even though Black voters cast more votes than White voters in the election as a whole, Black voters will consistently only be able to elect two candidates of their choice, while White voters elect three candidates of their choice. Because divided votes on the Council are usually racially polarized, Black voters' representatives will routinely be outvoted on issues that particularly affect the Black community.

The City Council plan entrenches White majority voting power in Hattiesburg, despite the Black voting plurality. Under the totality of the circumstances, Black residents in Hattiesburg undeniably "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 1031(b).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the District Court improperly held that, under the totality of the circumstances, Plaintiffs-Appellants did not establish a Section 2 violation where (1) the majority-White Hattiesburg City Council enacted a ward plan that perpetuates a safe majority-White Council despite a marked shift in population from majority-White to majority-Black, (2) the Defendants *concede* that elections are characterized by extreme racially polarized voting and a third majority-Black or competitive ward was possible, and (3) the key Senate Factors weigh in Plaintiffs-Appellants' favor.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This appeal is filed on behalf of Kenneth E. Fairley, Sr., Charles Bartley, D. Franklin Browne, Fred Burns, Dennis D. Henderson, Clarence Magee, and Carlos Wilson, all Black citizens of Hattiesburg, Mississippi. Plaintiffs-Appellants allege the 2012 Hattiesburg, Mississippi City Council ward plan—which entrenches a White majority on the City Council despite the City's changing demographics—dilutes Black voting strength and results in a denial of an equal and effective opportunity for Black voters to elect City Council members of their choice in violation of Section 2 of the Voting Rights Act.

A. The History of Hattiesburg City Government and Its Changing Demographics.

Until 1985, Hattiesburg elected city commissioners through at-large elections that, due to the presence of extreme racial bloc voting, ensured the election of White-preferred candidates and diluted Black voting strength. After a federal district court struck down Hattiesburg's at-large city elections as a violation of Section 2 of the Voting Rights Act, *Boykins v. City of Hattiesburg*, No. H–77–0062(C), slip op. (S.D. Miss. Feb. 29, 1984), Hattiesburg adopted a mayor-council form of municipal government: a five-person City Council, with members elected

by single-member wards, wields Hattiesburg's legislative power[1] and the mayor, elected at-large, exerts executive power.[2] Each City Council member is elected from a ward, and each ward must "contain, as nearly as possible," a fifth of the City's population, "as shown by the most recent decennial census." MISS. CODE ANN. § 21-8-7(4)(a)-(b). The City Council has the authority and obligation to redistrict the municipality when necessary, and its decision "may not be vetoed by the mayor." MISS. CODE ANN. § 21-8-7(c)(i).

Since the adoption of the mayor-council structure in 1985, the City Council has had three White members and two Black members. Wards 1, 3, and 4 are, and have always been, majority-White wards and have always elected White members of the City Council. ROA.15-60637.368. Wards 2 and 5 are, and have always been, majority-Black and have always elected Black representatives to the City Council. ROA.368−69.

While the City Council representation has remained static, the population in Hattiesburg has changed dramatically since 1985 and the majority population has flipped from White to Black. Between 1980 and 2010, the Black population grew by a staggering 74.28% while the White population declined by 28.30%. ROA.1181. The 2010 decennial census established that the Black population now comprise a majority (53.04% single race, and 53.92% any-part Black) of the total

[1] MISS. CODE ANN. § 21-8-15.
[2] MISS. CODE ANN. § 21-8-9.

population of Hattiesburg and a plurality (47.95% single race and 48.5% any=part Black) of its voting-age population. ROA.342. Meanwhile, only 40.48% of the population is non-Hispanic White and non-Hispanic White voters comprise only 45.98% of eligible voters. ROA.342.

	Total Population (45, 989)[3]	**Total Voting-Age Population (36, 293)**
Single-race Black	24, 391 (53.04%)	17, 402 (47.95%)
Any Part Black	24, 797 (53.92%)	17, 603 (48.50%)
Non-Hispanic White	18, 615 (40.48%)	16, 689 (45.98%)
Non single-race non-Hispanic White	27, 374 (59.52%)	Unknown
Hispanics of any race	1, 996 (4.34%)	1, 749 (4.08%)
Single-race Black Hispanics	109	79
Any Part Black Hispanics	156	99

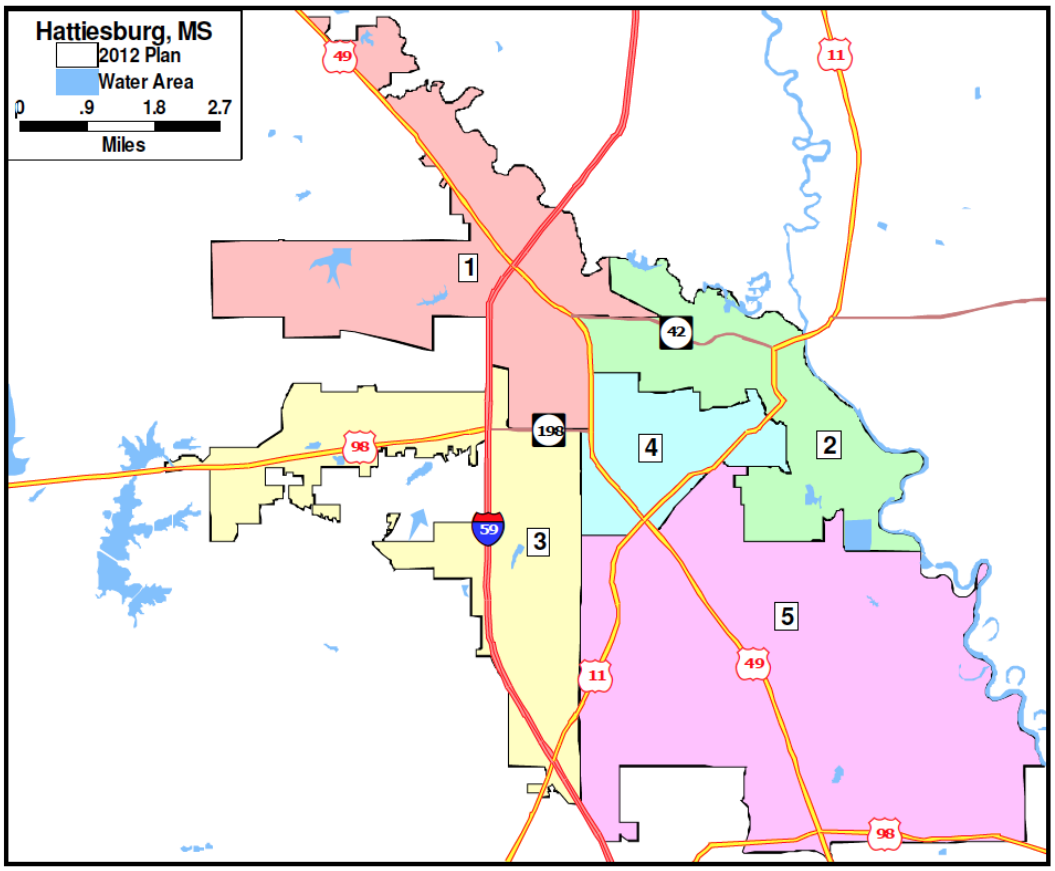
B. The City Council's 2012 Redistricting Plan Maintains White Control of the Council.

On July 17, 2012, the City Council adopted a redistricting plan in response to the 2010 decennial census data. ROA. 342. The City Council developed a plan following a public hearing on June 28, 2012. ROA.1187−88. The explicit primary goal of the Council's plan was to create "as little change" as possible, despite the significant demographic changes in the City. ROA.378. The proposed 2012 Plan retained the three White-majority wards, and two Black-majority wards.

[3] Statistics in this chart were taken from ROA.342 (citing the 2010 census).

ROA.378. The 2012 Plan ignored the other available options for that pivotal third ward, including a third majority-Black ward or a competitive ward that creates an equal opportunity for White and Black voters to elect a City Council representative of their choice.

The motion to adopt the City Council ward plan was opposed by the two Black City Council members, but it was nevertheless adopted over their objection by the three White City Council members. ROA.342. See below for a figure[4] of the 2012 Council Redistricting Plan.



[4] ROA.1189.

In developing the plan, the City Council did not seek to reflect the changing demographics of the City. Instead, in order to maintain three safe majority-White wards, the 2012 Plan packs Black voters at staggering rates—74.77% and 77.56% of the voting-age population in Ward 2 and Ward 5, respectively—much higher than previous plans. ROA.1188. The 2004 Black voting age populations of Wards 2 and 5 under the 2004 plan, which consistently elected Black-preferred candidates, were 54.69% and 47.83%, respectively. ROA.1188.

Meanwhile, the White population of Hattiesburg is spread more evenly across Wards 1, 3, and 4, achieving majorities in all three wards even though there are fewer voting-age White residents of Hattiesburg overall. ROA.343. Though Black voters have been able to elect the mayor, no Black candidate has ever been elected to the Hattiesburg City Council from Wards 1, 3, and 4, representing White-majority subsets of the City. ROA.368. The following chart[5] provides demographic statistics on the wards:

	Total Population	**Total Black Voting-Age Population**	**Total White Voting-Age Population**
Ward 1	9, 506	3, 470 (41.8%)	4, 368 (52.7%)
Ward 2	8, 901	4, 898 (74.0%)	1, 238 (18.7%)
Ward 3	9, 069	3, 470 (22.9%)	5, 584 (73.6%)
Ward 4	8, 991	2, 430 (32.5%)	4, 800 (64.3%)
Ward 5	9, 524	4, 870 (76.9%)	1, 208 (19.1%)

[5] Found in ROA.343.

C. Plaintiffs-Appellants' Three Illustrative Plans Demonstrate Alternatives That Would Have Created a Third Effective Ward for Black Voters.

William S. Cooper, an expert witness who testified on behalf of the Plaintiffs-Appellants, prepared three illustrative plans to demonstrate that the City Council could have easily created a third majority-Black ward that complies with the one-person, one-vote standard, and properly accounts for Hattiesburg's shift to a majority-Black city. ROA.1196−97. The illustrative plans respect traditional redistricting factors and maintain communities of interest. ROA.1196−97. The District Court did not find otherwise.

Plaintiffs' Illustrative Plan 1 creates three majority-Black wards: Ward 2 (66.53% Any Part Black Voting Age Population "AP BVAP"), Ward 4 (56.51% AP BVAP), and Ward 5 (66.62% AP BVAP). ROA.1191. All three wards in *Plaintiffs' Illustrative Plan 1* are compact. ROA.1193.

Plaintiffs' Illustrative Plan 1 – 2010 Census Summary[6]

Ward	Population	% Dev	18+ Pop	%18+ AP Black	%18+ NH White	Margin (18+ AP Black minus 18+ NH White)
1	9,402	2.22%	8,180	35.79%	57.97%	-22.18%
2	9,281	0.90%	7,092	66.53%	26.21%	40.32%
3	9,164	-0.37%	7,667	23.03%	72.53%	-49.50%

[6] ROA.1191.

4	9,019	-1.95%	6,978	56.51%	38.68%	17.83%
5	9,123	-0.82%	6,376	66.62%	28.67%	37.95%

Under *Plaintiff's Illustrative Plan 2*, Ward 4 is 54.18% AP BVAP. Wards 2, 3, and 5 are identical to *Plaintiffs' Illustrative Plan 1*. ROA.1196.

Plaintiff's Illustrative Plan 3 creates three majority-Black wards with 60%+ AP BVAP: Ward 2 (61.62% AP BVAP), Ward 4 (61.50% AP BVAP) and Ward 5 (66.62% AP BVAP). ROA.1196.

All three of these plans would have given Black voters, comprising the largest group of voters in Hattiesburg, an opportunity to elect a majority of the City Council members. Given that a third majority Black ward could be drawn, it is obvious that the City could have adopted a compromise plan that created a competitive third ward where both Black and White voters would have an equal opportunity to elect their candidate of choice. Instead, the Council chose a plan that unfairly locks Black voters into two wards and guarantees White voters, a minority voting population, the ability to consistently elect a majority of the City Council.

D. District Court Judgment and Appeal

Despite the foregoing, the District Court held that Hattiesburg's current ward plan does not dilute the voting or political power of Black citizens in violation of

Section 2 of the Voting Rights Act. ROA.384. The District Court held, as Defendants conceded, that the Plaintiffs-Appellants clearly satisfied the three *Gingles* conditions for a Section 2 claim.[7] ROA.354. However, the District Court found that, under the totality of the circumstances, the 2012 Plan did not violate Section 2. ROA.384.

The District Court numerically tallied the Senate factors and held that "six of the nine factors weighed in favor of Defendants," and only three factors weighed in favor of Plaintiffs. ROA.382–83. It did so in spite of the Supreme Court's express instructions that the Senate factors "cannot be applied mechanically," *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), are not equally weighted, *Gingles*, 478 U.S. at 48 n. 15, and are ultimately "illustrative, not exhaustive," *id.* at 478 U.S. at 56 n. 24.

Additionally, in its Senate factor findings, the District Court made numerous reversible errors including relying on extraneous elections and political positions to justify the imbalance on the City Council, discounting the racial polarization of City Council votes, and dismissing overwhelming evidence of the historical discrimination that continues to disparately impact the Black community.

[7] These three factors are: (1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50.

The District Court acknowledged "the two *most important factors*—racial polarization and the extent of African-American electoral success—weigh in favor of Plaintiffs." ROA.382−83 (emphasis added). Nonetheless, the District Court concluded that Plaintiffs-Appellants did not establish a vote dilution claim primarily because the 2012 Plan provides Black voters with "political power in rough proportion to their share of the voting-age population." ROA.384. The District Court's "rough proportionality" analysis, however, was seriously flawed. It failed to consider the 2012 Plan's proportionality against other *more* proportional options, undervalued the proportionality gap of the plan, and failed to consider the particular impact of depriving Black voters of any opportunity to elect their candidate of choice in a third ward (or guaranteeing White voters, a minority group, majority rule on the Council). ROA.384. Ultimately, it improperly treated "rough proportionality" as a safe harbor for the 2012 Plan.

Plaintiffs-Appellants appeal the District Court's erroneous and legally flawed decision to this Court.

SUMMARY OF THE ARGUMENT

The underlying question in every Section 2 challenge to a redistricting plan is straightforward: Does the plan interact with socio-economic conditions to deprive voters equal opportunity to effectively participate in the political process and to elect representatives of their choice on account of their race? The undeniable answer to that question in Hattiesburg is yes.

In 2012, the Hattiesburg City Council, over the objection of both Black City Council members, adopted a new ward plan that unnecessarily packs Black citizens into two supermajority wards and thus maintained three safe majority-White wards. No candidate of choice of the Black community has ever been (or ever will be) elected in any of the three majority-White wards.

Therefore, White voters, a minority of the population, are guaranteed the ability to elect three candidates of their choice and Black voters, a plurality of the voters and a majority of the population, only have the opportunity to elect two candidates of their choice. Black voters in Hattiesburg have experienced a long history of discrimination in voting and nearly every other area of public life. They have overcome tremendous obstacles and struggled mightily to meaningfully participate in their electoral system. Nonetheless, just as Black people emerged as a majority population in Hattiesburg, the White-controlled City Council locked in

its minority control over the City Council, ensuring that Black voters will be limited to just two of five seats on the City Council.

The District Court held that Plaintiffs-Appellants established all three *Gingles* factors. If all three *Gingles* requirements are established, the statutory text directs courts to consider the "totality of circumstances" to determine whether members of a racial group have less opportunity than other members of the electorate. *League of United Latin American Citizens* ("*LULAC*") *v. Perry,* 548 U.S. 399, 436 (2006); *Johnson v. De Grandy,* 512 U.S. 997, 1011-1012 (1994); *Abrams v. Johnson,* 521 U.S. 74, 91 (1997). To conduct the totality of circumstances analysis, the Supreme Court has instructed lower courts to refer to the Senate Report on the 1982 amendments to the Voting Rights Act. *Gingles*, 478 U.S. at 44-45.

Despite finding the presence of all three *Gingles* factors, and the presence of some of the key factors from the Senate Report, the District Court nonetheless held that Plaintiffs did not establish a Section 2 violation. ROA.15-60637-281. In analyzing the Senate factors, the District Court made several key legal errors. First, the District Court relied on the African-American mayor's influence in Hattiesburg to somehow ameliorate the inequity in the City Council's plan. This was a clear legal and reversible error.

Ultimately, the District Court denied Plaintiffs-Appellants claim primarily on the basis of a fundamentally flawed "rough proportionality" analysis. The District Court held that guaranteeing that Black voters, the largest voting bloc in Hattiesburg, can only elect candidates of choice in 40% of the seats was "roughly proportional." In doing so, it failed to consider that either a competitive third ward or majority-Black third ward would achieve greater proportionality.

The District Court committed legal error when it treated this supposed "rough proportionality" as a safe harbor for the 2012 Plan, in violation of the admonition in *De Grandy*, 512 U.S. at 1019-20. As Justice O'Connor explained in a concurring opinion in *De Grandy*, "proportionality is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive." *Id*. at 1025 (O'Connor, J., concurring); *see also id.* at 1028 (Kennedy, J., concurring) (noting that while proportionality has some relevance, "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act"). The District Court failed to consider the importance of the third tie-breaking ward in determining Black voters' equal opportunity to self-govern, the disproportionate packing of Black voters, and the extreme racial polarization in assigning determinative weight to its "rough proportionality" holding. This is not the searching inquiry that the totality of the circumstances analysis requires.

Black residents simply do not have an equal opportunity to self-govern as do White residents in Hattiesburg. After a long struggle against discrimination, Black residents in Hattiesburg have managed to register and vote in equal or greater number than Whites throughout Hattiesburg. Nonetheless, the White City Council has guaranteed that White voters, a minority in Hattiesburg, will continue to determine a majority of City Council members.

Here, the District Court ultimately found that the Hattiesburg City Council's redistricting plan did not result in dilution of Black voting strength. However, this decision was based on a misreading of the governing law, and is reversible error. *See LULAC v. Perry*, 548 U.S. at 427; *De Grandy*, 512 U.S. at 1022. Accordingly, this Court should reverse the District Court's finding that this rigged electoral system passes muster under the Voting Rights Act.

ARGUMENT

Section 2 of the Voting Rights Act prohibits the "impos[ition] or appl[ication]" of any electoral practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 1031(a). A violation of Section 2 is established if, under the totality of the circumstances, Black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 1031(b). The Supreme Court has held that "the Act should

be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer*, 501. U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). A showing of discriminatory intent is not required, as "Congress made clear that a violation of §2c[aa] be established by proof of discriminatory results alone." *Chisom*, 501 U.S. at 404.

A successful Section 2 claim has four components. Plaintiffs must satisfy the three "*Gingles* preconditions" for alleging a vote dilution claim, specifically: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. Plaintiffs must also demonstrate that, under the totality of the circumstances, "a challenged election practice has resulted in the denial or abridgement of the right to vote based on race or color." *Chisom*, 501 U.S. at 394. Under this fourth prong, proportionality, or lack thereof, is an important factor in making the "totality of the circumstances" determination. *De Grandy*, 512 U.S. at 1020.

I. ALL THREE *GINGLES* PRECONDITIONS, THE ESSENTIAL ELEMENTS OF A SECTION 2 VIOLATION, ARE FULLY SATISFIED.

At trial, the parties stipulated that all of the *Gingles* preconditions had been established, ROA.354, and there is no need for this Court to reassess that conclusion here. *See Bartlett v. Strickland*, 556 U.S. 1 (2009) (stating that when parties in a voting rights claim stipulate that the *Gingles* preconditions are satisfied, a court need not inquire further). Indeed, the record clearly establishes that Plaintiffs-Appellants met their burden to establish the *Gingles* preconditions absent any stipulation by the parties.

At trial, Plaintiffs-Appellants presented evidence that Hattiesburg's Black population is sufficiently large and geographically compact to create three properly apportioned City Council wards in which Black voters would constitute an effective majority of the voting age population. *See* ROA.1181. The purpose of this requirement is to demonstrate that the inability of Black voters to elect their preferred candidates results from illegal vote dilution and not from the "natural" dispersion of Black voters across Hattiesburg. *Gingles*, 478 U.S. at 50-51. Plaintiffs-Appellants' expert William Cooper demonstrated, through his illustrative plans, that three properly apportioned single-member wards in which Black voters constitute a majority of both the total population and the Any-Part Black VAP[8]

[8] "VAP" stands for "voting-age population," which includes all voters over the age of eighteen. The "Any-Part Black" VAP includes all voting-age residents who identify as partially or entirely Black and therefore includes biracial and multiracial individuals. This demographic is only slightly different than the single-race Black VAP, which only includes individuals that identify only as Black. The total any-part Black VAP is 48.5% of the total VAP while the single-race Black VAP is 47.95% of the total VAP.

could be drawn. ROA.1180−81. In fact, these illustrative plans show that there are at least three ways that the City Council wards can be redrawn to create a third Black majority ward that accounts for the increase in the Black population. ROA.1181.

Plaintiffs-Appellants also produced evidence that the Black citizens of Hattiesburg are politically cohesive. *Gingles*, 478 U.S. 30 at 51. To show political cohesiveness, "a significant number of minority group members [must] usually vote for the same candidates." *Id.* at 56. The consistent support of Black voters for Mayor Johnny Dupree, a Black candidate who was re-elected to a fourth term in June 2013, is demonstrative of political cohesiveness. ROA.344. Moreover, after analyzing several City Council and mayoral elections, Appellants' expert witness, Dr. Allan Lichtman, found that the Black voters of Hattiesburg were "invariably cohesive behind the African-American candidate." ROA.2198.

The existence of racially polarized bloc voting, the combination of the second and third *Gingles* factors, has been called "the keystone of a dilution case." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1566 (11th Cir. 1984), *cert. denied*, 469 U.S. 976 (1984). It is undisputed that this keystone exists here. Elections for the Hattiesburg City Council are characterized by racially polarized voting wherein Black voters and White voters are both politically cohesive and consistently support opposing candidates. In Hattiesburg elections since 2001,

there is "a clear pattern of substantial racial bloc voting, with black voters invariably cohesive in support of black candidates and white voters invariably bloc voting against the candidates of choice of black voters." ROA.1156. Indeed, legally significant racial bloc voting was demonstrated in city elections in 2001, 2005, 2009, and 2013. ROA.361. Therefore, the District Court held: "On the whole, the evidence supports what the parties have agreed: that there is a high level of racial polarization among Hattiesburg's voters." ROA.367.

II. UNDER THE TOTALITY OF THE CIRCUMSTANCES, BLACK VOTERS IN HATTIESBURG HAVE LESS OPPORTUNITY THAN OTHER MEMBERS OF THE ELECTORATE TO PARTICIPATE IN THE POLITICAL PROCESS AND ELECT CITY COUNCIL REPRESENTATIVES OF THEIR CHOICE.

The *Gingles* preconditions provide strong evidence of a Section 2 violation because they demonstrate that a community is unable to elect a candidate of its choice, despite having the population to do so by majority vote, simply because of the interaction of districting and racially polarized voting patterns. Therefore, "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of Section 2 under the totality of circumstances." *Clark v. Calhoun Cnty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994); *De Grandy*, 512 U.S. at 1010; *Teague v. Attala County*, 92 F.3d 283, 293-94 (5th Cir. 1996). This is not that rare case.

The totality of the circumstances analysis is a functional appraisal of whether "minorities have been denied an 'equal opportunity' to 'participate in the political process and to elect representatives of their choice.'" *Abrams v. Johnson*, 521 U.S. 74, 91 (1997) (quoting 42 U.S.C. §1973(b)). The totality of the circumstances analysis involves a "searching practical evaluation of the 'past and present reality,'" using the Senate Factors as a guide.[9] *Gingles*, 478 U.S. at 44-45. The Senate Factors do not require Plaintiffs to prove a majority of those factors or even any particular number of them. *Id*. Indeed, often several factors might be irrelevant to a particular claim. In essence, the court must determine whether "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and white voters to elect their preferred representatives." *Id.* at 47. In this case, a "searching practical evaluation," *id.* at 45, demonstrates that the 2012 Plan, with three safe majority-White wards, interacts with the social and historical conditions in

[9] The factors include (1) prior history of voting-related discrimination; (2) the degree of racially polarized voting; (3) the presence of voting practices or procedures that tend to subjugate the minority group's voting preferences; (4) the exclusion of minority group members from the candidate slating process; (5) the extent to which the minority group bears the effects of past discrimination in areas that tend to hinder its members' ability to participate effectively in the political process; (6) the use of subtle or overt racial appeals in political campaigns; and (7) the extent to which members of the minority group have succeeded in being elected to public office. *Gingles*, 478 U.S. at 44-45. In an appropriate case, a court may also consider (8) the extent to which elected officials have been responsive to the particularized needs of the minority group and (9) the policy underlying the challenged voting practice or procedures. *Id.* at 45.

Hattiesburg that have produced extreme racially polarized voting, to deprive Black voters of the equal opportunity to elect their preferred representatives.

Under *Johnson v. De Grandy*, the fact that the challenged redistricting plan here affords Black voters effective voting majorities in only two out of five wards, shows that the redistricting plan fails to provide Blacks in Hattiesburg with "a number of . . . districts . . . substantially proportional to their share of the population." 512 U.S. at 1024. As Justice O'Connor explained in *De Grandy*, proportionality (properly understood), or lack thereof, "is *always* relevant evidence in determining vote dilution, but it is *never* itself dispositive." *Id.* at 1025 (O'Connor, J., concurring).

As explained below, the District Court lost sight of these overarching principles, mechanically and incorrectly applied the Senate factors, and imposed a flawed "rough proportionality" analysis. In so doing, the District Court arrived at the erroneous conclusion that guaranteed White majority control of the City Council, in a city with extreme racially polarized voting, a minority of White voters, and a plurality of Black voters, does not unfairly disadvantage Black voters in violation of Section 2.

A. Plaintiffs-Appellants Have Established the Predominant Senate Factors (Factors 2 and 7).

It is well established that the most important Senate Factors "are the extent to which minority group members have been elected to public office in the jurisdiction and the extent to which voting in the elections of the state or political subdivision is racially polarized," *Gingles*, 478 U.S. at 51 n. 15 (internal quotations marks and citation omitted), because they speak directly to the question of whether a group can effectively and equally participate in the political process. Here, those factors weigh heavily in favor of Plaintiffs-Appellants.

The District Court acknowledged that both predominant Senate Factors weighed in favor of Plaintiffs-Appellants' claim of vote dilution, ROA.383, although it incorrectly relied upon the fact that the mayor is Black to diminish the significance of these factors with respect to the City Council's compliance with Section 2. In so doing, the District Court erroneously injected the results of the mayoral race—involving a different electorate than the subset of voters involved in a third ward—to remedy the injury suffered by Black voters packed into just two wards.

1. Hattiesburg elections are characterized by racially polarized voting.

The first "predominant" factor considers "the extent to which voting in the elections of the State or political subdivision is racially polarized" (Senate Factor 2). *Gingles*, 478 U.S. at 44-45. Racially polarized voting exists "where there is a

consistent relationship between [the] race of the voter and the way in which the voter votes." *Id*. at 53 n.21 (alteration in original; internal quotation marks omitted). As discussed above, the evidence definitively established extreme racially polarized voting in Hattiesburg. The District Court correctly held that this factor clearly weighs in favor of Plaintiffs-Appellants: "On the whole, the evidence supports what the parties have agreed: that there is a high level of racial polarization among Hattiesburg's voters." ROA.367.

Plaintiffs-Appellants relied on the expert testimony of Dr. Allan Lichtman, an expert in the field for over forty years who has participated in over eighty voting and civil rights cases, to prove that racially polarized voting is prevalent and persistent in Hattiesburg. He testified that since 1997, Hattiesburg has demonstrated a clear pattern of extreme racially polarized voting both in City Council and mayoral elections. *See generally* ROA.1155−56. In the City Council election he analyzed, Dr. Lichtman reported that there was a marked division between Black and White voters casting a ballot in support of the Black or White candidates respectively. In 2001, the Ward 1 election reflected 100% of Black voters casting ballots for the Black candidate, while 100% of the White voters supported the White candidate. ROA.1159. Dr. Lichtman testified that Hattiesburg's racially polarized voting was at a mathematical maximum for both Black and White voters. ROA.1156.

The mayoral elections also reflect longstanding racially polarized voting. Dr. Lichtman reported that the 1997 mayoral election demonstrated extreme bloc voting by White voters. In that election, approximately 85% of Black voters supported a Black candidate while 15% of Black voters supported a White candidate. ROA. 1170. However, 100% of White voters supported the White candidate. ROA.1170. The extent of racially polarized voting only increased in the 2001 mayoral election. In 2001, Dr. Lichtman observed that 100% of Black voters supported the Black candidate and 100% of White voters supported a White candidate. ROA.1159. This pattern remained consistent for the 2013 mayoral and special elections. ROA.2199. The only "exception" to this pattern was the 2005 mayoral election, wherein 2% of White voters voted for a Black candidate. ROA.1159. Even so, there still remained 98% of White voters and 100% of Black voters who supported a candidate of their own race. ROA.1159.

Based on the foregoing, Dr. Lichtman testified that Hattiesburg elections are very racially polarized and this factor weighs heavily in Plaintiffs-Appellants favor. [10]

[10] The District Court, while acknowledging the undeniable evidence of the "high level of racial polarization," took issue with Dr. Lichtman's description of the racial polarization as at the "mathematical maximum." ROA.364. However, at least with respect to the relevant elections analyzed, Dr. Lichtman's statement is an accurate description of the results. The only evidence to the contrary was, as the District Court recognized, based on exogenous elections not probative of the elections at issue. ROA.365. The Court agreed that the paltry opposing evidence suggesting the possibility of effective crossover voting in Ward 1 was "tenuous" at best because

2. Black candidates have never been successful in majority-White City Council wards.

The second "predominant" Senate factor considers "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37. This factor does not require the total absence of minority electoral success. *See id.* at 75 ("[T]he language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim."). Nonetheless, Plaintiffs-Appellants have shown total absence of minority electoral success in all of the three majority-White wards.

As the District Court recognized, "[t]he most probative evidence here is the election results in Wards 1, 3, and 4," the three majority-White wards. ROA.368. And "[i]t is undisputed that no African-American candidate has ever been elected to the Hattiesburg City Council from those wards." ROA.368. Therefore, this factor weighs heavily, indeed entirely, in Plaintiffs-Appellants favor. This should have been the end of the analysis. While the District Court acknowledged that this factor weighs in favor of Plaintiffs-Appellants, the court erred by discounting the weight of this factor in Plaintiffs-Appellants' favor by unduly focusing on the fact that Hattiesburg has a Black mayor, an absolutely irrelevant analysis.

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there were "simply too many contingencies to predict with any certainty that an African-American would win an election in Ward 1." ROA.364.

First, the mayoral elections are exogenous and not probative of Black voters' opportunity to elect City Council members in single-member, White-majority, wards. *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1397 (5th Cir. 1996) ("[E]xogenous elections—those not involving the particular office at issue—are less probative than elections involving the specific office that is the subject of the litigation."). The election scheme and factors that contribute to the election of mayoral candidates is entirely different than that of the City Council, involve a different electorate, and are not instructive when assessing a vote dilution claim challenging the districting of City Council wards.

The "general public is less interested" in elections that are not for a governor or mayor. *Clark v. Edwards*, 725 F.Supp. 285 (M.D. La. 1988). Thus, there is often higher voter turnout for a mayoral election than for other local elections. In fact, increased Black voters' interest in mayoral elections contributed to the election of Hattiesburg's Black mayor. Plaintiffs-Appellants' expert Dr. Lichtman explained that "election analysis shows higher Black than white turnout in these city elections for Hattiesburg, accounting for the margins of victory for the Black mayoral candidate in 2001 and 2005." ROA.1156.

Thus, the election of a Black mayoral candidate is not probative of Black voters' ability to elect candidates of choice in White-majority wards. Indeed, if anything, Black voters' consistent ability to elect their candidate of choice in an at-

large election, despite racially polarized voting, and yet consistent inability to elect a majority of City Council members, should draw further scrutiny to the ward plan challenged here. It makes clear that it is the nature of the 2012 Plan, particularly the packing and cracking of Black voters in the wards, that entrenches disproportionate White voting power and frustrates Black voters' ability to elect candidates of their choice to the City Council.

But the District Court held that Black voters' total lack of success in the relevant elections in Wards 1, 3, or 4 was somehow "mitigated by . . . the considerable power [Mayor Dupree] wields as mayor." ROA.369. This finding is clear legal error. The District Court cited no authority for the proposition that Black voters' success in a different electoral system somehow alleviates the City's duty to ensure that the City Council electoral system is equally open to Black voters. Although the mayor's position is a powerful one, his election certainly does not eliminate the City's obligation to fairly apportion the City Council under the Voting Rights Act. In *LULAC v. Perry*, the Supreme Court made clear that a state (or local government) cannot claim to remedy a vote dilution injury suffered by Black voters in one part of the state (or city) by pointing to the election of a Black candidate in another part of the state (or city). 548 U.S. at 437 (stating that the proportionality inquiry does not allow a city "to trade off the rights of some members of a racial group against the right of other members of that group"). The

District Court improperly imported Black voters' ability to elect an at-large mayor to remedy the discriminatory infirmities of the 2012 City Council ward plan. This alone constitutes reversible error.

It is undisputed that Black voters have never been successful in the relevant elections of City Council Wards 1, 3, and 4. ROA.321. The evidence suggests they never will be. Therefore, this factor weighs heavily in favor of Plaintiffs-Appellants.

B. Mississippi and Hattiesburg Have a Long History of Official Discrimination, and Black Residents of Hattiesburg Continue to Bear its Effects (Senate Factors 1 and 5).

The State of Mississippi and Hattiesburg have a long and undisputed history of official discrimination that has touched "the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36-37 (Senate Factor 1); ROA.355−60. Moreover, at trial, Plaintiffs-Appellants presented extensive and specific evidence that Black citizens in Hattiesburg continue to "bear the effects of [that] discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 45 (Senate Factor 5).

There is a substantial socioeconomic disparity between Hattiesburg's Black citizens and its White citizens in the areas of income, employment rate, educational attainment, home ownership, and vehicle availability. ROA.356−57.

Dr. Lichtman testified to numerous grave socioeconomic disparities between Black and White people of Hattiesburg. First, the household income for White people in Hattiesburg is almost twice as much as it is for Black people. ROA.2204. In fact, income per capita is 164% higher for White people than Black people. ROA.2213. Additionally, 42% of Black people live below the poverty line in comparison to 26.9% of whites. ROA.2204. In Hattiesburg, Black people have an unemployment rate of 19.6%, which is 211% higher than White people. ROA.2204, 2213. In education, approximately 77% of Black people and 91.7% of White people graduate high school respectively. ROA.2207. However, White people obtain a college degree or greater at a rate of 250% higher than Black people. ROA.2213. The educational attainment disparity has a subsequent effect on an individual's economic sustainability by qualifying him or her for better paying jobs.

The District Court's conclusion that Dr. Lichtman's analysis "was wholly disconnected from the local facts," ROA.359, was clearly erroneous. The statistics Dr. Lichtman cited are specific to Hattiesburg. *See* ROA.1155−56. *See also* ROA.1168; ROA.2196. "Congress and the courts have recognized that 'political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities and low incomes.'" *Westwego Citizens for Better Government v.*

Westwego, 946 F.2d 1109, 1212 (5th Cir. 1991) (citing *Gingles*, 478 U.S. at 69). The socio-economic disparities certainly impact the ability of Black people in Hattiesburg to elect a candidate of choice in majority-White wards. Considering how Black people in Hattiesburg are disproportionately impaired in obtaining higher education and unemployed, Dr. Lichtman reasonably concluded that there are significantly less qualified candidates from the Black community in Hattiesburg. Moreover, Black candidates will face more severe challenges in funding political campaigns and getting supporters to the polls because of these socioeconomic disparities. For example, 12.4% of Black people in Hattiesburg do not have a vehicle available to travel in rural Hattiesburg, compared to 6.5% of White people. ROA.2212.

The District Court noted that Black people in Hattiesburg have overcome significant hurdles in order to participate robustly in the political process: "Hattiesburg's African-American citizens have historically registered and voted in greater numbers than its white citizens." ROA.357. But the foregoing evidence suggests that Black people would participate to an even greater extent if not for the unequal socioeconomic challenges they face. Plaintiffs-Appellants do not rely solely upon socioeconomic disparities to prove a Section 2 violation. To the contrary, Plaintiffs-Appellants have already demonstrated that both of the key predominant Senate Factors weigh strongly in their favor and that, despite

occasional robust participation in the electoral process, Black people do not have an equal opportunity to elect candidates of their choice.

Nonetheless, the extreme history of discrimination in Hattiesburg and Mississippi and the legacy of severe socioeconomic disparities that Black people face as a result, and must overcome in order to participate in the political process, certainly tip in favor of Plaintiffs-Appellants. The District Court's holding that this factor "weighs in favor of Defendants," ROA.382, defies credulity, is clearly erroneous, and in any event is hardly worth the significance the District Court attached to it.

C. The Remaining Factors are Either Irrelevant to This Case or Weigh in Favor of Plaintiffs-Appellants.

Unlike the two predominant Senate factors, racially polarized voting and the election of minority group candidates, the other Senate factors "are supportive of, but not *essential to*, a minority voter's claim." *Gingles*, 478 U.S. at 48 n. 15. There is "no requirement that any particular number of factors be proved." *Id.* at 45. Therefore, the District Court's simplistic tally, that "six of the nine factors weigh in favor of Defendants," ROA.382, was not only incorrect, *supra*, but irrelevant.

The third, fourth, and sixth Senate factors—the presence of voting practices or procedures that tend to subjugate the minority group's voting preferences, the exclusion of minority group members from the candidate slating process, and the

use of subtle or overt racial appeals in political campaigns—are not relevant in this case. The key to this case, as discussed above, is the manner in which racially polarized voting has prevented Black voters from ever electing a candidate of their choice in three of the City Council wards (Senate Factors 2 and 7) and the 2012 Plan, with three majority-White wards, ensures that this pattern will continue even though Black voters comprise more of the voters in Hattiesburg than White people do.

The District Court also misinterpreted the evidence in analyzing the Senate factor related to the City's responsiveness to the needs of the minority. While the District Court held that some of the evidence demonstrates responsiveness to the minority community, it erroneously held that the City Council voting patterns suggest that the Council responds to the minority interests. ROA.374. In fact, the opposite is true. The District Court relied on the unremarkable fact that over 90%, of the City Council votes are unanimous. ROA.374. Of course, it is unsurprising the most City Council votes are unanimous as most local votes are routine and address the day-to-day administrative work of running a city.

The relevant question is, where votes are divided, are they racially polarized and are the Black representatives routinely outvoted such that particularized minority interests are subordinated to the White-majority City Council's judgment. Indeed, the evidence showed that when City Council votes are divided, they

usually divide along racial lines and the Black City Council members lose. Eighty percent of 3-2 divided votes between October 2011 and September 2014 were divided along racial lines. ROA.374. At least two of those racially divided votes were essential to minority community interests: the adoption of the 2012 Plan at issue here, and the City Council's refusal to increase property taxes to meet the school board's funding request (over 90% of the students in Hattiesburg Public School District are African-American).[11] ROA.376. The City Council's voting patterns demonstrate that votes of particular concern to the Black community routinely break down along racial lines and the Black Council members are outvoted and thus unable to prevail on behalf of the minority community. Viewed properly, this evidence weighs in favor of Plaintiffs-Appellants.

Moreover, it is also worth noting that the District Court uncritically accepted the City's stated goal of making "as little change to the existing district lines as possible" as legitimate. ROA.378. However, the city of Hattiesburg underwent a significant demographic change between 2000 and 2010, leading to a change in the majority population of Hattiesburg. It would be appropriate, therefore, for the City to seek to reflect those changes in its ward plan rather than

[11] The school board successfully sued the City Council for its failure to meet its budgetary needs. "After the school board successfully sued the City Council over the budget request, the City Council declined – along racial lines – to ratify the mayor's reappointment of the school board members who disagreed with the Council." ROA.351. Indeed, there are several examples of the City Council taking measures to overturn the decisions of Hattiesburg's Black Mayor.

seek out as "little change" as possible to a three majority-White ward plan in a city that is now majority Black. Under the circumstances, the goal of as "little change" as possible is essentially a goal to entrench disproportionate White voting strength. Thus, the District Court's uncritical non-tenuous finding is itself tenuous at best. In any event "proof of a merely non-tenuous state interest discounts one . . . factor, but cannot defeat liability," *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1401 (5th Cir. 1996), particularly where, as here, the most important factors weigh so definitively in Plaintiffs favor.

III. THE 2012 CITY COUNCIL PLAN DILUTES BLACK VOTING STRENGTH BY FAILING TO ACCOUNT FOR THE GROWTH IN THE BLACK POPULATION OF HATTIESBURG, PACKING THE GROWING BLACK POPULATION INTO TWO COUNCIL WARDS, AND LOCKING IN A MAJORITY WHITE COUNCIL TO GOVERN A MAJORITY BLACK CITY.

Ultimately, the totality of the circumstances analysis requires a "functional analysis of vote dilution" based upon a "searching and practical evaluation of reality." *Gingles*, 478 U.S. at 66. A functional and realistic appraisal of the facts in Hattiesburg clearly demonstrates that the 2012 Plan impermissibly dilutes the voting power of Black people in Hattiesburg. Hattiesburg's Black population has significantly increased while the White population has steadily declined. As a result, Black people now comprise a majority of the population and plurality of eligible voters. Non-Hispanic Whites comprise a minority of both the population and eligible voters. But rather than acknowledging this significant demographic

shift, the 2012 Plan maintains the status quo of three majority-White voting-age population wards.

The City Council could have created a third majority-Black ward or a competitive ward that gave both White voters and Black voters an equal opportunity to elect their candidate of choice. Instead, it created three safe majority-White wards. *See* ROA.363, 368. It did so by disproportionately packing Black people into two majority-Black wards. Packing unnecessarily concentrates a minority population into a specific ward, which results in an overall dilution of minority voting strength in the voting plan. *See* ROA.1188. Black voters comprise 74.77% and 77.56% of the voting age population in Wards 2 and Ward 5, respectively. ROA.1188. This is a significant increase from previous plans and packs Black people at much higher rates than White people in the three majority-White wards. It is undisputed that this level of packing was not necessary in order to allow Black voters in Hattiesburg to elect their candidate of choice. Courts have held that excessive packing impermissibly dilutes voting power. *Terrazas v. Clements*, 537 F.Supp. 514, 542 (N.D. Tex. 1982) ("[It is] unnecessary to provide minority population concentrations of that size in order to assure that the minority population can elect a candidate of its choice. In view of this fact, minority concentrations of 74% and 80% in Bexar County constitute packing and reduce the number of districts where minorities can elect a candidate of their choice.").

The 2012 Plan therefore excessively packs Black voters and, in doing so, locks in a white-controlled City Council to govern a majority Black city that is characterized by extreme racially polarized voting. Therefore, Black voters' preferred candidates will never have control of the City Council or an equal opportunity to elect a third Black-preferred candidate. This is a textbook example of vote dilution: extreme racially polarized voting and the packing of Black voters hinders them from exercising their political power and electing candidates of their choice. White voters, a minority of the population, are guaranteed the right to elect a majority of City Council members while Black voters, a plurality, are guaranteed to lose a majority of wards every time. Under these circumstances, it cannot be said that the electoral system in Hattiesburg is "equally open" to Black voters. It is no more equal to lock Black voters into two wards when they constitute a majority in the city (and a plurality of the voting age majority) than it would be to limit white voters to only two of five seats when they constitute a majority.

IV. THE DISTRICT COURT'S "ROUGH PROPORTIONALITY" ANALYSIS IMPERMISSIBLY TREATED "ROUGH PROPORTIONALITY," EVEN WHERE IT SIGNIFICANTLY UNDERREPRESENTS BLACK VOTERS, AS A SAFE HARBOR.

In *Johnson v. De Grandy*, the Supreme Court held that "equal political opportunity [is] the focus of the enquiry." 512 U.S. 997, 1014 (1994). Therefore, "substantial proportionality" of representation weighs against a finding of a Section 2 violation in many cases because proportionality of representation will

ordinarily "thwart the historical tendency to exclude [a minority group,] not encourage or perpetuate it." *Id.* at 1014.

The Court in *De Grandy* was careful, however, to hold that even strict proportionality is not a "safe harbor" because every case must be "assessed 'based on the totality of circumstances.'" *Id.* at 1018. Thus, the Court concluded that "proportionality . . . is obviously an indication that minority voters have an equal opportunity . . . to elect representatives of their choice" but cautioned that "the degree of probative value assigned to proportionality may vary with other facts." *Id.* at 1020 (internal quotation marks omitted).

The District Court's "rough proportionality" analysis improperly applied the clear guidance of *De Grandy* at every turn. The District Court claimed that, in a five-ward plan, "[s]trict proportionality is impossible." ROA.380. But that is not true. A five-ward plan giving white voters a safe majority in two wards, Black voters a safe majority in two wards, and creating a fifth competitive toss-up ward would achieve substantial proportionality. Instead, the District Court summarily concluded that the current Plan, which systematically ensures Black underrepresentation, "provides African-Americans with electoral opportunity that is roughly proportional" and therefore this factor "weighs in favor of Defendants." ROA.380, 382. This was erroneous.

The District Court's "roughly proportional" assessment is not the "searching practical evaluation" that Section 2 requires. *De Grandy*, 512 U.S. at 1018. First, the District Court's conclusion that 40% representation for a Black population that comprises 53.04% of total population and 47.95% of the voting age population (and 60% representation for a white community that comprises just 40.48% of total population and 45.98% of the voting age population) constitutes proportionality is wrong.

Even if "[t]here will necessarily be an imbalance in one direction or another," a plan with three majority-Black wards (or two and a toss-up) would certainly be *more* proportional because Black voters comprise a larger percentage of the voting age population than White voters. The District Court dismissed this argument, stating that it was "not required to determine which one is the most fair." ROA.380. But the District Court created a Hobson's choice for itself, incorrectly believing that either Black people were entitled to three seats or whites were. The District Court failed to consider another of the City Council's options: to create an equal opportunity third ward for Black and White voters. ROA.380. In sum, the most proportional plans would have been ones that either created an equal opportunity ward for both Black and White voters or a third majority-Black ward. Among the three options available, the City chose the plan that is the least proportional, ensuring majority rule by a minority White population. This choice

is far from "an indication that [Black] voters have an equal opportunity . . . to elect representatives of their choice." *De Grandy*, 512 U.S. at 1020. Therefore, this factor should weigh in favor of Plaintiffs-Appellants. The District Court provided no explanation as to why the City Council's choice to systematically underrepresent Black voters and over-represent White voters should "weigh in favor of Defendants" just because they provide Black voters with some representation. ROA.382. This constitutes clear legal error.

Even if the 2012 Plan is somehow "roughly proportional," the "degree of probative value assigned to proportionality may vary with other facts." *De Grandy*, 512 U.S. at 1020. In this case, any "rough proportionality" of the 2012 Plan is not particularly probative. First, as discussed above, it is the least proportional among the other options available to the City Council. Second, the difference between the 2012 Plan and other more proportional options is the difference between majority and minority rule. The District Court entirely ignored the vital importance of this third ward, stating: "In other words, the Court need not reject one roughly proportional plan because there exists another which may be slightly more roughly proportional." ROA.380.

The difference for the Black population is anything but "slight." In a majority-rule system, the allotment of the third tie-breaking ward is of vital importance. This is especially true where voting is extremely racially polarized,

both in elections and in the City Council. Thus, the specific facts of this case erode the probative value of any "rough proportionality," especially since the "rough" nature of that proportionality ensures that White voters will have majority representation while representing a minority of eligible voters and Black voting strength will be undervalued. *See LULAC*, 548 U.S. at 442 ("Even assuming Plan 1374C provides something close to proportional representation for Latinos, its troubling blend of politics and race—and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination—cannot be sustained.").

Nonetheless, the District Court gave the "rough proportionality" factor decisive weight. Despite the Plaintiffs-Appellants full satisfaction of the *Gingles* preconditions and the two most important Senate factors, the District Court concluded that Plaintiffs-Appellants failed to establish a Section 2 violation on the basis of its flawed "rough proportionality" analysis: "The evidence demonstrates that African-Americans in Hattiesburg enjoy political power in rough proportion to their share of the voting-age population, and that they actively exercise such power through the political process." ROA.384. In essence, the District Court treated "rough proportionality," as it saw it, as a safe harbor despite the overwhelming evidence that Black voters have less opportunity to elect candidates of their choice

than White voters. This is precisely what the Court prohibited in *De Grandy* and constitutes reversible legal error.

Conclusion

The Hattiesburg City Council's redistricting plan frustrates and dilutes the exercise of Black voting strength, ensures that a White minority will dominate the City Council, and therefore deprives Black voters of an equal opportunity to participate effectively in the political process and elect candidates of their choice. For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's judgment.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. 32(a)(7)(B), the undersigned counsel certifies that this brief complies with the type-volume limitations because it contains 9,085 excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii). This brief also complies with the typeface and style format requirements of Fed. R. App. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013 and is typed in 14 point Times New Roman Font.

This 1st day of February, 2016.

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Certificate of Service

I hereby certify that I electronically filed the foregoing BRIEF OF PLAINTIFFS-APPELLANTS' KENNETH E. FAIRLEY, SR., ET AL. v. HATTIESBURG, MISSISSIPPI, ET AL., with the Clerk of the Court using the (CM/ECF) system which will automatically send e-mail notification to all counsel of record, including:

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This 1st day of February, 2016.

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