No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* SUPPORTING APPELLEES

JAMES ROBERTSON
HAROLD R. TYLER, JR.
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
FRANK R. PARKER *
SAMUEL ISSACHAROFF
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 'Eye' Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

SAMUEL RABINOVE
RICHARD T. FOLTIN
THE AMERICAN JEWISH COMMITTEE
165 East 56 Street
New York, New York 10022
(212) 751-4000

Attorneys for *Amici Curiae*

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* SUPPORTING APPELLEES

STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to assure civil rights to all Americans. Protection of the equal voting rights of all citizens has been an important component of the Committee's work, and it has submitted *amicus curiae* briefs in a number of voting rights cases decided by this Court, including *Escambia County v. McMillan*, —— U.S. ——, 80 L.Ed. 2d 36 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *McDaniel v. Sanchez*, 452 U.S. 130 (1981); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has more than eighteen years' experience litigating voting rights cases, including several appearances before this Court.

The American Jewish Committee is a national organization of approximately 50,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of this organization that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve the security and constitutional rights of all Americans, irrespective of race, religion, sex or national origin.

The American Jewish Committee and the Lawyers' Committee for Civil Rights Under Law strongly supported enactment of the Voting Rights Act of 1965. We continue to believe that this landmark statute, as amended, must be enforced vigorously to fulfill its objectives and therefore urge affirmance of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal challenges a determination by a three-judge district court that a legislative redistricting plan enacted by the General Assembly of North Carolina had the effect of diluting black voting strength in six multi-member state House of Representatives and Senate districts and in one racially gerrymandered state Senate district.

Although this appeal presents this Court with its first plenary review of a case involving Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, since its amendment by Congress in 1982, the issues presented nonetheless fall within the well-developed jurisprudence of this Court concerning vote dilution. At stake in this litigation is the ability of the federal judiciary under the mandate of the Voting Rights Act to void discriminatory redistricting plans and to secure for black citizens the full opportunity to equally participate in the political process and to elect the representatives of their choice. Appellants, with the backing of the Solicitor General, seek to debilitate the amended Voting Rights Act by asserting that the trial court's careful examination of the context in which a vote dilution claim arises necessarily leads to a "proportional representation" standard of review. In addition, appellants would reinfuse an intent standard into the Act, despite its express repudiation by Congress in 1982, by requiring proof of the electorate's racial motivation before racially polarized voting may be weighed as an evidentiary factor in a vote dilution claim.

It is instructive that the attempt to secure such an evisceration of the amended Voting Rights Act occurs in the context of at-large elections. Beginning with *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Burns v. Richardson*, 384 U.S. 73 (1966), and continuing through *Rogers v. Lodge*, this Court has repeatedly viewed with skepticism the use of multimember districts in communities evidencing a history of sharp racial polarization and discriminatory practices. Although the use of at-large sys-

tems in itself violates neither the Voting Rights Act nor the Constitution, it is long settled that these systems singularly lend themselves to an impermissible diminution of the value of the franchise of minority populations. In amending the Voting Rights Act in 1982, Congress drew upon two challenges to at-large elections to frame the "totality of the circumstances" standard embodied in Section 2 of the Act. *See White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976).

Under the statutory "totality of the circumstances" test derived from *White* and *Zimmer*, vote dilution claims are of necessity fact specific and must correspond to the local context. North Carolina is a state with a long history of official discrimination against blacks in all aspects of civil life, including the iron-clad preclusion of any role in political life. From the conclusion of Reconstruction until 1969, no black had ever been elected to the State House of Representatives; not until 1975 did any blacks number among the state's Senators. Against this background, the claims of "proportional representation" can be laid to rest with the most rudimentary examination of North Carolina political life. Although blacks constitute 22.4% of the state's population, between 1971 and 1982 (the year this lawsuit was filed), the number of blacks in the state House was between two and four out of a total of 120; between 1975 and 1983, there were one or two black members of the state Senate out of a total of 50. Only five House districts and two Senate districts are involved in this litigation and, as a simple arithmetical matter, the outcome would not and could not guarantee proportionality.

This appeal permits this Court to affirm the district court's proper application of the congressionally-specified evidentiary factors of illegal vote dilution. Beyond reaffirming the application of amended Section 2, however, this appeal allows for a renewed declaration of the piv-

otal role of the voting rights of America's minority citizens. If the political processes are to be utilized to eradicate the vestiges of discrimination from our society, full and equal participation in the political process, including the ability to elect representatives, must be guaranteed to minorities under the careful and exacting judicial scrutiny mandated by Congress.

As amici, the Lawyers' Committee for Civil Rights Under Law and the American Jewish Committee appeal to this Court not to waver from this task.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE TOTALITY OF CIRCUMSTANCES DEMONSTRATED AN IMPERMISSIBLE DILUTION OF MINORITY VOTING STRENGTH, AND ITS ANALYSIS OF EACH OF THE RELEVANT FACTORS WAS CONSISTENT WITH THE VOTING RIGHTS ACT AMENDMENTS OF 1982.

A. Section 2 Violations Are Established By the "Totality of the Circumstances."

In 1982, Congress enacted a series of amendments to the Voting Rights Act, 42 U.S.C. § 1973, to secure for victims of discriminatory vote dilution a strong and workable statutory remedy. Congress devoted particular attention to the standards for proving abridgment of the right to vote under Section 2 of the amended Act as a result of this Court's ruling that claims of unconstitutional vote dilution can be premised only upon a showing of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).[1] The legislative history of the 1982 amendments makes unmistakably clear that the principal objective was to provide a remedy for electoral schemes that deny minorities an equal opportunity to participate in the political process and elect representatives of their

[1] The *City of Mobile* plurality extended the same standard to vote dilution claims under the pre-1982 version of Section 2. 446 U.S. at 61.

choice without requiring proof of discriminatory intent. S. Rep. No. 417, 97th Cong., 2d Sess. at 15-16, *reprinted* in 1982 U.S. Code Cong. & Ad. News 177 [hereinafter cited as S. Rep.].[2]

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[2] The Solicitor General argues in his brief that the Senate Report "cannot be taken as determinative on all counts," and that the statements of Senator Dole must instead "be given particular weight." Brief for the United States as Amicus Curiae Supporting Appellants at 8 n.12, 24 n.49 [hereinafter cited as Br. for U.S.] However, Senator Dole fully endorsed the Committee Report, as is clear from the first sentence of his Additional Views: "The Committee Report is an accurate statement of the intent of S. 1992, as reported by the Committee." S. Rep. at 193 (Additional Views of Senator Dole). *See also* S. Rep. at 199 (Supplemental Views of Senator Grassley, co-sponsor of Dole compromise amendment) ("I am wholly satisfied with the bill as reported by the Committee and I concur with the interpretation of this action in the Committee Report").

Contrary to the Solicitor General's contention, the Senate Report must be regarded as an authoritative pronouncement of legislative intent, since it was endorsed by the supporters of the original bill, as well as by the proponents of the compromise amendment. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1920). The Solicitor General's extensive reliance on the statements of witnesses before the Senate Committee on the Judiciary is unsupportable: "Remarks . . . made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight . . ." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976). *See also National Woodwork Mfrs. Assoc. v. N.L.R.B.*, 385 U.S. 612, 639-40 (1967); *N.L.R.B. v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964); *United States v. Calamaro*, 354 U.S. 351, 357 n.9 (1957).

The Solicitor General's position is a radical departure from the previous reliance by the Justice Department on the Senate Report as the authoritative vehicle for interpreting Section 2. References to the Report are found throughout the government argument opposing the at-large election system in Dallas County, Alabama (Brief for Appellant at 20, 25, 26, 27, 35, 38, 41, *United States v. Dallas County Commission*, 739 F.2d 1529 (11th Cir. 1984), and are cited as authority in more than ten pages of its twenty-five page argument in *United States v. Marengo County Commission*, Brief for Appellant at 16, 18, 19, 20, 21, 22, 23, 25, 26, 27, 36, 39. *United States v. Marengo County Commission*, 731 F.2d 1546 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 375 (1984).

The intent of Congress as revealed by the statutory language and the legislative history of the 1982 amendment to Section 2 makes five things clear.

First, in enacting a Section 2 results test, Congress intended to eliminate the necessity of demonstrating discriminatory intent to prove a violation. S. Rep. at 27; *McMillan v. Escambia County (McMillan II)*, 748 F.2d 1037, 1041-42 (5th Cir. 1984).

Second, the results test expressly "restore[d] the pre-*Mobile* legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote," S. Rep. at 27, which Congress understood not to require proof of discriminatory intent. This "results" test was a statutory codification of the test used by this Court in *White v. Regester*, S. Rep. at 27, and the pre-*City of Mobile* case law, most notably, *Zimmer v. McKeithen*. Accordingly, the pre-*City of Mobile* cases provide a guide as to how the statute is to be interpreted. S. Rep. at 27; *see also United States v. Marengo County Commission*, 731 F.2d 1546, 1565-66 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 375 (1984).

Third, Congress intended that proof of a Section 2 violation should be "based on the totality of the circumstances." 42 U.S.C. § 1973(b). Under this standard, plaintiffs are held to a showing that the "political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White*, 412 U.S. at 766. The typical evidentiary factors which may be used to prove that minorities have less opportunity to participate in the political process are spelled out in the Senate Report.[3]

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[3] The Senate Report specified the following constellation of factors:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the

Fourth, the evidentiary factors derived from these cases are relevant in any judicial inquiry into claims of vote dilution. However, the legislative history is clear that Congress intended that no one factor should predominate, and "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. at 29. Instead, Section 2 "requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of

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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 provision, 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 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.

Two additional factors of lesser evidentiary significance are mentioned:

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; [and]

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.

S. Rep. at 28-29 [footnotes omitted]

whether the voting strength of the minority voters is . . . 'minimized or canceled out.' " S. Rep. at 29 n.118, *quoting Fortson* and *Burns*.

Fifth, Congress intended Section 2 to reach practices that either completely negate or minimize the voting strength of minorities. The electoral successes of minority candidates is one of a number of circumstances "which may be considered." 42 U.S.C. 1973(b). Consequently, "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,' in violation of this section." S. Rep. at 29 n.115, *quoting Zimmer*, 485 F.2d at 1307.

Of necessity, the question of the existence of vote dilution entails an intensely factual inquiry. The standard developed by the pre-*City of Mobile* case law and incorporated by Congress into the 1982 amendments provides a framework that highlights the features that have recurred through the various factual settings where vote dilution has been found. These factors correspond to a paradigmatic setting in which a claim of vote dilution incorporates some combination of the following: (1) structural obstacles to the electoral success of minorities, such as multimember districts, (2) a history of discrimination and/or absence of or minimal minority political success, and (3) certain behavioral patterns that accentuate the racial axis of the vote dilution, such as racially polarized voting and racial appeals in electoral campaigns. The juxtaposition of the particular factual pattern against the paradigm model of how an electoral system can operate to cancel out or dilute the exercise of the franchise by racial minorities yields the conclusion whether a violation of Section 2 of the Voting Rights Act exists.

B. The District Court's Ultimate Conclusion of Discriminatory Results was Fully Supported by the Totality of Circumstances.

Twenty years of voting rights litigation has imparted the clear lesson that certain electoral systems, foremost

among them multimember districts or at-large elections, have shown themselves to have resulted in the illegal dilution of minority voting strength with such regularity that, while not *per se* violative of the Voting Rights Act, these systems must elicit from reviewing courts a serious presumption of statutory infirmity under amended Section 2. In its last full treatment of a constitutional voting rights claim, this Court emphasized "the tendency of multi-member districts to minimize the voting strength of racial minorities." *Rogers v. Lodge*, 458 U.S. at 627. This Court has repeatedly ruled that at-large elections violate the statutory or constitutional rights of minority voters,[4] and has directed courts fashioning remedial decrees to avoid the implementation of such electoral systems.[5]

A wealth of social scientific literature confirms the "conventional hypothesis" that at-large elections constitute a significant political disadvantage for minority candidates and voters. *See* Davidson and Korbel, *At-Large Elections and Minority Group Representation*, 43 J. Politics 982, 994-95 (Table 1) (1981) (listing empirical studies).[6] Dissenting from the application of the constitutional intent standard in *Rogers v. Lodge*, Justice

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[4] *See Rogers, supra*; *White, supra*; *Perkins v. Matthews*, 400 U.S. 379, 389 (1971) (at-large elections described as method for whites to retain electoral control after black voter registration increase in wake of Voting Rights Act). In addition, sixteen of the 23 appellate court cases cited in the Senate Report involved challenges to at-large elections, of which ten were successful. S. Rep. at 23 n.78.

[5] *Connor v. Johnson*, 402 U.S. 690, 692 (1970) ("when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."); *see also Wallace v. House*, 425 U.S. 947 (1976); *East Carroll Parish Board v. Marshall*, 424 U.S. 636, 639 (1976); *Chapman v. Meier*, 420 U.S. 1, 18 (1975).

[6] *See also* E. Banfield & J. Wilson, *City Politics* 91-96, 303-308 (1963); A. Karnig & S. Welch, *Black Representation and Urban Policy* 99 (1980); Berry and Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla. St. U. L. Rev. 85, 93 (1979); Engstrom

Stevens focused on the inherent tendency of at-large systems to maximize majority political power and reemphasized this Court's skeptical view of multimember districting. 458 U.S. at 632, 637-38 & n.16 (Stevens, J., dissenting) (quoting 1 J. Kent, *Commentaries on American Law* 230-31 (12th ed. 1873)).

The facts in this case present a clear example of the interaction between the at-large structural impediment and the history and behavioral patterns of discrimination in North Carolina.[7] The district court's findings of fact are replete with documentation of the discrimination against blacks in North Carolina, not only with respect to the right to vote, but also in housing, education, employment, health, and other public and private facilities. 590 F. Supp. at 359-64. The court noted past use of literacy tests, poll taxes, anti-single shot voting laws, numbered seat requirements, and other means to deny blacks the opportunity to register and vote, including the continued use of a majority vote requirement.

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and McDonald, *The Election of Blacks to City Councils*, 75 Am. Pol. Sci. Rev. 344 (1981), Jones, *The Impact of Local Election Systems on Black Political Representation*, 11 Urb. Aff. Q. 345 (1976); Karnig, *Black Representation on City Councils*, 12 Urb. Aff. Q. 223-242 (1976); Kramer, *The Election of Blacks to City Councils*, 1971 J. of Black Studies 443-49 (1971); Latimer, *Black Political Representation in Southern Cities*, 15 Urb. Aff. Q. 65, 71-82 (1979); Robinson and Dye, *Reformism and Black Representation on City Councils*, 59 Soc. Sci. Q. 133-141 (1978); Sloan, *"Good Government" and the Politics of Race*, 17 Social Problems 161, 170-73 (1969).

In addition, studies have documented the impediments against black representation in southern legislatures created by at-large elections, and the amelioration of the discriminatory effects following the elimination of multimember districts. *See, e.g.*, Parker, *Racial Gerrymandering and Legislative Reapportionment* in C. Davidson, *Minority Vote Dilution* 88 (1984).

[7] *Amici* emphasize that six of the seven challenged districts use at-large elections. The remaining district, Senate District No. 2, was created by extensive realignment and resulted in the division of a black population concentration, thereby precluding an effective voting majority. 590 F. Supp. at 358.

The court found that black voter registration rates remained depressed relative to whites "because of the long period of official state denial and chilling of black citizens' registration efforts." *Id.* at 361. Also as a consequence of the history of discrimination, blacks continue to suffer from a lower socioeconomic status which, the court found, continues to impair their ability to participate on an equal basis in the political process. *Id.* at 361-63. The historic use of racial appeals in political campaigns was found to persist in North Carolina, and to continue to affect the capability of blacks to elect candidates of their choice. *Id.* at 364. Finally, voting was found to be severely racially polarized in the challenged districts, *id.* at 367-72, and black candidates to remain at a disadvantage in terms of relative probability of success in running for office. *Id.* at 367.

In sum, with the single exception of denial of access to a candidate slating process, the district court found that all of the factors specified in the Senate Report existed or were present in the recent past in the challenged districts. More important, the persistent effect of each factor, even in isolation, was found to have a direct and appreciable impact on present minority political participation which continued to disadvantage blacks relative to whites. In light of these findings of fact, the district court properly concluded that the signposts for vote dilution drawn from the case law and legislative history of Section 2 all pointed to the dilution of minority voting strength in the multimember districts and the single-member Senate district.

II. THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT THE ELECTION OF SOME MINORITY CANDIDATES DID NOT ALTER THE HISTORIC PATTERN OF LACK OF OPPORTUNITY FOR MINORITY VOTERS, NOR DID IT ADOPT A PROPORTIONAL REPRESENTATION STANDARD.

Congress drew upon *White* and *Zimmer* as model judicial interventions to remove structural barriers that im-

peded minority access to the political process. It bears emphasis that many of the factors focused upon in *White* and its progeny are not in themselves either illegal or unconstitutional but may nonetheless, in their aggregate, trigger the need for remedial intervention.[8]

Appellants' arguments before this Court would defeat the overall inquiry into the structures, practices and behaviors affecting minority political opportunity in two critical ways: first, appellants would have the multi-factored *White/Zimmer* analysis negated by the episodic election of black candidates, and second, appellants seek to introduce an intent standard into the well-developed concept of racially polarized voting.

A. The Election of Some Black Officials Did Not Disprove Lack of Equal Opportunity to Elect Minority Officials.

Appellants contend that "the degree of success at the polls enjoyed by black North Carolinians" distinguishes this suit from prior vote dilution cases and is sufficient "to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process." Br. of Appellants at 24. Similarly, the Solicitor General asserts that the challenged multimember districts have "apparently enhanced—not diluted—minority voting strength." Br. for U.S. at 23. Both Appellants and the Solicitor General cite the extent of claimed minority success as a principal reason for overturning the district court. This argument is wrong as a matter of law and fact.

As previously stated, the legislative history is clear that Congress intended that a Section 2 violation should

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[8] "[T]he facts in *White* set the contours for the puzzle, but the blank spaces could be filled in with different pieces . . ." Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 699 (1982). *See also* Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va.L.Rev. 155 (1983).

depend upon "the totality of the circumstances," and the election of minority candidates in challenged districts does not, in itself, foreclose a finding of vote dilution. S. Rep. at 29 n.115. Thus, the degree of minority electoral success is "*one* circumstance which *may* be considered . . ." 42 U.S.C. 1973 (emphasis added). *See also* S. Rep. at 29 ("there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."). Indeed the proviso in Section 2[9] was enacted in response to concerns that a results test would devolve into a standard focused solely on the extent of minority electoral success.

The two principal cases cited by the Senate Report, *White* and *Zimmer*, both provide direct precedent for the district court's ruling that the election of minority candidates does not necessarily foreclose a finding of vote dilution. In *White*, this Court determined on facts almost identical to the present case that multimember legislative districts in Dallas and Bexar Counties, Texas, denied minority voters equal opportunities to elect candidates of their choice notwithstanding that two blacks and five Mexican-Americans had been elected to the Texas legislature from those districts. 412 U.S. at 766, 768-69. Similarly, in *Zimmer*, the Fifth Circuit found vote dilution in at-large, county-wide voting despite the election of three black candidates after the case was tried.[10]

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[9] "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.

[10] "[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority

Numerous pre-*City of Mobile* cases, which Congress intended to govern Section 2, establish the proper legal standard that, where other evidence of minority vote dilution is present, the election of minority candidates does not foreclose a finding of a voting rights violation.[11] Courts construing Section 2, as amended, have reached the same conclusion.[12]

The reasoning of these cases should be apparent. Under at-large voting, the election processes can easily be manipulated by the white voting majority to achieve any desired result, and the election of minority candidates alone is not determinative of whether minority voters enjoyed a genuine opportunity to elect candidates "of their choice." Under certain circumstances, notably the pendency of a challenge to at-large elections, the election

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candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record." 485 F.2d at 1307.

[11] *Cross v. Baxter*, 604 F.2d 875, 885 (5th Cir. 1979) ("district court erroneously held that the election of a single black official foreclosed any possible dilution claims"); *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 (5th Cir. 1978); *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 149 n.21 (5th Cir. 1977), *cert. den.* 434 U.S. 877 (1977); *Graves v. Barnes (Graves II)*, 378 F. Supp. 640, 648, 659 (W.D. Tex. 1974), *vac'd on other grounds sub nom. White v. Regester (White II)*, 422 U.S. 935 (1975); *Wallace v. House*, 377 F. Supp. 1192, 1197 (W.D. La. 1974), *aff'd in part and rev'd in part on other grounds*, 515 F.2d 619 (5th Cir. 1975), *vac'd on other grounds*, 425 U.S. 947 (1976); *Beer v. United States*, 374 F. Supp. 363, 398 n.295 (D.D.C. 1974), *vac'd on other grounds*, 425 U.S. 130 (1976); *Yelverton v. Driggers*, 370 F. Supp. 612, 616 (S.D. Ala. 1974).

[12] *See Ketchum v. Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984), *cert. denied*, 86 L.Ed.2d 692 (1985); *Marengo County*, 731 F.2d at 1572; *NAACP v. Gadsden County School Bd.*, 691 F.2d 978 (11th Cir. 1982); *Sierra v. El Paso Ind. School Dist.*, 591 F. Supp. 802, 810 (W.D. Tex. 1984); *Major v. Treen*, 574 F. Supp. 325, 351 (E.D. La. 1983); *Political Civil Voters Organization v. Terrell*, 565 F. Supp. 338, 342 (N.D. Tex. 1983).

of hand-picked minority candidates might be "politically expedient" to the white majority or entrenched political forces. *Zimmer*, 485 F.2d at 1307. Similarly, such election of minority candidates might well be part of an effort to moot claims of minority vote dilution and to "thwart challenges to election schemes on dilution grounds." *Id.*

In rushing to herald the electoral success of North Carolina blacks, appellants and the Solicitor General overlook the critical findings of fact of the district court. The statewide figures reveal that there were never more than four blacks in North Carolina's 120-member House of Representatives between 1971 and 1982, and never more than two blacks in the 50-member State Senate from 1975 to 1983. 590 F. Supp. at 365. In the period from 1970 to 1982, black Democrats in general elections within the challenged districts lost at three times the rate of white Democrats. Tr. 114.

The district court's findings with respect to the 1982 elections showed that there were "enough obviously aberrational aspects in the most recent elections," 590 F. Supp. at 367, to disprove the contention that blacks were not still disadvantaged in the multi-member districts at issue. Although black Democratic candidates did enjoy some degree of success, it did not nearly rival the success of white Democratic candidates, not a single one of whom lost in the general elections. Tr. 114, 115. In House District 36, a black Democrat won one of the 8 seats in the district in 1982. Since there were only seven white candidates for the 8 seats in the primary, it was a mathematical certainty that a black would win. *Id.* at 369. In House District 23, there were only 2 white candidates for 3 seats in the 1982 primary, and the black candidate ran unopposed in the general election, but still received only 43% of the white vote. *Id.* at 370. In three other elections prior to 1982, the same black candidate won in unopposed races, yet failed to receive a majority of white votes in each contest. *Id.*

The district court made two critical findings of fact concerning the purported electoral successes of blacks in North Carolina. First, even in elections where black candidates were victorious, witnesses for the plaintiffs and defendants alike agreed that the victories were largely due to extensive single-shot voting by blacks.[13] Tr. 85, 181, 182, 184, 1099. Even the defendants' expert witness conceded that, "as a general rule," black voters had to single-shot vote in the multimember districts at issue in order to elect black candidates. Tr. 1437. Thus the district court determined, "[o]ne revealed consequence of this disadvantage is that to have a chance of success in electing candidates of their choice in these districts, black voters must rely extensively on single-shot voting, thereby forfeiting by practical necessity their right to vote for a full slate of candidates." 590 F. Supp. at 369.

Second, the district court also concluded that the evidence at trial showed that in several of the 1982 elections, "the pendency of this very litigation worked as a one-time advantage for black candidates in the form of unusual political support by white leaders concerned to forestall single-member districting." 590 F. Supp. at 367 n.27. This is exactly the concern which led the *Zimmer* court to reject assertions identical to those advanced by the appellants here.

In sum, the evidence amply supported the district court's conclusion that:

> [T]he success that has been achieved by black candidates to date is, standing alone, too minimal in total

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[13] Single-shot voting occurs when minority voters concentrate their voting strength on one or a few preferred candidates and deliberately fail to exercise their right to cast ballots for other candidates in the race. The purpose of single-shot voting is to enhance the likelihood of a minority candidate's election by depriving nonminority candidates of the minority vote; however, it also has the effect of completely eliminating any influence minority voters might have over the choice of the elected nonminority candidates. *See City of Rome v. U.S.*, 446 U.S. 156, 184 n.19 (1980).

> numbers and too recent in relation to the long history of complete denial of any elective opportunities to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant adverse factor in the political processes of the state—either generally or specifically in the areas of the challenged districts.

590 F. Supp. at 367. In reviewing this issue, this Court should defer to the "intensely local appraisal of the design and impact of the . . . multimember districts," *White*, 412 U.S. at 670, which the three-judge district court gave the facts of this case. On this issue, appellants' contentions are wrong as a matter of law, and the district court's factual findings are supported by substantial evidence and are not clearly erroneous.[14]

B. Appellants' Claim that the District Court Imposed a Proportional Representation Standard Harkens Back to the Rejected Arguments Made by Opponents of the 1982 Amendment to the Voting Rights Act.

Without doubt the most inflammatory claim that can be raised in a vote dilution case is the charge of proportional representation. *Cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 156-167 (1977). Appellants seek to obscure the district court's careful examination of all the *White/Zimmer* factors by raising the blazing charge that the district court "flatly" stated a standard of "guaranteed proportional representation." Br. for Appellants at 19. In appellants' eyes, any reference to the actual proportions of blacks in North Carolina as compared to black electoral success reveals the entire factual inquiry to have been a subterfuge designed to conceal an imposition of proportional representation. The district court opinion, however, expressly disavows any contention that a violation of Section 2 can be established by "the fact that blacks have not been elected under a challenged districting plan in numbers propor-

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[14] *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); Fed. Rule Civ. Pro. 52(a).

tional to their percentage of the population." 590 F. Supp. at 355.

Consideration of minority electoral success is one of many evidentiary factors which the case law and legislative history of the Voting Rights Act specify as proper grounds for judicial examination. The leap from the evidentiary weighing of the rate of success to an *ipso facto* creation of an entitlement to proportional representation is derived from the arguments made by opponents of the 1982 Amendments to the Voting Rights Act, namely that there is no intelligible distinction between a results test and proportional representation.[15] The argument that consideration of the rate of electoral success as one evidentiary factor inevitably yields proportional representation was firmly rejected both by the sponsors of the original amendment and the proponents of the Dole compromise. *See, e.g.*, S. Rep. at 33 ("[T]he Section creates no right to proportional representation for any group"); *id.* at 194 (Additional Views of Senator Dole) ("I am confident that the 'results' test will not be construed to require proportional representation"). Since the district court properly considered the totality of circumstances under the mandated legal standards, the efforts to persuade this Court that it in fact required proportional representation can only be understood as an invitation to embrace the views of opponents of the 1982 amendments and should categorically be declined.

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[15] *See e.g.*, 1 *Voting Rights Act: Hearings on S. 53 et al. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 3 (1982) (Opening Statement of Senator Orrin Hatch) ("In short, what the 'results' test would do is to establish the concept of 'proportional representation' by race as the standard by which courts evaluate electoral and voting decisions"). A full discussion of the proportional representation objections of the legislation's opponents can be found in the Senate Subcommittee's Report. *See* S. Rep. at 139-147 (Voting Rights Act: Report of the Subcomm. on the Constitution); *see also id.* at 186-87 (Attachment B of Subcommittee Report: Selected Quotes on Section 2 and Proportional Representation).

III. APPELLANTS SEEK TO NULLIFY THE 1982 AMENDMENT TO THE VOTING RIGHTS ACT BY FORECLOSING THE JUDICIAL INQUIRY INTO THE TOTALITY OF THE CIRCUMSTANCES WHICH GIVE RISE TO CLAIMS OF VOTE DILUTION.

A. The Use of Statistical Analysis and Lay Witnesses to Establish Racially Polarized Voting Without Any Inquiry Into Voter Motivation Is Fully Supported by the Case Law and the Legislative History of Section 2.

Appellants argue that the district court employed an erroneous legal standard in concluding that the facts of this case showed a high degree of racially polarized voting. They contend that the district court adopted a *per se* rule that racial bloc voting occurs whenever less than 50 percent of the white voters cast ballots for black candidates. Br. for Appellants at 36.[16]

Racially polarized voting is a key component of a vote dilution claim, as emphasized both by Congress and this Court. "In the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections." S. Rep. at 33. As this Court wrote in *Rogers*,

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.

458 U.S. at 623. Racially polarized voting, when proven, provides a court with a critical evidentiary piece show-

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[16] The Solicitor General conceded in his brief in support of the Jurisdictional Statement that "[a]ppellants' restatement of the district court's standard for racial bloc voting is imprecise," since "the district court did not state that polarization exists unless white voters support black candidates in numbers at or exceeding 50%." Br. for the U.S. as *Amicus Curiae* at 13 n.10.

ing the political ostracism of a racial minority. *City of Rome v. United States*, 472 F. Supp. 221, 226 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). When combined with either at-large elections or a suspected gerrymander, bloc voting provides important confirmation that the potential structural impediments to minority political opportunity will in fact bar equal opportunity and the ability to elect representatives perferred by the minority community. *See Marengo County*, 731 F.2d at 1566-67 (racially polarized voting ordinarily the "keystone" of a dilution claim); *Nevett v. Sides*, 571 F.2d 209, 223 n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

At bottom, racially polarized voting is that which "follow[s] racial lines . . ." *United Jewish Organiaztions*, 430 U.S. at 166 n.24. Courts construing the 1982 amendment to Section 2 have found racially-polarized voting when the facts show a consistent pattern of a majority of one race voting opposite to the majority of the other race. *McMillan II*, 748 F.2d at 1043. Whether or not a Section 2 violation has been proved depends upon the degree of racially polarized voting, i.e., "*the extent to which* voting in the elections of the state or political subdivision is racially polarized." S. Rep. at 29 (emphasis added).

In the present case, based on evidence presented by expert witnesses and corroborated by the direct testimony of lay witnesses, the district court concluded that "within all the challenged districts racially polarized voting exists in a persistent and severe degree." 590 F. Supp. at 367. In direct reliance on the language of the Senate Report, the district court framed the inquiry in terms of "determin[ing] the extent to which blacks and whites vote differently from each other in relation to the race of the candidate." 590 F. Supp. at 367-68 n.29. The district court relied in part on testimony by plaintiffs' expert witness, Dr. Bernard Grofman, whose comprehensive study of racial voting patterns in 53 elections in the challenged

districts revealed consistently high correlations between the number of voters of a specific race and the number of votes for candidates of that race. These correlations were so high in each of the elections studied that the probability of occurrence by chance was less than one in 100,000. 590 F. Supp. at 368.

The district court analyzed elections in each of the challenged districts to conclude that, in each district, racial polarization "operates to minimize the voting strength of black voters." *Id.* at 372. This conclusion was buttressed by the observations of numerous lay witnesses involved in North Carolina electoral politics. The uncontroverted evidence showed that *no* black candidate received a majority of white votes cast in *any* of the 53 elections, including those which were essentially uncontested. *Id.* Whites consistently ranked black candidates at the bottom of the field of candidates, even where those candidates ranked at the top of black voters' preferences. *Id.* Given the overwhelming and uncontradicted facts of this case, there is no question but that racial polarization in each district was, as the district court properly found, "substantial or severe." 590 F. Supp. at 372.

Appellants challenge the methodology utilized by plaintiffs' expert witness as being "severely flawed." Br. for Appellants at 41. As the district court opinion makes clear, that methodology depended upon two distinct types of statistical analysis, ecological regression and homogeneous precinct analyses. These statistical studies were further corroborated by the lay testimony of direct participants in North Carolina politics. 590 F. Supp. at 367-68 n.29.

Appellants contentions run directly contrary to the preponderance of cases decided prior to *City of Mobile*, which Congress intended the courts to follow, as well as those applying Section 2 after its 1982 amendment. In the pre-*City of Mobile* cases, courts relied on statistical or

non-statistical evidence to establish racially polarized voting by a showing of a high degree of association between the racial composition of the voting precincts and the race of the candidate for whom votes were cast. *See, e.g., Graves v. Barnes,* 343 F. Supp. 704, 731 (W.D. Tex. 1972) (three-judge court), *aff'd sub nom. White v. Regester* (polarized voting established by Mexican-Americans voting overwhelmingly for candidates of own national background and whites voting overwhelmingly for white candidates). In conformity with this approach, the ecological or bivariate regression analysis performed by Dr. Grofman compared the votes for minority candidates in different precincts with the racial composition of that precinct in both racially segregated and racially mixed precincts. As the district court observed, the result of such a comparison is considered *statistically* significant if the relationship between the variables is sufficiently consistent, and *substantively* significant if it is of a sufficient magnitude to affect the outcome of an election. 590 F. Supp. at 367-369. *See McMillan v. Escambia County* (*McMillan I*), 638 F.2d 1239, 1241-42 n.6 (5th Cir. 1981), *aff'd on rehearing,* 688 F.2d 960, 966 n.12 (5th Cir. 1982), *rev'd on other grounds, Escambia County v. McMillan,* —— U.S. ——, 80 L.Ed.2d 36 (1984); *McMillan II,* 748 F.2d at 1043 n.12 (affirming the definition of bloc voting and related findings made in *McMillan I*). The use of regression analysis to demonstrate the association between the racial composition of precincts and voting patterns is supported by both the pre-*City of Mobile* case law [17] and cases applying Section 2 after its 1982

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[17] *See Parnell v. Rapides Parish School Board,* 425 F. Supp. 399, 405 (W.D. La. 1976), *aff'd,* 563 F.2d 180 (5th Cir. 1978), *cert. denied,* 438 U.S. 915 (1978) (regression analysis demonstrated high probability of polarization); *Bolden v. City of Mobile,* 423 F. Supp. 384, 388-89 (S.D. Ala. 1976), *aff'd,* 571 F.2d 238 (5th Cir. 1978), *rev'd on other grounds,* 446 U.S. 55 (1980) (regression analysis supported finding of racial polarization). *Accord* H. Blalock, *Social Statistics,* ch. 17 (2d ed. 1979); Grofman, Migalski, Noviello, *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension*

amendment.[18]

The additional statistical study performed by Dr. Grofman, homogeneous precinct analysis (also known as "extreme case" analysis), is an accepted statistical method comparing the voting patterns in precincts with heavy concentrations of one race and other precincts with comparable concentrations of another race. *See City of Port Arthur v. United States*, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982).[19]

In addition, ample precedent supports the district court's reliance on non-statistical evidence to supplement the testimony of experts.[20]

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of the Voting Rights Act: A Social Science Perspective, 7 Law and Policy 199 (1985).

[18] *See Jordan v. Winter*, 604 F. Supp. 807, 812-813 (N.D. Miss. 1984), *aff'd sub. nom. Mississippi Republican Executive Committee v. Brooks*, —— U.S. ——, 83 L.Ed.2d 343 (1984) (bivariate regression analysis indicated high level of racial polarization); *Marengo County*, 731 F.2d at 1567 n.35 (affirming district court's acceptance of regression analysis to show polarization); *Jones v. City of Lubbock*, 727 F.2d 364, 380 (5th Cir. 1984) (bivariate regression analysis provided strong basis for court's finding of polarization); *NAACP v. Gadsden County School Board*, 691 F.2d 978, 983 (11th Cir. 1982) (same regression technique used in *McMillan I* demonstrated polarization).

[19] *See, e.g., Terrell, supra*, 565 F. Supp. at 348; *Port Arthur, supra*, 517 F. Supp. at 1007 n.136. *See also Perkins v. City of West Helena*, 675 F.2d 201, 213 (8th Cir. 1982), *aff'd mem.* 459 U.S. 801 (1982); *Lipscomb v. Wise*, 399 F. Supp. 782, 785-786 (N.D. Tex. 1975), *rev'd on other grounds*, 551 F.2d 1043 (5th Cir. 1977), *rev'd*, 437 U.S. 535 (1978)

[20] *See Major v. Treen*, 574 F. Supp. 325, 338 (E.D.La. 1983) (testimony of trained political observers considered probative of bloc voting); *Terrell, supra*, 565 F. Supp. at 348; *Rome, supra*, 472 F. Supp. at 226-227 (finding testimony of black deponents highly probative of bloc voting); *Boykins v. Hattiesburg*, No. H77-0062(C), slip op. at 15 (S.D. Miss., March 2, 1984) ("lay witnesses from the White community . . . confirmed that members of the White community continue to oppose and fear the election of Blacks to office.")

B. Appellants and the Solicitor General Seek to Reimpose an Intent Standard Onto Section 2 Claims by Requiring Proof of Motivation of Voters.

Despite the district court's use of statistical and lay witness evidence "to determine the extent to which blacks and whites vote differently from each other in relation to the race of candidates," 590 F. Supp. at 367-68 n.29, appellants persist in charging that a *per se* rule was imposed. To the contrary, only *after* concluding that substantively significant racial polarization existed in all but two of the elections analyzed did the district court note that no black candidate had received a majority of the white votes cast. The court specifically referred to this finding as one of a number of "[*a*]*dditional* facts" which "*support* the ultimate finding that severe (substantively significant) racial polarization existed in the multi-member district elections considered as a whole." *Id.* at 368 (emphasis supplied).

The principal method for measurement of racial polarization relied on by the court below was the *statistically significant* correlation between the number of voters of a specific race and the number of votes for candidates of that race. 590 F. Supp. at 367, 368. The Solicitor General's charge that, under the lower court's methodology, a "minor degree of racial bloc voting would be sufficient to make out a violation," Br. for U.S. at 29, is gravely misleading since it confuses the lower court's definition of *substantive* significance with the court's initial definition of racial polarization as also requiring *statistical* significance. Contrary to the Solicitor General's conclusion that a "minor degree of racial bloc voting would be sufficient to make out a violation," Br. for U.S. at 29, a low correlation would result in a finding of a low extent of polarization and would weigh *against* an ultimate conclusion of impermissible vote dilution.[21]

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[21] Thus, the hypothetical situation in which a white candidate receives 51% of the white vote and 49% of the black vote and an

Both the Solicitor General and appellants propose methods to discount the importance of racial bloc voting by requiring proof that racial motivation underlies the disparate voting patterns. Appellants would hold plaintiffs to a nightmarish standard of conclusively establishing the intent of the electorate by disproving possible motivation by "any other factor [besides race] that could have influenced the election." Br. for Appellants at 42. The Solicitor General similarly advocates a standard requiring plaintiffs to show that " 'minority candidates . . . lose elections solely because of their race.' " Br. for U.S. at 31 (quoting *Rogers v. Lodge*). This standard, it is argued, would render racial bloc voting "largely irrelevant," *id.*; if a losing black candidate receives some unspecified amount of white support, this would demonstrate that motivational factors other than race play a role in the election.

Congress has made it plain that Section 2 plaintiffs are no longer required to ascribe nefarious motives to the individuals or community responsible for discriminatory election results; thus, it is immaterial whether white voters refuse to vote for black candidates "solely because of race" or because of some other factor closely associated with race. The impact of racial bloc voting on minority political participation is the same regardless of the ex-

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opposing black candidate gets the reverse would clearly not constitute severe polarization, as the Solicitor General contends. *See* Br. for U.S. at 29. In fact, since such a disparity would not be statistically significant, it would not constitute racial polarization at all. The suggestion that the district court's definition of racial polarization would invalidate numerous electoral schemes across the country, *see id.* at 30, conveniently ignores the fact that the court's correlation analysis correctly focused on "the *extent* to which voting . . . is racially polarized." S. Rep. at 29 (emphasis supplied). Racial polarization is properly evaluated as a question of degree, and not as a dichotomous characteristic which is legally conclusive if present and irrelevant in all other cases.

planation or motivation for that phenomenon.[22] In the presence of other *White/Zimmer* factors, if white voters consistently shun black candidates for reasons other than race, the result is still that the black community is effectively shut out of the political process.[23] In delineating the factors relevant to a showing of unequal opportunity to participate in the political process, Congress relied heavily on federal Courts of Appeals' interpretations of *White*, none of which adopted a definition of racial polarization that supports the standard urged here—in fact, most of them required no formal proof of polarization whatsoever.[24] Moreover, last Term, this Court rejected the argument that racial motivation of voters casting ballots for candidates of their own race must be established to prove racially polarized voting. *Mississippi Republican Executive Committee v. Brooks*, —— U.S. ——, 83 L.Ed.

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[22] *See* Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 Howard L.J. No. 2 (1985) (forthcoming).

[23] This point is also responsive to appellants' objections to the statistical methodology relied upon by the district court, which was characterized by appellants' own expert witness as a standard methodology for measuring racial voting polarization. Tr. at 1445. It simply does not matter whether "race is the only explanation for the correspondence between variables." Appellants' Brief at 42. Where differential voting along racial lines exists, for whatever combination of reasons, the result in the context of structural impediments such as at-large or multimember district elections can be a dilution of the minority vote which renders minorities unable to elect representatives of their choice. This result is a violation of the Voting Rights Act regardless of the existence or nonexistence of proof of racial animus on the part of whites who fail to vote for blacks.

[24] *See, e.g., Ferguson v. Winn Parish Policy Jury*, 528 F.2d 592 (5th Cir. 1976); *Robinson v. Commissioners Court*, 505 F.2d 674 (5th Cir. 1974); *Moore v. Leflore County Bd. of Election Comm's*, 502 F.2d 621 (5th Cir. 1974); *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973). The original *Zimmer* factors themselves did not even include racially polarized voting. *See Zimmer*, 485 F.2d at 1305.

2d 343.[25] It should likewise reject the argument in this case.

IV. CLAIMS OF VOTE DILUTION, LIKE ALL CLAIMS OF AN ABRIDGMENT OF THE FRANCHISE, ARE ENTITLED TO SPECIAL JUDICIAL SOLICITUDE.

Based upon an exhaustive review of the totality of circumstances involved in the North Carolina legislative elections, the district court unanimously concluded, under the statutory results test, that the legislative redistricting abridged the voting rights of blacks. Of particular significance, the court detailed the continued taint of discrimination upon all walks of North Carolina's civil life. As the Voting Rights Act and other pieces of civil rights legislation make clear, the political processes may provide critical relief for the victims of past and continuing discrimination—providing that those channels are open to victimized minorities.

The Voting Rights Act sets out to remove structural barriers to minority access to political processes in order to facilitate the removal of the vestiges of discrimination. The Act corresponds to a heightened standard of judicial scrutiny set down by this Court nearly half a century ago:

> [P]rejudice against discrete and insular minorities may be a special condition . . . curtailing the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry.

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[25] Defendants, represented by the same counsel as at present, argued that, "The use of a regression analysis which correlates only racial make-up of the precinct with race of the candidate ignores the reality that race . . . may mask a host of other explanatory variables. [*Jones v. City of Lubbock*, 730 F.2d 233, 235 (5th Cir. 1984) (Higginbotham, J., concurring).]" Jurisdictional Statement, *Allain v. Brooks*, No. 83-2053, at 12-13. This Court summarily affirmed the district court's decision in that case and, therefore, "reject[ed] the specific challenges presented in the statement of jursidiction," *Mandell v. Bradley*, 432 U.S. 173, 176 (1977).

United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Foremost among the rights specified by what Justice Powell has termed "the most celebrated footnote in constitutional law," [26] is the right to vote. *Id., citing Nixon v. Herndon*, 273 U.S. 536 (1927) and *Nixon v. Condon*, 286 U.S. 73 (1931). This Court has repeatedly stressed the need for judicial vigilance in claims of vote dilution or abridgment, as set forth in the *Carolene Products* footnote:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringment of the right to vote must be carefully considered and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The right to vote is listed first in the *Carolene Products* footnote among those rights that may warrant ". . . more exacting judicial scrutiny . . .," since infringements on this right restrict "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . ." 304 U.S. at 152 n.4. Similarly, Congress has recognized that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . ." S. Rep. at 19 (citing *Reynolds*, 377 U.S. at 555 n.29). As this Court concluded in *White v. Regester*, where the totality of circumstances indicate that minority citizens have not been able to "enter into the political process in a reliable and meaningful manner," court remedies are indispensable to bring the minority community into "the full stream of

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[26] Powell, J., *Carolene Products Revisited*, 82 Col. L. Rev. 1087 (1982).

political life . . ." 412 U.S. at 767, 769. In incorporating *White* and its progeny into the statutory results test, Congress repeatedly emphasized the importance of keeping political processes equally open to minorities:

> 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. . . .
>
> The requirement that the political processes leading to nomination and election be 'equally open to participation by the group in question' extends beyond formal or official bars to registering and voting or maintaining a candidacy.

S. Rep. at 28, 30.

So long as the paths to political success remain closed, blacks remain the "discrete and insular" minorities of the *Carolene Products* footnote to whom a special measure of judicial solicitude is owed. *See* Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 733-37 (1985) (need for political success for minorities to transcend "pariah" role in political process). Conversely, "representation-reinforcing" [27] judicial intervention is the most efficacious manner by which this Court may insure that the goals of two decades of statutory civil rights litigation may one day be met.

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[27] J. Ely, *Democracy and Distrust*, 101-103, 117 (1980). *See also id.* at 103:

> Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the district court be affirmed.

Respectfully submitted,

JAMES ROBERTSON
HAROLD R. TYLER, JR.
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
FRANK R. PARKER *
SAMUEL ISSACHAROFF
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 'Eye' Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

SAMUEL RABINOVE
RICHARD T. FOLTIN
THE AMERICAN JEWISH
COMMITTEE
165 East 56 Street
New York, New York 10022
(212) 751-4000

Attorneys for *Amici Curiae* **

* Counsel of Record

** The attorneys for *amici* gratefully acknowledge the assistance of Martin Buchanan and Roger Moore, students at Harvard Law School, on the brief.