IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 83-1968

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

On Appeal From The United States District Court for the Eastern District of North Carolina

APPELLANTS' REPLY BRIEF

LACY H. THORNBURG
Attorney General

JERRIS LEONARD
Counsel of Record

KATHLEEN HEENAN McGUAN
LEONARD & McGUAN, P.C.
900 17th Street, N.W.
Suite 1020
Washington, D.C. 20006
(202) 872-1095

JAMES WALLACE, JR.
Deputy Attorney General for Legal Affairs

TIARE B. SMILEY
NORMA S. HARRELL
Assistant Attorneys General
Attorney General's Office
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7218

Counsel for Appellants

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (203) 347-8203

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APPELLANTS' REPLY BRIEF

The Appellees, in support of the opinion of the district court, have advocated an interpretation of amended Section 2 of the Voting Rights Act which is divorced completely from the statutory language and, in large part, from the legislative history as well. The Appellees' most fundamental error is their assumption that proof of the "Senate factors" constitutes proof of a Section 2 violation. Even under this erroneous interpretation of the statute, in order to rationalize

the decision of the district court, the appellees must labor to explain away the electoral success of blacks in all the challenged districts in 1982, obscure their significant success prior to 1982, and champion a definition of racially polarized voting that would condemn the voting behavior in virtually every jurisdiction in this country in local, state and national elections.

I. Proof of the "Senate factors" does not constitute proof of a violation of Section 2

Subsection (a) of amended Section 2 states that, "[n]o voting . . . practice shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color . . ." 42 U.S.C. § 1973(a). In Subsection (b), Congress specifies that the right to vote has been abridged or denied when racial minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Thus the ultimate issue in a Section 2 case is does the challenged practice (*e.g.*, use of multi-member districts) result in unequal electoral opportunity that can be remedied by eliminating the practice.

The Appellees and the district court, however, read subsection (b) in a vacuum and thereby eliminated the obvious statutory requirement that there be a causal relationship between the challenged practice and the alleged inequality of electoral opportunity. This disassociation of subsection (b) from subsection (a) makes it possible for the Appellees to proceed with their basic proposition that proof of the existence of the Senate factors conclusively establishes that blacks have less opportunity than whites to participate in the political forum and determine election outcomes.

This basic conception of Section 2 is embodied in the Appellees' statement that the Senate Report "specified a number of factors the presence of which, Congress believed, would have the effect of denying equal opportunity to black voters." Appellees' Brief at 16 [hereinafter App. Br.] *See also,* App.Br. 32, App.Br. 44, App.Br. 101. Congress did not outlaw the items listed on pages 28-29 of the Senate Report nor did it devise Section 2 as a punishment for those jurisdictions in which those factors existed. The issue is not whether these Senate factors exist or even whether they have a discriminatory effect. They are not elements of a statutory criminal offense or a common law tort where proof of the elements establishes liability. The Senate Report specifically states that "[i]f as a *result of the challenged practice*" plaintiffs do not enjoy equal electoral opportunity, then there is a violation of the statute. S.Rep. No. 417, 97th Cong., 2d Sess. at 28 [hereinafter S.Rep.]

Reliance on evidence such as substandard housing and infant mortality diverts the district court's attention from the real issue. In his dissent from this Court's summary affirmance in *Mississippi Republican Executive Committee v. Brooks,* 105 S.Ct. 416 (1985), Justice Rehnquist noted that even where the lower court correctly found that the Senate factors were present, it could be a total non sequitur to conclude that past discrimination and its present effects "'resulted' in 'dilution' of minority voting strength *through the adoption of the redistricting plan in question.*" 105 S.Ct. at 423 (emphasis in original). Justice Rehnquist further wrote:

> To the extent that less blacks vote due to past discrimination, that in itself diminishes minority

> voting strength. But this occurs regardless of any particular state voting practice or procedure. . . . It is obvious that no plan adopted by the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. 105 S.Ct. at 423.

In the present case, the record shows that in 1982 the challenged multi-member structures elected a total of five black legislators.[1] Two black candidates, both running for public office for the first time in 1982, came very close to winning, demonstrating the potential for blacks to win more than a proportionate number of seats.[2] The single member districts ordered by the court, on the other hand, guarantee the election of six blacks from these districts and virtually assure that no more than seven blacks will be elected. These statistics demonstrate that not only were the court's findings on the Senate factors largely irrelevant to the question of equal access, but also that the multi-member districts could not have been the *cause* of whatever inequality of opportunity the court thought existed.

It is undisputed, for example, that the median income of blacks in the challenged districts is lower than that of whites. This problem, however, is endemic to the entire United States and nothing in the record demonstrates a relationship between this eco-

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[1]Forsyth County: 2 black representatives; Durham County: 1; Wake County: 1; Mecklenburg County: 1.

[2]Mecklenburg County: Jim Richardson finished ninth in a race for 8 seats, 250 votes behind the 8th place winner; Mecklenburg-Cabarrus Senate District: James Polk ran 5th in a race for 4 seats.

nomic disparity and multi-member districts. The elimination of at-large elections will not as Justice Rehnquist aptly wrote "subtract one jot or tittle" from this socio-economic situation. *See also, Collins v. City of Norfolk,* 768 F.2d 572, 575 (4th Cir. 1985).

The Senate factor analysis advocated by the Appellees sheds little light on the ultimate issue of whether the multi-member districts result in unequal electoral opportunity. Most of the factors are simply too remote in time to reveal anything about the political process today. Indeed, the factor analysis tends to count against the state 9 times *one* single fact: in the past nearly every jurisdiction in the nation discriminated, to some extent, against its black citizens. Using this analysis, *any* electoral practice challenged in any Southern jurisdiction would be found in violation of section 2. Indeed, the single member districts ordered as a remedy by the district court could be successfully attacked today on precisely the same record amassed below. In such a case the theory undoubtedly would be that, based on the totality of circumstances (*i.e.,* the Senate factors) single member districts restrict the influence of black voters and limit their potential to elect more than their proportional share of legislators. Using the analysis advocated by the Appellees the court would be compelled to find a violation of Section 2.

The Appellees' analysis is further flawed by their assumption that multi-member districts are at least presumptively violative of Section 2. *See* App.Br. at 2, 3, 20, 25. It is axiomatic that multi-member districts are not *per se* illegal. *White v. Regester,* 412 U.S. 755, 765 (1973); S.Rep. at 33. Moreover, the appellees contend that single shot voting is inherently

dilutive of black voting strength. App.Br. 59. This argument loses much of its force in light of Congress' position expressed in the Senate Report that prohibitions *against* single shot voting are indicative of vote dilution. *See* S.Rep. 29. The Appellees, however, want the Court to count against the State both the fact that blacks could not single shot in all elections 15 years ago, and the fact that they can today.[3] Neither blacks nor any other racial or political minority group are compelled to cast single shot votes in the challenged multi-member districts. All citizens are free to vote for a full slate, for one candidate or for some number in between. The votes of black citizens are not diluted simply they chose on the basis of race to concentrate their votes on one candidate. Nothing in the record supports the Appellees' inference that blacks must single shot in order to elect legislators responsive to their needs. On the contrary, black political organizations regularly endorse white democratic candidates because they represent the interests of the black community. R.454-55, 464-65, 638, 855, 1234-36.

If single shot voting is inherently dilutive, the Appellees have gained nothing by virtue of their victory below. Under the court-ordered plan, blacks in Durham, Forsyth, Mecklenburg, and Wake Counties are

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[3]North Carolina enacted an anti-single shot voting law for local elections in specified counties and municipalities in 1955. It was enforced until it was declared unconstitutional in 1972 in *Dunston v. Scott,* 336 F.Supp. 206 (E.D.N.C. 1972). It has not been enforced since 1972. At least since 1915, North Carolina has not had an anti-single shot provision for nomination or election of candidates for the North Carolina General Assembly. Stip. 91.

segregated into single member districts where they have no choice but to cast one vote and affect one election outcome.

Finally, the Appellees' interpretation of Section 2 leads to their contention that a finding of a violation of the statute is a factual conclusion subject to Rule 52. App.Br. 16. Appellees rely on *Anderson v. City of Bessemer City,* 105 S.Ct 1504 (1985), to support their position. *Anderson,* however, reiterates the basic holding of *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) that a district court's finding of discriminatory *intent* is a factual finding subject to Rule 52. If Section 2 required no more than proof of the Senate factors, then arguably a finding of dilution might be subject to Rule 52. The ultimate issue in this case, however, is whether multi-member districts result in less opportunity for blacks than whites to participate in the political process and to elect candidates of their choice. This is a mixed question of law and fact which requires the court to reach a conclusion by applying a rule of law to a particular set of facts. This Court has held in a variety of situations that such a determination is legal, not factual. *See Bose Corp v. Consumers Union of United States, Inc.,* 104 S.Ct. 1949 (1984). Thus the "clearly erroneous" standard under Rule 52 does not apply to the case at bar.

II. The Election of Minority Candidates Is a Recognized Indicator of Access to the Political Process.

The Appellees contend that the election of "some" minority candidates does not conclusively establish the existence of equal political opportunity. They proffer this argument in order to discount the significance of the results of the 1982 elections. In 1982, Durham

County, a 3 member district, which has a black voting age population of 33.6%, elected 1 black representative. Forsyth County, a 5 member district, which has a black voting age population of 22% elected 2 black representatives. Mecklenburg County, an 8 member district with a black voting age population of 25% elected 1 black representative and a second black candidate finished 9th, 250 votes behind the 8th place winner. In Wake County where the black voting age population is 20%, 1 black representative was elected to a 6 member delegation. In the Mecklenburg-Cabarrus Senate District a black candidate running for his first public office, finished 5th in a race for 4 seats. Obviously, proportional representation or better in 3 districts and near proportionality in the other 2 districts in question is significantly more than the "some" or "token" success described by the Appellees.

The Appellees insist that the language of Section 2 supports their theory that the 1982 elections do not count. The portion of subsection (b) on which the Appellees rely states as follows:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: 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.

This was included in the Dole compromise as a substitute for language in the House version which stated that "[t]he fact that members of a minority group have not been elected in numbers equal to the

group's proportion of the population shall not, in and of itself, constitute a violation of this section." H.R. Rep. 97-227 97th Cong., 1st Sess. 48 (1981). The House language gave rise to a great deal of concern in the Senate that the lack of proportional representation plus a mere scintilla of other evidence would be sufficient to establish a violation. *See, e.g.* 1 Senate Hearings 516 (statement of Sen. Hatch); *id.* at 1438 (testimony of Prof. Irving Younger). Senator Dole explicitly stated that the purpose of this compromise language was to ensure that the statute would not be construed to establish a right to proportional representation and that underrepresentation would not tend to establish a violation where the totality of circumstances demonstrated equal access. S.Rep. 194 (statement of Sen. Dole).[4]

The Appellees incorrectly assume that the language of the disclaimer is symmetrical. They reason that if lack of proportional representation does not establish unequal access to the process, then achievement of proportional representation does not establish equal access to the process. The Senate Report, however, directly states:

> *While the presence of minority elected officials is a recognized indicator of access to the process*, the "results" cases make clear that the mere

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[4]"The language of the subsection explicitly rejects as did *White* and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive." S.Rep. 194.

> combination of an at-large election and lack of proportional representation is not enough to invalidate that election method. S.Rep. 16 (emphasis added)

The Appellees further rely on *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) because, the Appellees claim, "in that case the court ruled for the plaintiffs despite the fact that blacks had won two-thirds of the seats in the most recent at-large election." App.Br. 55 This statement badly misrepresents the facts of the case upon which they rely. In *Zimmer*, the plaintiffs challenged the at-large election of a 9 member school board in East Carroll Parish where blacks constituted 59% of the population. The district court held for the parish. *Subsequent* to issuance of the district court's opinion blacks won 2 of 3 school board seats up for election in 1972 under the staggered term at-large system. The Court of Appeals on rehearing en banc reversed the decision declining to consider the 1972 election results because they were not part of the record. The *Zimmer* Court did not, as Appellees claim, rule for the plaintiffs despite black electoral success. The electoral success of blacks in East Carroll Parish was not dispositive because it was not part of the record.

Likewise, *all* the other cases cited by the Appellees fail to support their claim that electoral success of blacks is not dispositive of the issue of equal access. In *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984) 1 black had been elected to county office in the history of the county. In neither *Kirksey v. Board of Supervisors of Hinds County*, 554 F. 2d 139 (5th Cir. 1977) nor *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951

(5th Cir. 1978) had any blacks been elected to county office since the formation of the county. In *Cross v. Baxter*, 605 F.2d 875 (5th Cir. 1979) 1 black had been elected to the Moultrie City Council, but he was defeated in his bid for reelection. In *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975) there had been 1 black alderman in the town's history, but he was elected in 1968 when a popular white candidate withdrew from the election too late to have his name removed from the ballot. His name diverted so many white votes that a black won by a "stroke of luck." 515 F.2d 622. Finally, in *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) the only 3 minority candidates to be successful were slated and controlled by the white slating organization. None of these situations is comparable to the facts of the present case where blacks have been consistenly successful over a period of time and have achieved proportional representation in 3 of 5 challenged districts.

The Appellees further attempt to belittle the success of black candidates by comparing the statewide black population percentage with the racial composition of the entire General Assembly. App.Br. 2, 70, n. 74. This statistic is absolutely irrelevant to the present lawsuit. The Appellees challenged specific districts—they did not attack the statewide apportionment. Five districts are presently at issue: the House districts in Durham, Forsyth, Mecklenburg and Wake Counties and the Mecklenburg-Cabarrus Senate district. The appropriate comparison is on a district by district basis. *White v. Register*, 412 U.S. 755 (1973) (vote dilution cases require an "intensely local ap-

praisal.") The Appellees' statement that a 10% of the Legislature is black while 22% of the statewide population is black, might have some plausible relevance in an action challenging the legislative districts statewide. It has none here.

Contrary to the Appellees' representations, the 1982 election was not such a dramatic turn around that one might conclude that the results were an aberration.[5] Black candidates in the districts in question have enjoyed considerable success since the early 1970s. *See* Stips. 114-173. In Durham County, which is one third black, for example, one black has been elected to its three member delegation in every election since 1973.

Over the past 10 years blacks have consistently achieved substantial electoral success in the challenged districts. The Appellants do not rely on a one-time victory by a "stroke of luck" to demonstrate equal electoral opportunity. Rather, the record shows that over the long run, the process turns out fair results.

III. Racially polarized voting has legal significance when it operates consistently to defeat black candidates because of their race.

The Appellees contend that racially polarized voting occurs whenever blacks as a group vote differently

[5]The court "concluded" neither that the results of the 1982 election were an aberration, nor that the pendency of this litigation worked an advantage for blacks. The Appellees state several times in their brief that whites voted for blacks in 1982 only to defeat this lawsuit. (*See* App.Br. at 9, 17). They can cite nothing in the record to support this statement. They refer instead to the footnote in the district court's opinion in which the court merely observed that the inferences made on this topic were inconclusive. *See* J.A. 39, n. 27.

than whites as a group. App.Br. 72 Using this standard, every election in this country, including presidential elections, would qualify as racially polarized. The Senate Report, however, without actually defining polarized voting, states that it has significance in a Section 2 case when "race is the predominant determinant of politcal preference." S.Rep. at 33.[6] Appellees' regression analysis failed to prove that race is the predominant or even a dominant determinant of political preference.

The bivariate regression analysis advocated by the Appellees' expert and accepted by the court, does not prove that race is determining election outcomes.[7] A

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[6]*See also, Terrazas v. Clements*, 581 F.Supp. 1329, 1352 (N.D. Tex. 1984) ("ethnicity of the candidate or the electorate determines the outcome of political events"); *Jordan v. Winter*, No. GC82-80-WK-O (N.D. Miss. April 16, 1984) (majority of voters choose their preferred candidates on the basis of race); *Cross v. Baxter*, 604 F.2d 875, 800 n.8 (5th Cir. 1979) (where "race plays. . . . part in voters' choices"); *Political Civil Voters Organization v. City of Terrell*, 565 F.Supp. 338, 348 (N.D. Tex. 1983) ("Racially polarized voting occurs when race is a predominant factor and influence in voter choice"); (*Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) ("The inquiry is whether race or ethnicity was such a determinant of voting preference"); *U.S. v. Marengo Co. Comm.*, *supra*, 731 F.2d at 1567 ("race is the main issue in Marengo Co. politics"); *Lee County Branch NAACP v. City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984) (quoting from *Jones v. City of Lubbock*, *supra* at 234).

[7]Appellees argue that the Appellants did not contest the adequacy of their expert's methodology in the district court. This is simply incorrect. The Appellants' expert testified that although bivariate regression analysis was commonly used in vote dilution cases, it was inadequate because it failed to control for all the other obvious variables such as age, incumbency, and

regression analysis is a device which measures relationships: it provides quantitative estimates of the effects of different factors on a variable of interest. *See* 80 Col.L.Rev. 702 (1989). However, the regression analysis retains the properties associated with it only if one has in fact included all the variables likely to have an effect on the dependent variable. *Id* at 704. In other words, the regression model must mirror reality. In Dr. Grofman's model all candidates are fungible but for the distinguishing characteristic of race. In reality, however, candidates differ on the issues, they live in different neighborhoods, they belong to different political parties, espouse a variety of religious beliefs, and have vastly different educational backgrounds. If these variables were in fact determining, to some extent, election outcomes, the introduction of them into the regression model could significantly reduce the value of the correlation coefficients derived for race. *See, McCleskey v. Zant*, 580 F.Supp. 338, 362 (N.D. Ga. 1984),aff'd, 753 F.2d 877 (5th Cir. 1985). Moreover, the Appellees' argument that a multivariate regression analysis requires vote dilution plaintiffs to prove the intent of the voters cannot withstand even cursory examination. Multivariate analysis measures precisely the same thing as a bivariate regression: the *relationship*, in this instance, between election outcomes and a given variable. It does not purport to discover motives. It merely ensures that the relationships predicted by the model will have a certain validity because the model is based on reality.

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placement on the ballot. R. 1387-89. In addition, the Appellees' expert was cross-examined on his failure to test for any other variable but race. R. 177.

According to the Appellees the district court found polarized voting when "a substantial enough number of white citizens do not vote for black candidates, so that the polarization operates, under the election method in question, to diminish the opportunity of black citizens to elect candidates of their choice." App.Br. 72. Even if the court had developed such a standard, which it did not, it would not support a finding of polarized voting in this case. In the 1982 elections the most recent and therefore most reliable indicator of current voting trends, blacks enjoyed a higher success rate than whites. In Forsyth County, for example, 11 candidates ran in the democratic primary: 9 whites and 2 blacks. Of these, 5 were successful: 3 whites and 2 blacks. *See* Pl. Ex. 15(e), R.85, 112. In the general election, 8 candidates ran for the 5 seats: 6 whites and 2 blacks. *See* Pl. Ex. 15(f), R.86, 112. Of these 3 whites and 2 blacks were successful. *Id.* Thus in the democratic primary whites had a 33% success rate while blacks had a 100% success rate. In the general election, the whites had a success rate of 50% while that for blacks was again 100%. Similarly in Wake County 5 of 14 whites were successful in the democratic primary while the only black candidate also prevailed. *See* Pl. Ex. 17(d) R. 85, 112. In the general election, where 5 out of 10 whites lost, the 1 black candidate won. *See* Pl. Ex. 17(e), R. 86, 112. In Durham and Mecklenburg Counties as well, blacks have as good or better rates of success than white candidates. *See* Pl. Ex. 14c, R. 85, 112; Pl. Ex. 14(d), R. 86, 112; Pl. Ex. 16(e), R. 85, 112; Pl. Ex. 16(d), R. 86, 112. It is obvious that black voters in the challenged districts do not, as a result of polarized voting, have less opportunity than whites to elect candidates of their choice.

CONCLUSION

For the reason stated herein and in Appellants' Brief, the decision of the United States District Court below should be reversed.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

JERRIS LEONARD
Counsel of Record

KATHLEEN HEENAN MCGUAN
LEONARD & MCGUAN, P.C.
900 17th Street, N.W.,
Suite 1020
Washington, D.C. 20006
(202) 872-1095

JAMES WALLACE, JR.
Deputy Attorney General for Legal Affairs

TIARE B. SMILEY
NORMA S. HARRELL
Assistant Attorneys General
Attorney General's Office
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7218

Attorneys for Appellants