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COUSIN v. SUNDQUIST
145 F.3d 818 (6th Cir. 1998)

FACTS AND PROCEDURAL HISTORY

In drafting section 2 of the Voting Rights Act, Congress ensured that no “state or political subdivision” can employ voting practices that abridge “the right of any citizen of the United States to vote on account of race or color.”¹ In *Cousin v. McWherter*, eight African-American voters in Hamilton County, Tennessee alleged their voting rights had been abridged in violation of this Act.² Specifically, the voters claimed that the judicial elections for the Eleventh Judicial Circuit of Tennessee and the Court of General Sessions of Hamilton County violated section 2 because the elections resulted in dilution of the voting strength of African-Americans in Hamilton County.³ The voters sought injunctive and declaratory relief against the State Election Commission, the Coordinator of Elections, the Hamilton County Elections Commission, and the Registrar at Large of Hamilton County.⁴

At the time of the initial filing,⁵ the voters challenged the practice of at-large,

circuit wide elections of the nine judges for the Eleventh Judicial Circuit and three judges for the Court of General Sessions.⁶ In these elections, the at-large voting procedures allowed each candidate to run for a specifically designated position.⁷ Within each race, the candidate with the highest number of votes won.⁸ Although this case has been heard twice by the United States District Court for the Eastern District of Tennessee and twice by the United States Court of Appeals for the Sixth Circuit, the lower court initially held that the use of the at-large district diluted the effectiveness of minority voters in the county.⁹ The lower court relied on the Senate Report accompanying the 1982 Amendments to the Voting Rights Act to guide its analysis of the voters' claims.¹⁰ The Senate Report identified “the nature of section 2 violations and the proof required to establish these violations.”¹¹ In addition, the report also indicated “typical factors” that might be probative of a section 2 violation.¹² In

¹ Voting Rights Act of 1965, 42 U.S.C. § 1973 (West 1998).

² *Cousin v. McWherter*, 840 F. Supp. 1210, 1211 (E.D. Tenn. 1994).

³ *Id.*

⁴ *Id.*

⁵ At the time of the most recent ruling by the United States Court of Appeals for the Sixth Circuit, the Tennessee legislature had increased the number of Hamilton County General Sessions judges from three to five. *Cousin v. Sundquist*, 145 F.3d 818, 820 (6th Cir. 1998).

⁶ *Cousin v. McWherter*, 840 F. Supp. at 1211.

⁷ *Cousin v. Sundquist*, 145 F.3d at 820.

⁸ *Id.*

⁹ 840 F. Supp. at 1221.

¹⁰ *Id.* at 1212-20.

¹¹ *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

¹² The Senate Judiciary Committee majority Report accompanying the 1982 amendments states:

Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other

citizens enjoy.

If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

typical factors include:

1. The extent of any history of official discrimination in the state or Political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively

weighing these "typical factors," the lower court found evidentiary support for five of the seven factors and that, under a totality of circumstances analysis, the dilution outweighed any compelling state interest.¹³

Defendants' appeal to the Sixth

in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group, whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

The cases demonstrate, and the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other. S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206, 207.

¹³ *Cousin v. McWherter*, 840 F. Supp. 1210, 1213 (E.D. Tenn. 1994).

Circuit resulted in remand to the lower court.¹⁴ The court of appeals required the lower court to articulate more specific bases for its findings and to correct its analysis of plaintiffs' burden.¹⁵ According to the court of appeals, to prove a section 2 claim a plaintiff must first satisfy three preconditions before a "totality of circumstances" analysis is employed.¹⁶ These three preconditions, as established by the United States Supreme Court in *Thornburg v. Gingles*,¹⁷ require that a plaintiff establish that the minority group is sufficiently large and geographically compact to comprise a majority in a single-member district; that the minority group is politically cohesive; and that the white majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate.¹⁸ The appeals court also found error in the district court's analysis of Tennessee's interest in linking the judiciary's electorate and jurisdiction.¹⁹ After concluding that states may have a substantial interest in the efficacy advanced when the jurisdictional and electoral bases of a court system are linked,²⁰ the court of appeals ordered the lower court to weigh Tennessee's linkage interest as a separate factor in the "totality of circumstances" test.²¹

¹⁴ *Cousin v. McWherter*, 46 F.3d 568, 569 (6th Cir. 1995).

¹⁵ *Id.* at 577.

¹⁶ *Id.* at 574.

¹⁷ 478 U.S. 30 (1986).

¹⁸ *Cousin v. McWherter*, 46 F.3d at 574 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

¹⁹ *Cousin v. McWherter*, 46 F.3d at 577.

²⁰ *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995) (citing *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993)).

²¹ *Cousin v. McWherter*, 46 F.3d at 577.

On remand, the district court found the presence of all three preconditions, as well as five of the seven factors announced by the Senate.²² Although the district court found that as a matter of law the state's linkage interest was a substantial state interest, it did not overcome the section 2 violations found by the court.²³

HOLDING

The Sixth Circuit determined that plaintiffs did not satisfy the third *Gingles* precondition that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.²⁴ The court stated that this singular holding mandated reversal.²⁵ The court also found further reversible error in the lower court's application of the "totality of circumstances" test.²⁶ Under a *de novo* review of the totality of circumstances test, the court found that only one Senate factor—the effects of past discrimination on African-Americans' political participation—bolstered the claim of vote dilution and that this factor failed

²² *Cousin v. McWherter*, 904 F. Supp. 686, 688, 691, 704-13 (E.D. Tenn. 1995).

²³ *Id.* at 712.

²⁴ *Cousin v. Sundquist*, 145 F.3d 818, 834 (6th Cir. 1998).

²⁵ To provide future guidance, the court suggested that the remedies of single member districting and cumulative voting were unsuitable to remedy a violation of section 2 of the Voting Rights Act. In addition, the court also limited Voting Rights Act claims to those of an impairment of a minority's ability to determine an election. The court stated it would refuse to permit claims of impairment of a minority's ability to influence the outcome of an election. *Cousin v. Sundquist*, 145 F.3d at 834.

²⁶ *Id.*

to outweigh the State of Tennessee's legitimate and substantial linkage interest.²⁷ Consequently, the court of appeals reversed the holding that minority plaintiffs were denied equal access to the political process and vacated the remedial order of cumulative voting.²⁸

ANALYSIS

The Sixth Circuit has twice held that plaintiffs must satisfy three preconditions to meet their initial burden of production.²⁹ In its analysis of the preconditions, the court reviewed these mixed questions of law and fact for clear error.³⁰ Although the court has demanded a showing of the three *Gingles* preconditions, plaintiffs needed to demonstrate only two of the preconditions. The defendants conceded the existence of the second precondition of a sufficiently politically cohesive minority group.³¹ In its analysis of the third precondition, this court found that plaintiffs had failed to show that the white majority vote sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.³² In light of plaintiffs' failure to produce evidence to support the third precondition, the court found it unnecessary to analyze the first precondition that the minority group was sufficiently large and geographically compact to constitute a majority in a

single member district.³³

In reviewing evidence regarding the presence of the third precondition, the court reexamined plaintiffs' and defendants' expert testimony as well as tabular data on racial bloc voting.³⁴ In finding that the white majority votes in a manner usually to defeat the minority's preferred candidate, the district court had relied on testimony from plaintiffs' expert, Dr. Cole, and tabular data of Chattanooga city elections.³⁵ In his analysis of Tennessee elections pitting a white candidate against an African-American candidate, Dr. Cole tabulated the percentage of whites voting for a white candidate and the percentage of African-Americans voting for an African-American candidate.³⁶ Dr. Cole suggested that his tabulations demonstrated the racial cohesion of an election and used these tabulations to determine the amount of white crossover votes an African-American candidate would need to win an election. Based on the crossover calculations, Dr. Cole concluded that an African-American candidate generally would lose a county

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Cousin v. McWherter*, 46 F.3d at 575; *Cousin v. Sundquist*, 145 F.3d at 823.

³⁰ *Cousin v. Sundquist*, 145 F.3d at 823.

³¹ *Id.*

³² *Id.* at 826.

³³ *Id.* at 823.

³⁴ *Id.* at 826.

³⁵ The tabular data the district court relied upon was gathered for *Brown v. Board of Commissioners of Chattanooga, Tennessee*, 722 F. Supp. 380 (E.D. Tenn. 1989) (The tabular data separated the percentages of the white and African-American vote for each candidate by deeming each election either "Racially Polarized" or "Not Racially Polarized" in Chattanooga City Commission elections from 1971-1987, Chattanooga judge contests from 1969-1987, and other elections and referenda from 1970-1988).

³⁶ *Cousin v. Sundquist*, 145 F.3d at 823-24.

wide election in Hamilton County.³⁷

When the court of appeals compared the study of defendants' expert, Dr. Taebel, with Dr. Cole's study, the court found that Dr. Taebel's study utilized a more germane methodology.³⁸ In his study, Dr. Taebel included not only Tennessee elections where opposing candidates were African-American and white, but he also included elections where both candidates were white.³⁹ Dr. Taebel's data supported the conclusion that minority preferred candidates enjoyed success in many Tennessee elections.⁴⁰ Based on his research, Dr. Taebel concluded that the majority did not vote in such a way as to deprive the African-American voters of Hamilton County of the opportunity to elect their preferred candidate.⁴¹ The court of appeals found Dr. Taebel's study more relevant because it asked whether minority preferred candidates, whatever their race, usually lose, not whether white candidates usually defeated African-American candidates.⁴² In taking the view that reflected "the potentiality that the minority's preferred candidate might be a white person," this court found Dr. Taebel's conclusions to be supported by his study, whereas, the court found Dr. Cole's conclusions unsupported by his study.⁴³

Additionally, the court found that the district court improperly relied on data from a previous case challenging

Chattanooga city elections.⁴⁴ This data was from nonpartisan city wide elections to a legislative body, and not relevant to the instant case of partisan countywide elections to the judiciary because it provided no basis for finding that the white majority usually voted in a manner to defeat the minority preferred candidate.⁴⁵ Using the success of minority preferred candidates, as opposed to only African-American candidates, as the standard for weighing the third precondition and Dr. Taebel's study which concluded that minority preferred candidates can and do win county wide Hamilton County elections, the court of appeals found that plaintiffs did not meet their burden regarding the third precondition.

Although the court of appeals clearly held that plaintiffs had not established a viable voting rights claim because they failed to meet their burden of production, the court examined the proposed remedial plans of single member districting and cumulative voting to provide guidance for future voting rights claims.⁴⁶ In its discussion of the impropriety of single member district plans, the court of appeals viewed the single member districts as "at odds with the important state interest of 'linkage.'"⁴⁷ The court emphasized that linkage allowed judges to serve the entire constituency from which they were elected as well as ensured judges could be held accountable via election by the entire

³⁷ *Id.* at 824.

³⁸ *Id.* at 825.

³⁹ *Id.* at 824-25.

⁴⁰ *Id.* at 824.

⁴¹ *Id.*

⁴² *Id.* at 825.

⁴³ *Id.* at 825-26.

⁴⁴ *Id.* at 826.

⁴⁵ *Id.*

⁴⁶ *Id.* at 826-31.

⁴⁷ *Id.* at 827.

constituency.⁴⁸ In weighing Tennessee's interest in linkage for legitimacy and substantiality, the court also reasoned that in this case linkage was not instituted or sustained to dilute minority voting strength.⁴⁹

Additionally, the court of appeals found the "impairment of the minority's ability to influence the outcome of the election, rather than to determine it" was an underlying premise of the single member districting proposal.⁵⁰ The court found error in the district court's assumption that an "influence claim" would be actionable under the Voting Rights Act.⁵¹ The court of appeals did not agree with the district court's interpretation of the legislative history of the influence claim.⁵² Specifically, the court of appeals considered neither the language of the Senate Report accompanying the 1982 amendments to the Voting Rights Act,⁵³ nor a footnote in the *Gingles* opinion⁵⁴ to be substantial

evidence for allowing an "influence claim."⁵⁵ The district court relied on the Senate's concern over whether minority voting strength had been "minimized or canceled out" and the failure to include a requirement of minority geographic compactness, later included in the inquiry by the *Gingles* court.⁵⁶ The district court noted a *Gingles* footnote that did not

elect the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

⁵⁵ *Cousin v. Sundquist*, 145 F.3d at 828.

⁵⁶ *Cousin v. McWherter*, 904 F. Supp. at 713.

⁴⁸ *Id.* at 827-28.

⁴⁹ *Id.*

⁵⁰ *Id.* at 828.

⁵¹ *Id.*

⁵² *Id.*

⁵³ The district court noted "that the Senate Report as previously cited herein expressly directs an inquiry into whether or not the totality of circumstances indicates that the voting strength of minority voters has been 'minimized or cancelled out.' This is clearly inclusive of an influence claim such as plaintiffs have alleged in this case." *Cousin v. McWherter*, 904 F. Supp. at 713.

⁵⁴ Footnote 12 in *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986), states:

The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to

preclude an influence claim.⁵⁷ Unpersuaded by the reasoning of the lower court, the court of appeals interpreted the *Gingles* footnote as limiting the use of influence claims.⁵⁸ The court of appeals also looked to another Supreme Court opinion for support.⁵⁹ This court found that when presented with factual circumstances ripe for deciding the issue of an influence claim, the Supreme Court failed to assert that an influence claim was permissible.⁶⁰ Based on the lack of positive legislative history allowing a claim of an impairment of a minority's inability to influence an election as actionable, the court of appeals found plaintiffs' influence claims inactionable under the Voting Rights Act.⁶¹

The court of appeals viewed the proposed cumulative voting scheme as an inappropriate solution for a section 2 voting rights claim.⁶² The court found that cumulative voting would achieve "proportional representation" and viewed it as "an end not contemplated in the Voting Rights Act."⁶³ Furthermore, the court foresaw cumulative voting as potentially undermining judicial

collegiality, independence, and quality.⁶⁴ Like the United States Court of Appeals for the Eleventh Circuit, this court viewed cumulative voting as encouraging racial bloc voting and "the very practices and stereotypes the Equal Protection Clause is set against."⁶⁵ The court also cited concerns related to "organized interest groups seizing control of a fraction of the state judiciary"⁶⁶ and a "fear that cumulative voting is a step in the evolution of the current strategy of creating majority-minority districts to produce proportional results."⁶⁷ In light of these concerns, the court found cumulative voting totally unsuitable to remedy voting rights claims.⁶⁸

The court of appeals also reviewed the "totality of circumstances" test of the Senate factors.⁶⁹ In a *de novo* weighing of the seven factors,⁷⁰ the court found that only the effects of past discrimination on political participation was dispositive to the claim of minority vote dilution.⁷¹ The court did not alter the district court's finding of African-American economic

⁵⁷ *Cousin v. Sundquist*, 145 F.3d at 828-29.

⁵⁸ *Id.* at 828.

⁵⁹ *Id.* (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)).

⁶⁰ *Cousin v. Sundquist*, 145 F.3d at 828.

⁶¹ *Id.* at 828-29.

⁶² *Id.* at 829.

⁶³ *Id.*

Section 2(b) of the Voting Rights Act states: "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973.

⁶⁴ *Cousin v. Sundquist*, 145 F.3d at 830.

⁶⁵ *Id.* (quoting *Nipper v. Smith*, 39 F.3d 1494, 1546 (11th Cir. 1994)).

⁶⁶ *Cousin v. Sundquist*, 145 F.3d at 830 (quoting Mary Thrower Wickam, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 WM. & MARY L. REV. 1251, 1284 (1992)).

⁶⁷ *Cousin v. Sundquist*, 145 F.3d at 831.

⁶⁸ *Id.* at 829.

⁶⁹ The court changes from a clear error standard of review to a *de novo* review because the court is reviewing the application of the totality of circumstances test that involves a mixed question of law and fact. *Id.* at 831-32.

⁷⁰ *Senate Report*, *supra* note 11.

⁷¹ *Id.* at 831-33.

and political isolation within Hamilton County.⁷² However, the court did not find that any of the other six factors substantially supported the vote dilution claim.⁷³ The court also looked at the supplemental factors of the responsiveness of elected judges to the needs of the minority voters as well as Tennessee's linkage interest.⁷⁴ The court found that the judges had been responsive and that the state linkage interest was still legitimate and substantial.⁷⁵ Although the court reiterated that the preconditions had not been satisfied and thus no violation had been established, the court showed that plaintiffs' claims would not have passed a "totality of the circumstances" test.⁷⁶

CONCLUSION

When this court strictly applied the *Gingles* factors as the burden of production for all section 2 plaintiffs, two effects followed. First, the court of appeals encumbered the ability of future voting rights plaintiffs to bring voting rights suits. Second, the court foreclosed any possible claim of an "inability to influence an election."

In requiring voters with Voting Rights Act claims to satisfy the three-pronged *Gingles* burden of production before even addressing the totality of circumstances test, the onus on plaintiffs has increased dramatically. The preconditions as the burden of production are arguably more difficult to satisfy than the Senate factors under a totality of the

circumstances test. The totality of circumstances test provides flexibility to the trier of fact. This flexibility, as echoed in the Senate Report when it stated that "no requirement that any particular number of factors be proved, or that a majority of them point one way or the other,"⁷⁷ gave wide latitude to plaintiffs in presentation of their case. It is foreseeable that the burden structure imposed here may be heavy enough to deter voting rights claims under section 2.

The potential chilling effect is very ironic in light of the purpose behind the 1982 Voting Rights Act Amendments. The amendments were drafted as a response to the Supreme Court's requirement that a discriminatory intent be proven before a voting rights violation could be found. The congressional intent behind the amendments was to lighten the burden of proof for plaintiffs trying to prove violations under the Voting Rights Act. The amendments instituted a results oriented test where plaintiffs needed only to show that the effect of vote dilution was affecting their ability to determine the outcome of an election. The strict application of the *Gingles* preconditions has reversed the intended effects of 1982 amendments of a lighter burden for voting rights plaintiffs.

Secondly, the strict application of the *Gingles* preconditions as the burden of production for all plaintiffs claiming violations under section 2 necessarily forecloses the claim of an inability to influence an election ceases to be a viable claim. The first precondition states that a

⁷² *Id.* at 833.

⁷³ *Id.* at 831-33.

⁷⁴ *Id.* at 833-34.

⁷⁵ *Id.* at 833.

⁷⁶ *Id.* at 834.

⁷⁷ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206, 207.

minority must be sufficiently large and geographically compact to constitute a majority in a single member district. In requiring the ability to attain a majority-minority district as a precondition for establishing a violation, the court has foreclosed any possibility of a claim by a small minority group who wants only to influence an election. The strict application of the first precondition also forecloses the possibility that any small minority will be able to make a voting rights claim. The idea that the size of a minority affects its ability to protect the votes of its citizens does not seem to comport with the spirit of the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment.

In *Gingles*, the preconditions articulated by the court were clearly meant to apply to all “ability to elect” claims. However, in reserving judgment on the viability of an influence claim in *Gingles*, *Voinovich*, and *Degrandy*, the Supreme Court has failed three times to eliminate the option of an influence claim. The Court has left the influence claim as an option. In *Gingles*, the Supreme Court applied the preconditions only to an ability to elect claim. It is a distinct possibility that the *Gingles* preconditions do not govern ability to influence claims, but only ability to elect claims.

The language of section 2 also indicates the viability of an ability to influence claim. The section allows violations to include abridgement of the

right to vote in “political processes leading to nomination or election in the State or political subdivision.” Political participation encompasses far more than voting in an election. If this section is to fulfill its mission of protecting the political process, it must protect not only the right to vote, but also protect the ability to foster coalitions. Interracial coalitions fostered by their ability to influence an election may help maintain the linkage interest the court of appeals found so significant. Additionally, allowing influence claims further protects larger minorities. Frequently, minorities are “packed” into a district where they are guaranteed a minority-preferred candidate. The minority may lose the ability to influence and participate fully in the election if their votes are unnecessarily “wasted” on the minority-preferred candidate in the majority-minority district. It is entirely possible that applying the *Gingles* preconditions rigidly to all section 2 voting rights claims threatens to jeopardize the flexibility carefully written into the Act, unnecessarily over-burden plaintiffs making voting rights claims, and eliminate the ability of small minorities to protect their voting rights.

Summary and Analysis prepared by:

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