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July 21, 2011

Board of County Commission  
Gulf County, Florida  
1000 Cecil G. Costin, Sr. Blvd.  
Port St. Joe, Florida 32456

Re: County-wide elections

Dear Commissioners:

Several months ago, the County retained our Firm to review the feasibility and likelihood of success of attempting to return to county-wide, at-large elections for County Commission seats, instead of the single-member district system in place currently and since its establishment by the Federal Court 25 years ago. Over the last few months, we have collected and organized data from primary, general and special elections in Gulf County from 2004 through 2010 and analyzed that data against the backdrop of relevant Federal statutory and decisional case law.

In summary, we do not recommend proceeding at this time with any attempt to revert to county-wide, at-large elections. As detailed below, we believe that at this time the likelihood of success of any such attempt by the County will be less than fifty percent (50%) and will result in the County incurring substantial costs, including the attorneys' fees for the County's counsel and that of any opposition.

## **Background of the Voting Rights Act**

Congress enacted the Voting Rights Act of 1965 to further the purposes of the Fifteenth Amendment to the United States Constitution and to eradicate racial limitations on the fundamental right to vote. In 1982, Congress amended Section 2 of the Voting Rights Act to provide that a violation of the Act could be proven by showing discriminatory effect alone without requiring a party to show a discriminatory purpose or motive. In other words, under the amendments to Section 2, the Court only looks at the results of elections rather than how those results came about.

Four years after its amendment, in 1986, the United States Supreme Court issued the landmark decision in *Thornberg v. Gingles*. In that case, the Court established the following three factors which a person must establish in order to prove a voter dilution claim under Section 2 of the Voting Rights Act:

- first, that a minority group is sufficiently large and geographically compact to constitute a majority in a single member district;

- second, the minority group is politically cohesive; and
- third, the minority preferred candidate is usually defeated by white majority bloc voting.

While there are other factors which might have some relevance in a voter dilution claim, without a showing of these three factors, a Court will usually not find that a multimember district will impede the ability of minority voters to elect representatives of their choice.

### **Background of Consent Judgment**

Following the amendment to Section 2 of the Voting Rights Act, and days within the decision in *Gingles*, by Order dated June 17, 1986, the Honorable Roger Vinson of the United States District Court for the Northern District of Florida entered a Consent Judgment in the case styled *Nathan Peters et al v. Gulf County, Florida et al*, Case No. 86-2035-RV. This Consent Judgment, which was not opposed by the County, enjoined future county-wide at-large elections for Gulf County Commission members, and, in its place, established five (5) single-member districts, the boundaries for which were specifically set forth in an exhibit attached to the Consent Judgment. In support of its decision, the District Court made the following findings:

[D]ue to a series of factors, including a past history of official racial discrimination in the State of Florida and certain social economic conditions of black citizens in Gulf County, the at-large election system for the Gulf County Commission employing partisan elections with party primaries having a majority vote run off requirement, numbered places and anti-single shot voting requirements has the effect of diluting and minimizing the voting strength of black citizens of Gulf County and thereby denying black citizens of Gulf County an equal opportunity to participate in the political process and to elect candidates of their own choice, in violation of the Plaintiff's rights as secured by, inter alia, the Voting Rights Act of 1965.

The Court retained jurisdiction of the case for a period of not less than five (5) years following implementation of the single-member district plan described in the Consent Judgment.

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### **Procedural Posture**

In order to return County Commission elections to county-wide, at-large elections, the County will need to, in essence, "re-open" the Consent Judgment. This will be accomplished by the filing of a motion to modify or vacate the Consent Judgment, which will be filed in the same Court that issued the Consent Judgment, the United States District Court for the Northern District of Florida. The motion is a

comprehensive, fact-specific, often-voluminous document, which will likely take several weeks to prepare.

Once filed, the "re-opened" case may be assigned to Judge Vinson, who now sits as a Senior Judge, or it may be assigned to another judge in the District, most likely either Chief Judge M. Casey Rodgers out of Pensacola or Judge Richard Smoak out of Panama City. The County will have to serve notice of the motion on any potentially opposing parties.

Whether and to what extent there will be opposition to the County's attempt to revert to at-large elections is an unknown which will significantly affect the amount of time and expense which will be incurred. For example, when Washington County re-opened the Consent Decree which controlled its elections, there was no opposition, and the proceeding concluded within just a few months. Fees and costs incurred by the County were minimal, approximately \$40,000 excluding the costs incurred for the County's expert witness.

For purposes of our review, we have assumed that the County will draw opposition and the Court will allow the parties a reasonable period of discovery, which is the phase of litigation where the parties can investigate facts, obtain testimony through depositions and otherwise prepare the case for trial. Although the Northern District has a reputation for expediting proceedings to trial, the amount of time that this case will proceed through the discovery phase will vary based upon the Judge assigned, the degree of opposition, whether there is more than just one other party involved and various other factors. As a general range, I anticipate the Court allowing at least six and up to twelve months for the parties to engage in discovery. Within two months following the completion of discovery, the case will proceed to trial.

This case will be tried by a judge, not a jury. Generally, a bench trial, as we call it, allows greater flexibility with scheduling, especially on the days of trial since the Judge can start early and end late. I anticipate a trial in this matter will last at least one week and may last as many as three weeks.

### **Overview of Proof Needed to Modify**

The usual posture of these cases involves one or more County residents who are members of a distinct minority group suing to enjoin a voting process that results in racially polarized voting, meaning that a bloc of white voters can defeat a candidate preferred by the minority. These cases are sometimes brought by individuals, but many times are brought on behalf of minority citizens by certain advocacy groups whose mission includes, in part, equal representation or fair voting. These groups have traditionally included the ACLU and the NAACP.

In cases brought by County residents, the burden of proof rests with the resident or plaintiff to admit evidence sufficient enough to prove the three *Gingles* factors. Again, the motive or purpose of voters is irrelevant; the Court's focus is solely on the results of the elections. In such a case, the defendant (here, the County) would have to produce evidence to counter or question that offered by the plaintiff/resident; however, the County would not have any burden of proof.

Here, if the County proceeded with an attempt to revert back to county-wide elections, the case would present reversed roles because the County would be seeking relief from the Court, namely, the modification or termination of the Consent Judgment. In order to convince a court to allow it to terminate the Consent Judgment and reinstitute at-large elections, the County must prove that the change will not make it more difficult for African Americans than for others to elect their candidates of choice. In essence the data needed is the same that would be introduced if the County were defending itself against a Section 2 challenge; the difference is that in a Section 2 challenge parties speculate about what might happen following implementation of single-member districts. In this case, we know how the single-member district system has fared; speculation surrounds the consequences of reverting to an at-large system.

#### **Identification of the Opposing Party**

In the original action which established the Consent Judgment, Nathan Peters was the only named plaintiff. However, the style of the case clearly listed Mr. Peters "on behalf of himself and all others similarly situated." This means any other African American citizen could potentially object to or contest the modification or termination of the Consent Judgment. Further, anyone of these citizens could recruit the assistance of an advocacy group, as mentioned earlier, that could fund the litigation, meaning that the individual citizen(s) would not need to pay legal fees and expenses to be represented.

#### **Collection of Data**

Voting Rights Act litigation is driven by data compilation and analyses to show voting trends and predict how those trends effect the *Gingles* factors. A certain limited number of political scientists specialize in voting data compilation and analysis. Several years ago, the County engaged Dr. Ron Weber, a political scientist who specialized in this area. Although Dr. Weber retired, we were able to secure Dr. Charles Bullock and Dr. Keith Gaddie, who both specialize in this area and work across the country in Voting Rights Act litigation. Dr. Bullock is a distinguished professor at the University of Georgia, while Dr. Gaddie, who studied at Florida State University, is a professor at the University of Oklahoma.

The data we collected from the Supervisor of Elections office included data showing voter registration by race and by precinct at the time of each election – be it primary, general or special – from 2004 through 2010. Further, data showing the racial composition of those who actually turned out to vote for each of those elections was

analyzed. The data's relevance is related to its proximity in time, meaning that the more recent the election, the more persuasive the evidence of voter preference.

Estimates of black and white preferences among candidates rely on two standard techniques used in voting rights litigation. One technique, weighted ecological regression, estimates the best fitting line for data plots in which the racial make-up of the turnout of the precincts as a percentage serves as the independent variable while the support for a candidate as a percentage of turnout serves as the dependent variable. The second technique, homogenous precincts, sums the votes of precincts in which at least 90% of the voters were of one race. With respect to this second technique, while Gulf County has a number of homogeneously white precincts, in recent years, the County has not had one precinct which was over 90% black in participation. For example, in the 2006 general election, the most heavily black precinct was only 87% black in turnout. As such, this technique could not be used in the majority of the elections reviewed.

Finally, while local elections might seem more relevant, they are no more important than the races for statewide and national offices, including President, U.S. Senator, and Congress.

### **Summary of the Analysis of Data**

In general elections, white and black voters in Gulf County usually have different preferences. In a pattern that has become widespread across the South, but also in many other states across the country, white voters generally select Republican candidates while African American voters prefer Democrats. That pattern, which has become a historical trend, characterizes 18 of the 22 general elections analyzed in Gulf County. This racial division appeared in most of the general elections in each year, except for 2004 when it emerged in two of four contests. Three of the four general election contests in which the candidate assembled a biracial coalition involved incumbent members of Congress – Representative Allen Boyd in 2004 and 2008 and Senator Bill Nelson in 2006.

In Democratic primaries, the racial voting pattern was mixed. In at least half of the contests, black and white voters rallied behind the same candidate. However, in 2010, black and white voters only rallied behind the same candidate in the primary involving the gubernatorial race but not in the other four contested elections.

Black and white voters appear to have similar preferences in the three non-partisan primaries. These include the election of an African American as County Judge in 2006.

Thus, to summarize, black and white voters usually prefer different candidates in general elections and in about half the Democratic primaries. African Americans and whites usually unite behind the same candidate in non-partisan contests.

When black and white voters shared preference, the black choice succeeded. However, when black and white voters disagreed in candidate selection, the black choice usually lost. In fact, the only two instances in which the black choice succeeded in the face of white opposition occurred in 2008. In that year, white voters gave narrow majorities to the Republican candidates for State Attorney and Sheriff. These two individuals lost the Gulf County vote to the Democrats who won overwhelming shares of the black vote. In all of the other 20 contests in which black and white preferences diverged, the white choice won. This data was comprised from 16 general elections along with the four Democratic primaries in 2010.

The most recent election in 2010 presented strong evidence that a white bloc vote usually defeats the black preferred candidate. In all of the general elections and in all but one primary in 2010, blacks and whites supported different candidates. In every instance in which the vote split along racial lines, the candidate preferred by white voters defeated the choice of black voters.

#### **Risk of Fee-Shifting if the County does not Prevail**

If the County's attempt to modify or vacate the Consent Judgment generates opposition, and if that opposition ultimately succeeds or prevails by defeating some or all of the County's requested relief, it is likely that the Court will order the County to pay the attorney's fees of the opponent who prevailed. In awarding such fees, the Court will review the amount of time spent by the lawyer and multiply that by the lawyer's customary, hourly rate. If there are numerous lawyers involved in the case, the Court will review the reasonableness of the services provided but may well award fees to all lawyers who represented the prevailing party.

Our Firm's experience in these types of matters has taught us that if an advocacy group such as the ACLU gets involved in the opposition, they will tap into their resources across the country and bring in lawyers who specialize in this area. Those lawyers, who are usually well experienced practitioners, usually come from bigger cities, such as Atlanta or Washington D.C., and their hourly rate reflects both their level of experience and their market rate from where they practice. In other words, it is not unlikely that an experienced lawyer from Atlanta will customarily charge an hourly rate of \$500 or more.

#### **Potential Media Exposure**

Finally, the County should consider any potential media exposure which this case might generate. Presently, redistricting efforts are ongoing across Florida and the country. There is heated debate in many of these areas and a heightened sense of awareness by advocacy groups to the voting rights of certain minorities being affected. By filing a motion in Federal Court, Gulf County may potentially create a battle ground for this ongoing debate.

**Recommendation**

We do not recommend the County move forward with any attempt to modify or vacate the Consent Judgment at this time. We believe the County has less than a 50% chance of satisfying its burden of proving that an at-large system of voting will maintain or increase the electability of a candidate preferred by African American voters in the face of white bloc voting; the results of the most recent election cycle, that from 2010, will undercut any argument to the contrary. We have concerns that given this poor likelihood of success, the County may incur substantial expenses both for the fees and costs incurred on its own behalf as well as on the behalf of opponents who ultimately prevail in the litigation.

We will be happy to provide any additional information or elaborate on any of the matters set forth in this letter. We appreciate the opportunity to provide this analysis for your review.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Michael P. Spellman", written over the typed name below.

Michael P. Spellman

MPS/tsw