IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 95-3925, 98-2785, 98-2798, 98-2811, 98-2899, 98-3004, 98-3051, & 98-3075

RON HARPER, WILLIAM ELLIOT, et al.,

Plaintiffs-Appellees and Cross-Appellants

and

ROBERT McCOY and KEVIN PERKINS,

Plaintiffs-Appellees

v.

CITY OF CHICAGO HEIGHTS, et al.

Defendants-Appellants and Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

Brief of
The Center for Voting and Democracy
as Amicus Curiae

In Support of Plaintiffs-Appellees Kevin Perkins and Robert McCoy Urging Affirmance

Jamin B. Raskin, Professor, American U., Washington College of Law
Attorney for Amicus Curiae

STATEMENT OF THE ISSUES

The Center for Voting and Democracy will address the following issues:

1. Whether cumulative voting is a legitimate remedy for a violation of Section 2 of the Voting Rights Act.

2. Whether the district court abused its discretion in selecting a seven-member cumulative voting plan as a remedy in this case.

INTEREST OF THE AMICUS CURIAE

The Center for Voting and Democracy is a non-partisan and non-profit corporation incorporated in the District of Columbia for educational purposes. The Center researches and distributes information on electoral systems that promote full voter participation and fair representation, particularly alternatives that will enable more voters to elect candidates of their choice than in plurality or in traditional at-large elections. The Center's mission is founded on the belief that implementing such voting systems would: restore vitality to our democracy; ensure fairer representation of our society's diversity in elected bodies; and assist local, state, and national governments in solving the complex problems facing our nation. The Center has been active in encouraging government officials, judges and the public to explore systematic alternatives to the use of territorial districting, especially where race is used as a divisive and controlling factor.

SUMMARY OF ARGUMENT

Cumulative voting is a legally valid remedy for minority vote dilution claims under Section 2 of the Voting Rights Act. It has been upheld against constitutional challenge, referred to favorably by federal courts as a vote dilution remedy, and approved as a remedy by federal courts as part of settlements under Section 2. The empirical experience shows that it is effective in remedying minority vote dilution. Its use is not contrary to the "proviso" of Section 2. That proviso merely states that the election of minority candidates at a proportion less than that minority groupís share of the relevant population does not by itself indicate liability; it does not state that the potential for such a result invalidates a Section 2 remedy. Both the plain language of the statute and Supreme Court precedent make clear that the potential to achieve "proportionality" is not problematic. Similarly, the cases cited by appellants rejecting cumulative voting remedies dealt with factually distinct situations in which the district remedy offered by the defendant jurisdiction was itself adequate, the district court showed insufficient deference to the defendant

jurisdictionís policy preferences, or the lower court underestimated the peculiar needs attendant to judicial elections.

The particular cumulative voting plan adopted by the district court in this case is an appropriate remedy within the courtís discretion. Illinois, including Chicago Heights, has a history of using cumulative voting for some elections. The "equal and even" form of cumulative voting adopted by the court is particularly easy for voters to understand and for election officials to administer.

Finally, the district court did not abuse its discretion by choosing a seven-member cumulative voting plan in an at-large framework. The decision to use an at-large framework was justified by the need to achieve finality to this twelve-year denial of plaintiffsí fundamental voting rights by avoiding the potential for Shaw litigation, and by the deference paid the district court to the policy preferences reflected in the defendant jurisdictionsí electoral system prior to the filing of the suit. The use of seven members was justified by the need for an odd number of members (to reduce the likelihood of tie-breaking votes by an official elected at-large) and the need to keep the government body size as close as possible to that chosen by the defendant jurisdictions.

ARGUMENT

I. Cumulative Voting is a Proper Remedy Under the Voting Rights Act

There is no federal constitutional or statutory provision banning the use of cumulative voting, limited voting, or single transferable vote systems ("modified at-large systems"), or barring the adoption of such systems by federal courts. The constitutionality of these schemes has been upheld by a number of courts. Federal courts may approve such alternatives to single-member districts as remedies in cases brought under Section 2 of the Voting Rights Act. Indeed, federal courts may be required to adopt such alternative systems to reconcile dilution remedies with the jurisdictionís policy choices.

A number of courts have commented favorably on the use of cumulative voting and other "modified at-large" systems as voting rights remedies. See, e.g., SCLC v. Sessions, 56 F.3d 1281, 1313 (11th Cir. 1995) (Hatchett, dissenting); see also Marshall v. Edwards, 582 F.2d 927, 936 n.9 (5th Cir. 1978) (noting prevalence of "proportional representation" systems abroad, acknowledging use of "Hare system" in the United States, and quoting approvingly from John Stuart Millís endorsement of proportional representation systems); Latino Political Action Committee, Inc. v. City of Boston, 609 F. Supp. 739, 744 (D. Mass. 1985) (describing limited votingís beneficial effect on minority voters, and relying on use of limited voting in present system to reject vote dilution claim). Judge Hatchett of the Eleventh Circuit has praised cumulative voting as a potential remedy in judicial election cases. SCLC v. Sessions, 56 F.3d at 1313-1315. Many courts have approved settlements of Section 2 cases using cumulative voting. See, e.g., Buckanaga v.

Sisseton Indep. Sch. Dist No. 54-5, No. 84-1025 (D.S.D. 1988); Banks v. Peoria, No. 87-2371 (C.D. Ill. 1987); and the Dillard cases cited above.

Contrary to the arguments raised by appellants, there is no factual or legal impediment to the use of cumulative voting as a Section 2 remedy, either as a general matter or under the circumstances of this case.

A. Cumulative Voting Is An Appropriate And Effective Remedy For Minority Vote Dilution

Cumulative voting affords voters protected by Section 2 an equal opportunity to elect candidates of choice, which is the purpose behind Section 2. See 42 U.S.C. ß 1973b. By allowing voters to "plump" multiple votes in favor of one heavily preferred candidate and thus register the intensity of voter preference, cumulative voting gives voters in a minority group a better chance to elect a candidate of choice. This principles applies to voters in politically cohesive racial minority groups as well as all other self-defined political minorities.

The track record of the first cumulative voting elections held (pursuant to Voting Rights Act settlements) in the late 1980s and early 1990s makes this clear from the standpoint of racial and ethnic minority empowerment. Whenever racial or ethnic minority candidates participated in a cumulative voting election, their participation resulted in the election of racial or ethnic minority candidates for the first time in decades (or ever). This result obtained in all regions of the country and for all minority groups, including elections held in Peoria, Illinois (black candidate), Alamogordo, New Mexico (Hispanic candidate), Sisseton, South Dakota (Native American candidates), and several local jurisdictions in Alabama (black candidates). Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 750 (1992), at 758-60. Moreover, cumulative voting elections also enhance opportunities for non-racial or ethnic minority voting blocs ó for example, they have in some instances resulted in the election of a Republican candidate in a predominately Democratic jurisdiction for the first time in that jurisdictionís modern history. Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in Affirmative Action and Representation: *Shaw v. Reno* and the Future of Voting Rights 285 (Anthony A. Peacock ed., 1997); Pildes and Donoghue, *Cumulative Voting in the United States*.

B. Cumulative Voting Is Not Contrary to the "Section 2 Proviso"

Appellant Park District (Brief at 33-34) cites the opinion in Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998) for the proposition that cumulative voting is inconsistent with Section 2 of the Voting Rights Act because of the "Dole proviso," which reads:

> Nothing in this Section shall be read to guarantee the election of minority group representatives in proportion to the minority groupís share of population.

42 U.S.C. ß 1973 (emphasis added). This language has been interpreted (correctly) to mean that statutorily protected minority groups are not entitled to "proportional representation." See, e.g.., McGhee v. Granville County, 860 F.2d 110, 117-118 (4th Cir. 1988). However, this language has no bearing on the use of cumulative voting as a valid Section 2 remedy. The Park Districtís argument and the decision in Cousin reflect nothing more than terminological confusion between a political science rubric for electoral systems used in many democratic nations on the one hand and a very distinct judicial concept in Section 2 law on the other.

Cumulative voting and other "modified at-large" voting systems have been placed by political scientists within a broad umbrella of electoral systems called "proportional representation." These systems contrast with plurality or "winner-take-all" systems in that they are designed to allot legislative seats according to votes cast. These systems have nothing to do with racial quotas or entitlements.

The proviso, on the other hand, was added to the text of Section 2 only to make it clear that Section 2 did not establish a quota system in elections ó that is, that no election would be held invalid simply because there were not a certain percentage of blacks elected. The Supreme Court has made it clear that "proportionality" as used in the proviso "links the success rate of minority candidates to the minority groupís share of the jurisdictionís population." Johnson v. DeGrandy, 512 U.S. 997, 1013 n.11 (1994). For example, if blacks make up 20% of the population of a county governed by a five-member commission, a consistent failure by black candidates to win one out of the five commission seats would not, in and of itself, entitle black voters to Section 2 relief. Nor would a failure to draw one out of five majority-black districts entitle black voters to any relief. Instead, plaintiffs would still have to prove (as they have proven in this case) racial bloc voting, historical discrimination, socio-economic disadvantage, and all the other applicable Gingles factors. However, if they made this showing, the fact that their relief might enable them to approach or even exceed "proportionality" would in no way be fatal to their claim.

This result is entirely consistent with the Section 2 proviso and the Voting Rights Act as a whole. This is clear from both the plain language of the proviso and the Supreme Courtís interpretation of it. The proviso itself merely states that "proportionality" is not a legal guarantee; it does not in any way imply that proportionality is a forbidden result. The Park District invites this Court to take a provision which says merely that racial "proportionality is not guaranteed in legislative bodies and convert it to the unintended and far more restrictive statement that racial "proportionality" is not allowed in legislative bodies.

The Supreme Court has explained this point beyond any doubt. In DeGrandy, the Supreme Court held that a percentage of representation equal to or greater than a minority groupís population percentage was not a "safe harbor" for defendant jurisdictions, and that such a result was consistent with the Section 2 proviso. Id. at 1013 n.11, 1017-1018. Indeed, Justice OíConnor noted that a representation percentage lower than the corresponding population percentage was "always relevant" and "probative evidence of

vote dilution." Id. at 1025 (OíConnor, J., concurring). This result is consistent with lower court decisions faced with this very issue. See, e.g., Williams v. City of Texarkana, 862 F. Supp. 756, 764 (W.D. Ark. 1992), affíd, 32 F.3d 1265 (8th Cir. 1994). Thus, the argument asserted by the Park District (and by the court in Cousin) ó that cumulative voting is barred by the Section 2 proviso because it enables minority groups to reliably attain a share of elected seats proportionate to their population share ó is flatly inconsistent with the plain language of Section 2 and the Supreme Courtís interpretation of this language.

The argument is also flawed factually. It proceeds from the premise that cumulative voting would guarantee proportionate electoral results. But cumulative voting provides only an opportunity to elect candidates of choice, not a guarantee. Voters who are part of any such political or racial minority must participate in the election and must be cohesive in their voting patterns. And it is by no means a foregone conclusion which candidates will win. Black voters may field too many competing candidates, split the (otherwise politically cohesive) black vote, and elect no candidates of choice. Or black voters may choose not to vote strategically by "plumping" their votes and forego the mathematical advantages afforded under cumulative voting by strategic voting. Alternatively, black voters may form a coalition with another group and help elect a non-black candidate, or a candidate who is not the first choice of the black community. Indeed, modified at-large voting systems move away from the kind of race-based politics now characteristic of territorial districting by allowing voters to, in effect, district themselves.

C. The Cases Cited By Appellants Do Not Hold That Cumulative Voting Is Unavailable As A Section 2 Remedy

Appellants cite several cases dealing with cumulative voting (or limited voting, another "modified at-large" system) for the proposition that such alternative electoral schemes are unavailable either generally or in this case. The cases cited are easily distinguished.

Neither McGhee v. Granville County, 860 F.2d 110 (4th Cir. 1988) nor Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994), cert. denied, 115 S.Ct. 1097 (1995) lend any support to appellantsí arguments. In McGhee, the Fourth Circuit rejected a limited voting remedy because the district remedy offered by the defendant jurisdiction adequately remedied the underlying violation. 860 F.2d at 115. For the reasons explained in the briefs submitted by the Perkins-McCoy plaintiffs and the United States, the defendantsí offered remedy in this case did not adequately remedy the underlying Section 2 violation found by the district court. The court in McGhee expressly disclaimed any intent to rule generally that limited voting schemes were unavailable as remedies, concluding that "the specific issue here is not the validity vel non of the [limited voting plan], but the prior adequacy of the Countyís plan." Id. at 120. The Fourth Circuitís holding in Cane was similarly limited to "the specific facts and circumstances presented," 35 F.3d at 929, which are ably explained and distinguished in the United Statesí amicus brief.

Finally, the Sixth Circuitís opinion in Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998) contains a number of criticisms of the cumulative voting remedy employed in that case. However, with the exception of the "Section 2 proviso" argument discussed above, the court emphasizes that all of its criticisms are directed at the use of cumulative voting in the unique context of judicial elections, where the need to maximize judicial "collegiality" and to avoid the "specter of ...organized interest groups seizing control" of the judiciary made cumulative voting inappropriate. 145 F.3d at 834. While we disagree with the criticisms made by the court in Cousin, they clearly do not apply in any event to the instant case.

II. Cumulative Voting Is A Proper Remedy In This Case

A. The Cumulative Voting System Used In This Case Is Established, Simple, And Has A History Of Use In Illinois, Including Chicago Heights

Cumulative at-large voting is not a novel system. Illinois used cumulative voting to elect its state assembly from 1870 to 1980. Everson, *The Effect of the "Cutback" on the Representation of Women and Minorities in the Illinois General Assembly*, in United States Electoral Systems: Their Impact on Women and Minorities. Many large corporations us cumulative voting (see the ABA Model Business Corporation Act). Cumulative voting has received a sharp increase in attention in recent years, with a corresponding rapid growth in its adoption in localities around the United States; the number of localities with cumulative voting now totals more than fifty. States with localities adopting cumulative voting since 1986 include Alabama, Illinois, New Mexico South Dakota and Texas. Texas has the greatest number of jurisdictions with cumulative voting, and the success of the system is supported by the fact that in 1995, the State of Texas adopted a law allowing school districts to adopt cumulative voting for their elections.

Nevertheless, because most localities still do not use cumulative voting, there are concerns that it will be confusing to voters simply because it is unfamiliar. While important to raise, the suggestion that cumulative voting is confusing to voters is baseless. Every empirical study of the use of cumulative voting in recent elections has shown that voter confusion is not a significant problem. *See* Richard Engstrom & Robert Brischetto, *Is Cumulative Voting Too Complex?: Evidence From Exit Polls*, 27 Stetson L. Rev. 813, 821-827 (1998) (exit poll data showed no significant voter confusion; when asked to compare it to other election methods they had experienced, more voters found cumulative voting relatively easier than relatively more difficult); Engstrom, *One Person, Seven Votes, supra*, at 294-295 (exit poll data of first-time cumulative voting election indicated 90% of voters understood system and did not find it any more difficult to use than other voting systems); Robert Brischetto & Richard Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 Social Sci. Q. 4 (1997) (exit poll data of first-time cumulative voting election indicated 90% of voters understood system); Richard Engstrom and Charles J. Barrilleaux, *Native Americans and*

Cumulative Voting: The Sisseton-Wahpeton Sioux, 72 Soc. Sci. Quarterly 388, 391 (1991) (both Native American and Anglo voters understood cumulative voting system).

The district court has made clear that the form of cumulative voting used in this case is the "equal and even" method of cumulative voting. As the record in this case makes clear (see Richie Affidavit, Document 518, Group Exhibit), this form of cumulative voting is particularly easy for voters and consistent with Illinoisí statutory scheme. The ballot can look exactly like the ballot for a traditional at-large election, and voters can vote exactly as they would in such an election. The only difference for voters is that they must be aware that the fewer candidates for whom they cast votes, the greater the share of their seven votes each favored candidate will receive. Use of equal and even cumulative voting (EE cumulative voting) also fully addresses concerns about election administration. In fact, Cook County used its current punch-card voting during the time when EE cumulative voting was used to elect the Illinois House of Representatives from 1870 to 1980 (Richie Affidavit, p. 4).

EE cumulative voting proceeds as described in the Illinois state statute. "Each elector may cast as many votes as there are aldermen to be elected in the elector's district, or may distribute his or her votes, or equal parts of the votes, among the candidates as the elector sees fit" (65 ILCS 5/3.1-15.35). To distribute "equal parts of votes," a voter simply "X" votes for the candidates he or she supports, and the voters' votes are evenly distributed among these candidates. In elections to the Illinois House of Representatives from 1870 to 1980, voters --including, of course, residents of Chicago Heights -- had the option to "X" vote for one, two or three candidates. If the voter supported one candidate, i.e., placed only one "X" on the ballot, that candidate received three votes. If the voter supported two candidates, each candidate received one and one-half votes each. If the voter supported three candidates, each candidate received one vote. The voter did not have to understand fractions; rather, the voter needed to understand that the fewer the number of candidates supported, the more votes each of those candidates received.

The City of Peoria currently uses EE cumulative voting. The system was adopted in a consent decree and has been used to elect five at-large city council members in elections held in 1991 and 1995. In both elections, Peoria's board of elections pursued community outreach about the cumulative voting system (Richie affidavit, pp. 4-5). The actual method of voting was similar to the previous method of election when three members were elected at-large, with voters having an option to support fewer than three candidates. The rate of invalid ballots has been comparable to other Peoria elections using non-cumulative voting methods.

EE cumulative voting can make voting easier for voters who are interested in electing more than one candidate. Rather than having to make uncertain calculations about which favored candidate might need slightly more votes than other candidates, a voter can simply vote for the preferred "team" of candidates.

As further indication of cumulative voting's viability as a workable electoral system, many senior political leaders and analysts in Illinois have indicated their indicated their support for restoring cumulative voting. The *Chicago Tribune* editorialized in 1995 that:

The magic of cumulative voting was that it often produced the most thoughtful, independent members of the legislature. There were liberal Republicans and conservative Democrats.... The intermeshing of political and regional interests has all but disappeared in the 15 years since cumulative voting was abolished. In its place, partisan politics has become increasingly shrill and confrontational.... For years, many partisans and political independents have looked wistfully at the era of cumulative voting. They acknowledge that it produced some of the best and brightest in Illinois politics. It's time for a debate about a possible revival.

"**Better Politics From An Old Idea**,"
Chicago Tribune, May 30, 1995, editorial.

B. The District Courtís Decision To Use Cumulative Voting In The Context Of A Seven-Member Body Was A Valid Exercise Of Its Remedial Discretion

Appellants object that the district courtís remedial plan modifies state law slightly by providing for seven-member cumulative voting at-large rather than either dividing the City into between three and six wards with three members per ward (for a "minority representation" system) or dividing the City into seven wards with two seats per ward (for an "aldermanic system"). Of course, it was the appellants themselves who first modified state law by moving to a six-member body with a "strong mayor" form of government, a result not permitted under Illinois law. Where appellants deviated from state law, it was with the effect of aggravating minority vote dilution. Where the district court did so, it was with the effect of reconciling the overriding need to fully remedy minority vote dilution with the competing interests of 1) deference to the defendant jurisdictionís policy judgments and 2) the need for certainty and finality in extremely protracted litigation. An examination of the district courtís reasoning shows that the district court did not abuse its remedial discretion.

In this case, the district court "exercise[d] its discretion in fashioning a near optimal plan" by balancing the policy preferences of the defendant jurisdictions with state law considerations and with the need to fully and completely remedy the underlying minority vote dilution. See Cane, 35 F.3d at 927, 928 (emphasis added). The latter concern must of course be paramount, so the district court legitimately decided, for the reasons discussed in the briefs of the Perkins-McCoy plaintiffs and the United States, that an odd number of members was required. State law authorized the use of cumulative voting, which the district court chose to avoid any further litigation under Shaw v. Reno, 509 U.S. 630 (1993).

In doing so, the district court was not making a finding that a viable Shaw challenge could be raised to any districting scheme adopted as a remedy. Rather, the court was making a realistic assessment that any districting plan had the potential for such litigation

which could delay the arrival of certainty and finality to the voters of Chicago Heights who had suffered an abridgement of the fundamental right to vote for many years. Under the unique circumstances of this case ó after 12 years, several elections, numerous district court hearings and two appeals ó it was not an abuse of discretion for the court to decide that a system immune from Shaw challenge was desirable.

Further, an at-large electoral framework was consistent with the policy judgments made by the defendant jurisdictions prior to the filing of this lawsuit. Before plaintiffs filed the instant lawsuit, both the Park District and the City Council were elected at-large. As the United States points out in its amicus brief, district courts may look to the policy judgments "underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body." Cane, 35 F.3d at 927, 928 (emphasis added). Because of its understandable desire to forestall any further litigation over district lines and to achieve consistency with the electoral scheme existing at the time of suit, the court deviated from state law in crafting this cumulative voting relief. This decision was not an abuse of discretion.

Nor was the selection of seven members an abuse of discretion. Appellant City of Chicago Heights points out (Brief at 34) that state law provided for either a cumulative voting scheme with between nine and 18 members (three each from between three and six wards), or an "aldermanic system" of 14 members (two each from seven wards). But every indication of the City and Park Districtís policy preferences ó its original five-member plan, its proposed six-member consent decree ó pointed toward keeping the size of the body relatively small. A governing body much larger than this would be inappropriate in a city as small as Chicago Heights. By choosing a seven-member body, the district court again reconciled the overriding need to fully remedy the minority vote dilution by using an odd number of seats with the corresponding need to keep the governing body as close as possible in size to that preferred by the defendant jurisdictions. Perhaps a five-member body would have worked as well, but the choice was well within the district courtís equitable discretion.

Similarly, we agree with the Perkins-McCoy plaintiffs and the United States that the change to a seven-member body does not run afoul of Holder v. Hall, 512 U.S. 874 (1994). In Holder, the Court was concerned with the absence of a "benchmark" from which to measure vote dilution for the purposes of determining liability. The Court did not state that after liability was found, a district court could not exercise its remedial discretion to choose a different number of members if it determined such a change to be necessary to fashion a full and complete Section 2 remedy. In the instant case, liability was established through the use of a traditional benchmark. At the remedial phase, all parties, including defendants, were choosing among various municipal government schemes provided for as options in the Illinois statutes. To the extent any "benchmark" was needed at this distinct phase not considered in Holder, the Illinois statutes provided them.

III. Conclusion

For the reasons stated above, this Court should affirm the district courtís remedial order.

TABLE OF AUTHORITIES