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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 AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

IN THE

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The Republican National Committee submits this brief as *amicus curiae* in support of appellees' claim that the judgment of the United States District Court for the Eastern District of North Carolina, entered on January 27, 1984, together with its supplemental judgment of April 20, 1984, should be affirmed. Pursuant to Rule 36.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Republican National Committee (RNC) submits this brief on its own behalf, and on behalf of Robert Bradshaw, Charlotte, North Carolina, Chairman of the

North Carolina Republican Executive Committee and a member of the Republican National Committee.

The RNC has participated in a variety of election law and voting rights cases before this Court as either a party or *amicus*, most recently in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), and *Davis* v. *Bandemer*, 603 F. Supp. 1479 (S.D. Ind. 1984), *prob. juris. noted*, No. 84-1244 (Mar. 29, 1985). The RNC and its membership support fair and effective representation for all the citizens of North Carolina in their state legislature and believe that the judgment of the court below effects such a result.

The *amicus* also believes that the appellants misrepresent both the nature of legislative representation in North Carolina and the effect of the judgment below.

SUMMARY OF THE ARGUMENT

The *amicus* Republican National Committee takes issue with the argument of the appellants that the judgment of the district court either implicitly or explicitly imposed a requirement of proportional representation for blacks in the North Carolina legislature. The district court's initial, January 27, 1984, opinion reveals no attempt at maximization, and the court's April 20, 1984, supplemental clearly demonstrates that the court rejected the notion of maximization or proportional representation that appellants now attempt to ascribe to the court.

Rather than impose what the court thought, intuitively, to be the plan which *did* maximize black electoral chances—a plan the plaintiffs themselves proposed to the court—the district court instead deferred to the priorities established by the North Carolina legislature and adopted the state's plan as a remedy.

In reaching its conclusions in both its initial and supplemental opinions, the district court reviewed a complex factual scenario, and its findings as to both subsidiary and ultimate facts should be sustained unless clearly

erroneous. The facts in this case are peculiarly local in nature, the determination of which is particularly suited to the district court. Not only was the district court's finding as to a key fact—the presence of polarized voting—not clearly erroneous, the expert testimony upon which the court based its finding was not seriously contested. The *amicus* believes that this case is bound by its particular facts, and is an inappropriate vehicle for considering the merits of the standards for review under Section 2 of the Voting Rights Act.

ARGUMENT

I. The District Court Properly Refused to Guarantee Proportional Minority Representation.

Of particular interest to the RNC as *amicus* is the appellants' claim that, since minority voters have no right to the creation of districts which would yield representation in proportion to their numbers, the district court erred in finding a Voting Rights Act violation.

It is clear that the Voting Rights Act, and in particular, Section 2 of the Act, imposes no requirement that any minority achieve representation in proportion to its numbers in the population. The statute, as amended in 1982, provides 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 (1982). This language is consistent with this Court's approach to the question of proportional representation in both constitutional and statutory voting rights cases.[1] The district court explicitly recognized and adopted that approach in its opinion. *Gingles* v. *Edmisten*, 590 F. Supp. 345, 355 (E.D.N.C. 1984):

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[1] *City of Mobile* v. *Bolden*, 446 U.S. 55, 69 (1980); *United Jewish Organizations* v. *Wilson*, 510 F.2d 512 (2d Cir. 1974), *aff'd sub nom. United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977).

> Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population [alone establish that vote dilution has resulted from the districting plan.] (Citing *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) (per curiam).

The *amicus* Republican National Committee has historically been a proponent of strong, majoritarian government in the United States. Ours is not, nor should it be, a proportional system of government. The views of the RNC in this regard were set forth in detail in another voting rights case pending before this Court, *Davis* v. *Bandemer*, No. 84-1244.[2]

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[2] Instead of requiring that legislatures do the impossible by providing proportional representation for all political interests, this Court has prudently required only that the electoral process be structured in ways that permit each voter an equal *opportunity* to select his legislative representative and thereby be given an equal chance to influence public policy. This Court's focus must continue to be on emphasizing procedural fairness in the political process by requiring that redistricting laws "provide a just framework within which the diverse political groups in our society may fairly compete." *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457, 470 (1982), (citing *Hunter* v. *Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring)).

The RNC explicitly rejects the notion that the creation of "safe" minority districts is the only available remedy under Section 2 of the Voting Rights Act, and agrees with the appellants that such a rule of law would be undesirable. The creation of permanent, safe districts for any minority, racial or political, is antithetical to our majoritarian system of government, and institutionalizes the very proportional government this Court has rejected. In its brief in *Davis* v. *Bandemer*, *supra*, the RNC argued strongly that legislative districts which are designed to be non-competitive to the exclusion of one political party are both constitutionally and philosophically repugnant. The inherent tension between proportional representation in racial equal protection cases and what has been called the "emerging political norm" has been recognized and discussed at length in Howard and Howard, *The Dilemma of the Voting Rights*

The *amicus* does not dispute the appellants' contention that Congress clearly had no intention to invalidate districting plans where minority candidates have had an equal opportunity to be elected, even if they did not necessarily win a proportional share of the seats. However, while no group has either a statutory or constitutional right to proportional representation, the statute does not prohibit *any* consideration of the relative representation of a protected class. In fact, the 1982 amendments do permit consideration of "the extent to which members of the minority group have been elected to public office in the jurisdiction" as part of the "totality of circumstances" which may be probative of vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. 193 *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 206-07. In assessing the success of black candidates, the court below concluded that:

> [The] success that has been achieved by black candidates is, standing alone, too minimal in total numbers and too recent in relation to the long history of complete denial of any elective opportunity to compel or even arguably to support an ultimate finding that a black candidate's race is no longer a significant factor in the political processes of the state—either generally or specifically in the areas of the challenged districts. 509 F. Supp. at 367.

The appellants correctly point out that "Section 2 of the Voting Rights Act does not entitle protected minorities . . . to safe electoral districts simply because a minority concentration exists sufficient to create such a district." Appellants' Brief at 19. However, the appellants then suggest that the opinion below mandates just that sort of proportional representation.

Act—Recognizing the Emerging Political Equality Norm, 83 Colum. L. Rev. 1615 (1983). That tension, however, does not exist in this case because the district court did not endorse but rather, explicitly rejected a maximization plan.

The appellants attempt to isolate the remedial action of the district court from its initial judgment. This presents an incomplete picture of the district court's reasoned approach to the proportional representation issue.

After the district court enjoined certain elections under the challenged plan, the North Carolina General Assembly responded by enacting, in the form of six new bills, a redistricting plan creating new boundaries for each of the invalidated districts. On March 12, 1985, the state submitted these plans to the district court for its approval, and contemporaneously submitted the plan to the Attorney General of the United States for preclearance insofar as the changes affected districts covered by Section 5 of the Voting Rights Act.

Three days later, on March 15, the plaintiffs objected to the proposed plan and requested modifications, in particular with respect to the areas covered by former House Districts 8 and 36. The district court denied the plaintiffs' motion for further depositions and a hearing on the question of the remedial adequacy of the state's plan, and resolved to decide the question of the state's compliance on the record as then extant. 590 F. Supp. at 377.

Although they did not concede the plan's validity in other respects, the plaintiffs objected specifically to the area comprising the Mecklenburg district, contending that the plan fractured substantial black population concentrations. These populations were insufficient to constitute another voting majority, but plaintiffs argued that they might, nonetheless, give that minority population considerable voting power as a substantial voting minority in at least one of the newly constructed single member districts. *Id.* at 379. This newly "packed" district would have contained a black population of 44.7 percent. *Id.* at 380 n.1. By contrast, none of the white majority districts under the state's plan contained black populations in excess of 28.2 percent. *Id.*

The court characterized the plaintiffs' proposal as requiring that "a state redistricting plan adopted to remedy judicially found dilution by submergence (or fracturing) of effective vote majorities must not only remedy the specific violation found but also maximize . . . the voting strength of those black voters outside the remedially drawn single-member districts." *Id.* The court wisely rejected the plaintiffs' invitation to maximize minority voting strength, relying upon Section 2 jurisprudence and equitable considerations. *Id.* at 382.

The court's factual findings led it to a conclusion that the challenged plan violated Section 2. Having so determined, the court's January 27 opinion must be reviewed together with its supplemental opinion. By explicitly rejecting, in its supplemental opinion, a proposal that *would* have maximized minority voting strength, the district court demonstrated that its goal was not proportional representation. The district court's opinion does not hold that blacks—or any minority—are entitled to proportional representation. Remarkably, appellants failed to reproduce this supplemental opinion in their Jurisdictional Statement, but instead invoked this Court's jurisdiction on the basis of an incomplete record.

II. The District Court Properly Deferred to Legislative Priorities In Considering A Remedy.

Even prior to the remedial stage of this litigation, the district court resolved to defer to "the primary jurisdiction of state legislatures over legislative reapportionment." 590 F. Supp. at 376. The court noted that this was especially appropriate where the legislature had been afforded no previous legislative opportunity to assess the substantial new requirement under the 1982 amendments to Section 2 of the Voting Rights Act for affirmatively avoiding racial vote dilution rather than merely avoiding its intentional imposition. *Id.*

Furthermore, the court recognized "the difficulties posed for the state by the imminence of 1984 primary elections" and offered to convene at any time upon the request of the state to consider and promptly rule upon proposed remedies. *Id.*

In its supplemental opinion, the district court recognized that neither the Voting Rights Act nor equitable considerations require—and neither do they permit—"the rejection of a legislative plan simply because the reviewing court would have adopted another thought to provide a better, more equitable overall remedy for the originally found vote dilution." 590 F. Supp. at 382. The court noted that such a principle of judicial deference to legislative aims clearly applies in constitutional redistricting cases, *White* v. *Weiser*, 412 U.S. 783, 794-97 (1972), and properly extended that deference to its analysis under the Voting Rights Act. *Cf. Upham* v. *Seamon*, 456 U.S. 37 (1982).

The court refused to accept plaintiffs' suggestion that racial vote dilution may be found "not only with respect to aggregations of black voters large enough to make up effective voting majorities in single-member districts, but with respect to smaller aggregations as well," and that dilution in that sense resulted from the state's remedial plan with respect to black aggregations outside the remedially-created single-member districts. 590 F. Supp. at 380. In considering whether, under the circumstances of a particular case, a 28.2 percent black minority may have less voting strength than a 45 percent minority, the court noted that such a determination depended, among other things, upon the philosophical-political makeup of the population majorities in the district.

The court refused to substitute its "intuitive" sense that the overall voting strength of blacks might be enhanced by packing them into a 45 percent minority district and, as a result, refused to substitute the plaintiffs' proposal for the state's.

III. The District Court's Findings of Fact Are Not Clearly Erroneous, But Are Based On A Particularly Localized Factual Record.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous, with due regard to be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52 (1984). This Court has enunciated general principles governing the exercise of an appellate court's power to overturn findings of a district court and has stated that the "foremost of these principles . . . is that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)." *Anderson* v. *City of Bessemer City*, —— U.S. ——, 53 U.S.L.W. 4314 (Mar. 19, 1985).

As this Court recently emphasized in *Anderson*, *supra*, "this standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.*

The appellants' principal objection to the opinion below is the district court's findings with respect to racial polarization. Appellant's Brief at 27, 34-35. While the *amicus* is not in a position to express a view as to whether or not racially polarized voting does exist in North Carolina, we do believe that the district court's determination that it does exist was not clearly erroneous. In fact, there was no significant difference in the testimony of opposing experts on this issue.

Plaintiff's expert, Dr. Bernard Grofman, used an "extreme case" analysis (focusing on voting in racially segregated precincts) and an "ecological regression" analysis (focusing on both racially segregated and racially mixed

precincts). Determining that the results under both analyses conform closely in most areas, Dr. Grofman opined, and the court found, that racial polarization did exist and was statistically significant. 590 F. Supp. at 367-368 and n.29.

Defendants' expert, Dr. Thomas Hofeller, had studied Dr. Grofman's data and heard his live testimony. The court noted that, "[a]side from two mathematical or typographical errors, Dr. Hofeller did not question the accuracy of the data, its adequacy as a reliable sample for the purpose used, nor that the methods of analysis used were standard in the literature." *Id.* at 368. While Dr. Hofeller did question the reliability of an extreme case analysis when standing alone, the court noted that he had made no specific suggestion of error in the figures used.

The court further noted that the general accuracy and reliability of Dr. Grofman's data were confirmed by the testimony of Dr. Theodore Arrington, expert witness for the intervenor-plaintiffs. "Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization. . . ." *Id.* at 368 n.29.

The district court's finding on this subsidiary fact was not the subject of extensive dispute between the parties' experts, but was a reasonable finding about which there was, in fact, some degree of agreement among the experts. As this Court has recently confirmed:

> [When] a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding if not internally inconsistent, can virtually never be clear error. *Anderson* v. *City of Bessemer City, supra* at 4317.

Nor does Rule 52 make an exception to applying the clearly erroneous standard to this finding on the basis

that it is merely one of several subsidiary facts. The rule does not make exceptions or purport to exclude certain categories of factual findings from the obligation of an appellate court to accept the district court's findings. The rule "does not divide facts into categories; in particular it does not divide findings of fact into those that deal with 'ultimate' facts and those that deal with 'subsidiary' facts." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982).

The facts in this case lend themselves to a local consideration particularly suited to the trial court. The facts in this case are further complicated by North Carolina's schizophrenic status under the Voting Rights Act. Only 40 of its 100 counties are subject to the preclearance provisions of Section 5 of the Act, and that divided coverage results in different standards of review within the same state under the two sections of the Act.

The numerous factual discrepancies in the briefs on appeal have further muddied an already obscure factual record. Supplemental Briefs of Appellees and Appellees-Intervenors. These disputes, and the particularly localized circumstances in this case, make it an inappropriate vehicle for a comprehensive review by this Court of the substance of, and standards under, the 1982 Amendments to the Voting Rights Act.

The three members of the district court panel were residents of North Carolina who conscientiously sorted the complex local factual issues presented to them. In such a case, deference to the factual findings of the district court is particularly warranted.

CONCLUSION

The decision of the United States District Court below should be affirmed.

Respectfully submitted,

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