No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RUFUS L. EDMISTEN, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. In this action brought under Section 2 of the Voting Rights Act, the District Court found as a matter of fact that, under the totality of relevant circumstances in North Carolina, the use of the challenged legislative districts results in black voters in those districts having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

Were these findings of fact clearly erroneous under Rule 52(a)?

II. Does administrative preclearance of a legislative district under Section 5 of the Voting Rights Act absolutely bar private

parties from litigating the legality of that district under Section 2 of the Voting Rights Act, in the face of clear statutory language to the contrary?

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

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, Appellees Ralph Gingles, et al., move that this Court dismiss the appeal or affirm the judgment below on the ground that the [illegible]

which the decision of the case depends are so unsubstantial as not to need further argument.

Statement of the Case

Appellees filed this action on September 16, 1981, challenging the 1981 apportionment of both houses of the North Carolina General Assembly ("the General Assembly") on the grounds, inter alia, that the apportionments were illegal and unconstitutional in that: (1) each had been enacted pursuant to provisions of the North Carolina Constitution which were required to be but had not been precleared under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c[1] ("§ 5 of the

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[1] Forty of North Carolina's 100 counties are covered by Section 5 of the Voting Rights Act.

Voting Rights Act" or "Section 5"); and (2) the use of multi-member districts illegally submerged minority population concentrations and diluted minority voting strength in violation of the Constitution and Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

After the Complaint was filed, the State of North Carolina submitted the provisions of the North Carolina Constitution, which prohibit dividing counties in the formation of a legislative district, for preclearance under Section 5. The Attorney General, in a letter signed by William Bradford Reynolds, objected to the provisions, finding that the use of large multi-member districts "necessarily submerges cognizable minority population concentrations into larger white electorates." Jurisdictional Statement at 6a.

The Attorney General, acting through Reynolds, also found the 1981 House, Senate and Congressional plans, as well as two subsequent House plans and one subsequent Senate plan, to be racially discriminatory.

Despite warnings from special counsel, black citizens' groups, and various legislators that the use of multi-member districts could result in impermissible dilution of black citizens' voting strength, the General Assembly continued to use this method in the House and in the Senate. At an 8 day trial in July 1983 before all three judges, appellees challenged six of the multi-member districts, five in the House and one in the Senate. Appellees also challenged the configuration of one single member Senate District. Five of the challenged districts consist

entirely of counties not covered by Section 5 and, therefore, were not subject to the Attorney General's review.

On January 27, 1984, the Honorable J. Dickson Phillips, Jr., writing for the unanimous District Court, found that black citizens of North Carolina do not have an equal opportunity to participate in the State's political system and that use of the challenged legislative districts illegally minimizes their opportunity to elect representatives of their choice. The District Court made extensive and meticulous findings that there currently exists: a disparity between black and white voter registration which is a legacy of past intentional disfranchisement; severe socio-economic inequities which result from past discrimination and which give rise to a commonality of interests within geographically identifiable black communities;

minimal electoral success of black candidates; the use of racial appeals in campaigns; and a persistent failure of most white voters to vote for black candidates. In short, the Court found that, while there has been some progress, the gap between the ability to participate of white and black voters remains substantial.

Based on these finding the District Court entered a unanimous Order which declared that the apportionment of the General Assembly in six challenged multi-member districts and one single member district violate Section 2 of the Voting Rights Act, and enjoined elections in those districts pending court approval of a districting plan which does not violate Section 2.[2]

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[2] Appellees did not challenge all multi-member districts used by the State nor did the District Court rule that the use of multi-member districts is per se illegal. The District Court's Order leaves

Appellants' petition for a stay of the Order was unanimously denied by the District Court, and was subsequently denied by Chief Justice Burger, on February 24, 1984, and by the full Court on March 5, 1984.[3]

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untouched 30 multi-member districts in the House and 13 in the Senate. The District Court's Order did not affect 48 of North Carolina's 53 House of Representative Districts and did not affect 27 of North Carolina's 29 Senate Districts.

[3] By subsequent orders, the District Court approved the State's proposed remedial districts for six of the seven challenged districts, and primary elections have been held in those districts. The District Court has not acted on the Defendants' proposed remedial apportionment of one district, former House District No. 8, pending preclearance of defendants' proposal under Section 5.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT NORTH CAROLINA'S GENERAL ASSEMBLY DISTRICTS VIOLATE §2 OF THE VOTING RIGHTS ACT IS BASED ON THE CORRECT STANDARD AND IS NOT CLEARLY ERRONEOUS

A. The District Court Applied the Correct Standard in Determining That the Election Districts in Question Have a Discriminatory Result

Section 2 of the Voting Rights Act was amended in 1982, by the Voting Rights Amendments of 1982, 96 Stat. 131 (June 29, 1982), to provide that a claim of unlawful vote dilution is established if, "based on the totality of circumstances," members of a racial minority "have less opportunity than other members to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973, as amended. The Committee Reports accompanying the amendment make plain the

congressional intent to reach election plans that minimize the voting strength of minority voters. S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28 (1982) (hereafter "Senate Report" or "S.Rep."); H. R. Rep. No. 97-227, 97th Cong., 1st Sess. at 17-18 (1981) (hereafter "House Report").[4]

The Senate Report, at pages 27-30, sets out a detailed and specific road map for the application of the amended Section 2. When called upon to apply the statute, as amended, to a claim of unlawful dilu-

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[4] Appellants assert that the legislative history of the 1982 amendments is unclear because there is no conference committee report. J.S. at 8. However, as the House unanimously adopted S.1992, which had been reported out of the Senate Committee on the Judiciary and adopted by the Senate, there was no need for a conference committee or for a conference committee report. See J.S. at 9a, n.7. In fact there was no conflict between the intent of the House and of the Senate. The Senate adopted substitute language to spell out more specifically the standard which the House meant to codify. S. Rep. at 27.

tion, the federal courts were directed by Congress to assess the interaction of the challenged electoral mechanism with the relevant factors enumerated in the Senate Report at 28-29.

It is apparent from the analysis of Section 2 contained in the Memorandum Opinion and from the detailed assessment of the facts that the District Court understood and properly applied its Congressional charge to the facts of this case.

The actual standard applied by the District Court is embodied in its Ultimate Findings of Fact:

> 1. Considered in conjunction with the totality of relevant circumstances found by the court -- the lingering effects of seventy years of official discrimination against black citizens in matters touching registration and voting, substantial to severe racial polarization in voting, the effects of thirty years of persistent racial appeals in political campaigns, a relatively depressed socio-economic status resulting in significant degree from a century of de jure and de facto segregation, and the continuing effect of a

majority vote requirement -- the creation of each of the multi-member districts challenged in this action results in the black registered voters of that district being submerged as a voting minority in the district and thereby having less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Considered in conjunction with the same circumstances, the creation of single-member Senate District No. 2 results in the black registered voters in an area covered by Senate Districts Nos. 2 and 6 having their voting strength diluted by fracturing their concentrations into two districts in each of which they are a voting minority and in consequence have less opportunity than do other members of the electorate to participate in the political process and to elect representatives of their choice. J.S. at 51a-52a.

Appellants assert that "the district court erred by equating a violation of Section 2 with the absence of guaranteed proportional representation." J.S. at 9. This statement, supported only by a sentence fragment from the opinion, J.S. at 9-10, grossly distorts the standard actually used by the District Court, and

ignores the extensive discussion by the District Court of the meaning and proper application of Section 2 of the Voting Rights Act. J.S. at 11a-18a. In that discussion, the District Court explicitly stated its interpretation of the standard to be applied and the factors to be considered:

> In determining whether, "based on the totality of circumstances," a state's electoral mechanism does so "result" in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution in White v. Regester and subsequently elaborated by the former Fifth Circuit in 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). These typically include, per the Senate Report accompanying the compromise version enacted as amended Section 2:

[Thereafter the District Court listed the factors enumerated at pp. 28-29 of the Senate Report.] J.S. at 12a-13a.

The District Court did not ignore White v. Regester, 412 U.S. 755 (1973), and its progeny, nor did the District Court interpret those cases to require proportional representation. See J.S. 14a-15a. As the Court explicitly said, "[T]he fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population [does not establish that vote dilution has resulted]." J.S. at 15a.

In sum, the District Court examined each factor specified by Congress in the Senate Report and, without limiting its assessment to just one factor, as appellants do, assessed them as a totality.[5] The

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[5] The Courts of other circuits, as did the Court below, have interpreted the amended Section to require the trial court

District Court clearly engaged in the Congressionally mandated analysis and applied the proper standard.

B. The District Court's Ultimate and Subsidiary Findings of Fact Are Not Clearly Erroneous

1. The Court Weighed The Particular Circumstances Relevant To This Action In Making Its Findings

Since the District Court applied the proper standard to the facts before it, the real question raised by appellants is whether the three judges properly weighed

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to examine the factors listed at pages 28-29 of the Senate Report and, considering the totality of the circumstances, determine whether the challenged election method violates Section 2. U.S. v. Marengo County Comm., 731 F.2d 1546, 1565-1566 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 384-385 (5th Cir. 1984); Velasquez v. City of Abilene, Tex., 725 F.2d 1017, 1022-23 (5th Cir. 1984); Rybicki v. State Bd. of Elections, 574 F. Supp. 1147, 1148-50 (E.D. Ill. 1983)(three judge court).

the voluminous evidence. While the judge heard eight days of testimony, examined hundreds of documents, and made thirty-three pages of factual findings, the appellants base their argument, in essence, on one fact: the electoral success of a few black candidates in 1982. The question thus raised is whether, in assessing the totality of circumstances, the District Court's judgment as to the proper weight to give to this fact is clearly erroneous.[6]

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6 Rule 52(a), F.R.Civ.P., provides that neither the ultimate nor the subsidiary findings of fact of the District Court may be reversed unless they are clearly erroneous. Rogers v. Lodge, 458 U.S. at 622-623, 627 (1982) (clearly erroneous standard applies to finding that use of large voting system is being maintained for a discriminatory purpose and to the underlying subsidiary findings); Pullman-Standard v. Swint, 456 U.S. 273, 287-293 (1982). See also Velasquez v. City of Abilene, Tex., 725 F.2d 1017, 1021 (5th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364, 380 (5th Cir. 1984).

The District Court analyzed each of the factors suggested by Congress to determine its bearing on the ability of black citizens to elect candidates of their choice to the General Assembly. One factor is the extent of black electoral success. With regard to that factor, it is plain that before this action was commenced in 1981, a nominal number of blacks had been elected to the General Assembly. The District Court discussed the 1982 elections and found them to be uncharacteristic. After examining black electoral successes and failures, Judge Phillips concluded:

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

J.S. at 37a-38a. See also, J.S. at 37a n.27.

This conclusion was considered along with findings on the other factors enumerated in the Senate Report. These are summarized as follows:

a. There is a current disparity in black and white voter registration resulting from the direct denial and chilling by the State of registration by black citizens, which extended officially into the 1970's with the use of a literacy test and anti-single shot voting laws and numbered seat requirements. The racial animosities and resistence with which white citizens have responded to attempts by black

citizens to participate effectively in the political process are still evident today. J.S. at 22a-26a.

b. Within each challenged district racially polarized voting is persistent, severe, and statistically significant. J.S. at 38a-39a, 46a.

c. North Carolina has a majority vote requirement which exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts. J.S. at 29a-30a.

d. North Carolina has a long history of public and private racial discrimination in almost all areas of life. Segregation laws were not repealed until the late 1960's and early 1970's. Public schools were not significantly desegregated until the early 1970's. Thus, blacks over 30 years old attended qualitatively inferior segregated schools. Virtually all neigh-

borhoods remain racially identifiable, and past discrimination in employment continues to disadavantage blacks. Black households are three times as likely as white households to be below poverty level. The lower socio-economic status of blacks results from the long history of discrimination, gives rise to special group interests, and currently hinders the group's ability to participate effectively in the political process. J.S. at 25a-29a.

e. From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been used effectively as a means of influencing voters in North Carolina. As recently as 1983, political campaign materials reveal an unmistakable intention to exploit white voters' existing racial fears and prejudices and to create new ones. J.S. at 31a-32a.

f. The extent of election of blacks to public office at all levels of government is minimal, and black candidates continue to be at a disadvantage. With regard to the General Assembly in particular, black candidates have been significantly less successful than whites. J.S. at 33a-34a, 37a-38a.

g. The State gave as its reason for the multi-member districts its policy of leaving counties whole in apportioning the General Assembly. However, when the challenged apportionments were enacted, the State's policy was to divide counties when necessary to meet population deviation requirements or to obtain Section 5 preclearance. Many counties were divided. The policy of dividing counties to resolve some problems but not others does not justify districting which results in racial vote dilution. J.S. at 49a-50a.

The District Court included the extent to which blacks have been elected to office as "one circumstance" to be considered, 42 U.S.C. §1973(b), made an intensely local and detailed appraisal of all of the relevant circumstances, and determined that the challenged districts have a discriminatory result.

For this Court to reverse the District Court's ultimate findings would require this Court to find (1) that the District Court's assessment of pre-1982 electoral success was clearly erroneous; (2) that the District Court's assessment that the 1982 elections were atypical was clearly erroneous; and (3) that, in weighing the totality of the circumstances, the relative weight given by the Court to one post litigation election year was clearly erroneous.

2. The District Court's Finding of Racially Polarized Voting is Not Clearly Erroneous.

Appellants assert that the electoral success of some blacks in 1982 precludes the District Court from finding severe racially polarized voting. This is the only subsidiary finding appellants challenge.[7]

In finding voting to be racially polarized, the District Court engaged in a detailed analysis of election returns from each of the challenged districts extending over several elections, supported by the testimony of numerous lay witnesses and

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[7] Although appellants challenge this finding as an error of law, the finding of racially polarized voting is one of fact covered by Rule 52(a). Jones v. Lubbock, 727 F.2d at 380. Appellants apparently limit this challenge to those areas not covered by §5. They do not discuss facts from either House District No. 8 (Wilson, Edgecombe, and Nash Counties) or Senate District No. 2.

expert testimony regarding every election for the General Assembly in which there had been a black candidate in the challenged multi-member districts for the three election years preceding the trial. J.S. 38a-39a. Based on its exhaustive analysis of the evidence, the District Court found that racially polarized voting was severe and persistent.

Appellants erroneously claim that the District Court determined racial polarization by labeling every election in which less than 50% of the whites voted for the black candidate as racially polarized. J.S. at 17. Although it is true that no black candidate ever managed to get votes from more than 50% of white voters, this is not the standard the District Court used.

Instead, the District Court examined the measurement of racially polarized voting to determine the extent to which

black and white voters vote differently from each other in relation to the race of the candidates. J.S. at 39a, n.29. The District Court's assessment can be summarized in three findings:

a. The evidence shows patterns of racial polarization. The Court found:

> On the average, 81.7% of white voters did not vote for any black candidate in the primary elections. In the general elections, white voters almost always ranked black candidates either last or next to last in the multi-candidate field except in heavily Democratic areas; in these latter, white voters consistently ranked black candidates last among Democrats if not last or next to last among all candidates. In fact, approximately two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. Black incumbency alleviated the general level of polarization revealed, but it did not eliminate it. Some black incumbents were reelected, but none received a majority of white votes even when the election was essentially uncontested.

J.S. at 40a.

b. The correlation between the race of the voter and the race of the candidate voted for was statistically significant at the .00001 level in every election analyzed. Although correlation coefficients above an absolute value of .5 are relatively rare and those above .9 are extremely rare, all correlation coefficients in this case were between .7 and .98 with most above .9. J.S. at 38a-39a and n.30.

c. In all but two elections, the black candidate lost among white voters --that is the results of the election would have been different if held only in the white community than if held only in the black community. J.S. at 39a-40a and n.31. The District Court used the term "substantively significant" in these circumstances. Appellants posited

no alternative definition supported either by case law or political science literature. J.S. at 40a, n.32.

Appellants offered no statistical analysis which contradicted the conclusions of the District Court. They did not question the accuracy of the data or assert that the methods of analysis used by appellees' expert were not standard in the literature. J.S. at 38a n.29. In fact, appellants conceded that the polarization of the voting was statistically significant for each of the elections analyzed.

Nonetheless, appellants contest the District Court's finding of racially polarized voting citing examples from only one post-litigation election year, 1982. This is particularly inappropriate, as the District Court concluded that 1982 was "obviously aberrational"

and that whether it will be repeated is sheer speculation. Among the aberrational factors was the pendency of this lawsuit and the one time help of black candidates by white Democrats who wanted to defeat single member districts. J.S. at 37a. This skeptical view of post-litigation electoral success is supported by the legislative history of the Voting Rights Act and the case law. Senate Report at 29, n.115; Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc) aff'd on other grounds sub nom East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976); NAACP v. Gadsden Co. School Board, 691 F.2d at 983.

In addition to being drawn only from post-litigation elections, the examples given by appellants are misleading and are taken out of context. For example:

(a) Appellants point out that in the 1982 Mecklenburg House primary, black candidate Berry received 50% of the white vote. The District Court noted this but stated that it "does not alter the conclusion that there is substantial racially polarized voting in Mecklenburg County in primaries. There were only seven white candidates for eight positions in the primary and one black candidate had to be elected. Berry, the incumbent chairman of the Board of Education, ranked first among black voters but seventh among whites." J.S. at 42a.

The other black candidate, Richardson, was ranked last by white voters in the primary but second, after Berry, by blacks. In the general election, Richardson was the only Democrat who lost.

Similarly, in the 1982 Mecklenburg County Senate race, the black candidate who was successful in the primary was the only Democrat who lost in the general election, ranking first among black voters but sixth out of seven by white voters for four seats.

b. Appellants point out that black candidate Spaulding received votes from 47% of white voters in the 1982 general election in Durham County. They neglect to point out there was no Republican opposition in that election, and that a majority of white voters there

failed to vote for the black incumbent even when they had no other choice. J.S. at 44a.

Appellants also failed to point out that in the Durham County primary for 1982 there were only two white candidates for three seats so at least one black had to win. As the District Court noted, "Even in this situation, 63% of white voters did not vote for the black incumbent, the clear choice of the black voters." J.S. at 44a.

(c) Appellants point out that in Forsyth County two black candidates in 1982 were successful but fail to note, as the District Court did, that white voters ranked the two black candidates seventh and eighth out of eight candidates for five seats in the general election while black voters ranked them first and second. J.S. at 43a.

(d) As another example, while noting that black elected incumbents have been re-elected, appellants fail to note that white voters almost always continue to rank them last and that black appointed incumbents have uniformly been defeated.

The three judges who heard the evidence considered each of the facts which appellants point out, together with the surrounding circumstances, and concluded that these pieces do not alter the conclusion of severe and persistent racially polarized voting.

Appellants also assert that racially polarized voting is probative of vote dilution only if it always causes blacks to lose. In fact, in 21 of the 32 election contests analyzed in which the black candidate received substantial black support, the black

candidate did lose because of racial polarization in voting. That is, he lost even though he was the top choice of black voters because of the paucity of support among white voters.

Appellants assert that whites must uniformly win for racially polarized voting to be probative. They support this argument by citing Rogers v. Lodge, supra, a case decided under the purpose standard of the Fourteenth Amendment of the United States Constitution. Appellees do not believe that Rogers v. Lodge stands for the proposition boldly asserted by appellants, but the Court need not consider, in the context of this case, whether the complete absence of black electoral success is necessary to raise an inference that an at large system is being maintained for a discriminatory purpose.

The instant case was decided under the Voting Rights Act, and the statutory language of Section 2 specifies that a violation exists if black citizens have "less opportunity" to elect representatives of their choice; it is not limited to situations in which black candidates have absolutely no chance of being elected. 42 U.S.C. § 1973(b). Racially polarized voting can give rise to this unequal opportunity, even if it does not cause black candidates to lose every single election.

Appellants' argument is, in essence, that any black electoral success necessarily defeats a Section 2 claim, an argument which defies the intent of Congress. See S. Rep. at 29, n.115, and discussion at p. 35, infra.

As the Court noted in Major v. Treen, 574 F.Supp. 325, 339 (E.D. La. 1983) (three judge court):

> Nor does the fact that several blacks have gained elective office in Orleans Parish detract from plaintiffs' showing of an overall pattern of polarization... Racial bloc voting, in the context of an electoral structure wherein the number of votes needed for election exceeds the number of black voters, substantially diminishes the opportunity for black voters to elect the candidate of their choice.

The District Court considered all of the evidence, including the facts to which the appellants allude, and determined that racially polarized voting is severe and persistent in the districts in question. This finding is not clearly erroneous.

3. The District Court's Ultimate Finding of Discriminatory Result is Not Clearly Erroneous

The task of the three District Court judges was to examine historic and current racial and political realities in North Carolina, to determine if the challenged legislative districts operate to deny black citizens an equal opportunity to elect representatives to the General Assembly. The judges below engaged in an intensely local appraisal of these factors and appellants ask this Court to rule that their determination was clearly erroneous.

Appellants do not challenge the lower court's findings on six of seven Section 2 factors, and, as discussed in part IB(2), supra, the seventh subsidiary finding, that voting in North Carolina is racially polarized, is not clearly erroneous. Thus, the question is whether the District Court

properly assessed the totality of circumstances. In the Statement of the Case appellants recite random black electoral successes and then imply, without saying, that under the circumstances, a finding of discriminatory result is erroneous because it is tantamount to a requirement of proportional representation.

As was discussed in part IB(1), supra, the District Court did not ignore the election of blacks in its weighing of the facts. Rather, after examining the extent of minority election, the District Court found, in addition to minimal election of blacks to the General Assembly before this litigation was initiated, that in the six multi-member districts in question, black candidates who won Democratic primaries between 1970 and 1982 were three times as

likely to lose in general elections as were their white Democratic counterparts. J.S. at 33a-34a.

In addition, the District Court found that blacks hold only 9% of city council seats (many from majority black election districts); 7.3% of the county commission seats; 4% of sheriff's offices; and 1% of the offices of the Clerk of Superior Court. No black has been elected to statewide office except three judges who ran unopposed as appointed incumbents. No black has been elected to the Congress of the United States as a representative of this state.[8] J.S. at 33a.

On a county by county basis appellants also paint a lopsided picture. In Forsyth County appellants specify isolated instances of electoral success but ignore

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8 North Carolina is 22.4% black in population.

electoral failures such as: (1) the defeat of appointed black incumbents which resulted in no blacks being elected to the House of Representatives from Forsyth County in 1978 and 1980, years in which all white Democrats were successful; (2) the defeat in 1980 of the black who had been elected to the County Commission in 1976 which resulted in a return to an all white County Commission; and (3) the defeat in 1978 and 1980 of the black who had been elected to the Board of Education in 1976 returning the Board of Education to its previous all white status.

In each of these instances the evidence showed that black Democrats were defeated when white Republicans did well, but white Democrats won consistently, even in good Republican years.

In addition, appellants do not mention that House District No. 8, which is 39% black in population and has four representatives, has never elected a black representative, J.S. at 36a, or that Mecklenburg County, which, with eight House seats and four Senate seats, is the largest district in the General Assembly and which is over 25% black in population, has this century elected only one black senator (from 1975-1979) and one black representative (in 1982, after this lawsuit was filed). J.S. at 34a.

In Mecklenburg County, as in Forsyth County, black Democrats who were successful in Democratic primaries, in the House in 1980 and 1982 and in the Senate in 1982, were the only Democrats to lose to white Republicans. No white Democrat lost to a Republican in those elections.[9]

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[9] Thus, this case is in no way similar

Rather than requiring guaranteed election, and rather than simplistically considering erratic examples of electoral success, the District Court followed the statutory mandate by considering black electoral success and failure as one factor in the totality of circumstances leading to its conclusion of discriminatory result. 42 U.S.C. § 1973(b).

Other courts have not required the complete absence of black electoral success in order to find a violation of Section 2. United States v. Marengo County Commission, 731 F.2d at 1572; Major v. Treen, 574 F.Supp. at 351-352; Rybicki v. State Bd. of Elections, 574 F.Supp. at 1151 and n.5. This interpretation of the amended §2 is consistent with pre-amendment case law

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to Whitcomb v. Chavis, 403 U.S. 124, 150-152 (1971), in which black defeat was caused by Democratic Party defeat, not by race.

which held that some black electoral success does not preclude a finding of dilution. See White v. Regester, 412 U.S. at 766; NAACP v. Gadsden Co. School Board, 691 F.2d at 983; Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir. 1977).

The conclusion of the District Court, that the election of some minority candidates does not negate a finding of discriminatory result, is consistent with the clear intent of Congress as stated in the Senate Report: "[T]he 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 n.115.

The determination of whether an electoral system has an illegal discriminatory result requires findings of fact which blend "history and an intensely local

appraisal of the design and impact of the ... multi-member district in the light of past and present reality, political and otherwise." White v. Regester, 412 U.S. at 769-770. The District Court in this action engaged in just this "intensely local appraisal." The District Court's findings are so meticulously supported by the record as to warrant summary affirmance by this Court.

II. THE DISTRICT COURT PROPERLY CONSIDERED ALL THE STATE'S EVIDENCE

Appellants dispute the weight the District Court gave to evidence that a handful of black voters and a few black and white politicians disagreed with the single member district remedies proposed by plaintiffs.

In their Jurisdictional Statement appellants allude to the testimony of one black legislator and some white politicians who supported retention of the multi-member redistricting plans under which they were elected and to the testimony of three [illegible] witnesses who testified in opposition to single member districts.

Appellants characterize this evidence as substantial, J.S. at 21, and urge that the Court below erroneously disregarded it. In fact the District Court carefully evaluated the testimony of all the [illegible] witnesses as a factor bearing upon the claim of racial vote dilution. J.S. App. 47a-48a. The Court found that the [illegible] witnesses who testified for the State were a "distinct minority" whose views "were almost exclusively to the desirability of the remedy sought by plaintiffs, and

the present existence of a condition of vote dilution." Id. This finding is amply supported by the record.

The appellants erroneously contend that in evaluating a claim of racial vote dilution, the District Court should have found that evidence that the plaintiffs' proposed remedy was not unanimously endorsed by every member of the black or white community outweighed all other evidence of the objective factors identified as relevant by Congress. This is fundamentally inconsistent with the Congressional mandate in amending Section 2 to eliminate racial vote dilution. It does not raise a substantial question. Compare Swann v. Charlotte-Mecklenburg Board of Education, 306 F. Supp. 1291, 1293 (W.D. N.C. 1969) aff'd, 402 U.S. 1 (1971). Cf.

Cooper v. Aaron, 358 U.S. 1, 16 (1958); Monroe v. Bd. of Commissioners, 391 U.S. 450, 459 (1968).

III. PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT DOES NOT BAR APPELLEES' CLAIM UNDER SECTION 2

Appellants rely on the decision by the Assistant Attorney General of the United States to preclear the House and Senate reapportionments pursuant to Section 5 of the Voting Rights Act to contend that appellees (plaintiffs below) were estopped or precluded from pursuing their Section 2 claims in those districts composed of

counties covered by Section 5.[10] This argument is specious, and was rejected by the District Court for three reasons:

> (1) The statute expressly contemplates a de novo statutory action by private plaintiffs; (2) The substantive standard for a violation of Section 5 is not coterminous with the substantive standard under Section 2; and (3) Section 5 preclearance is an ex parte non-adversarial process that has no collateral estoppel effect.

Section 5 of the Voting Rights Act expressly contemplates a de novo action such as in the instant case:

> Neither an affirmative indication by the Attorney General that no objection will be made nor the Attorney General's failure to object, nor a declaratory

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10 This argument is limited to House District #8 and Senate District #2, the only districts composed of counties covered by Section 5.

> judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. 42 U.S.C. § 1973c.

The statute does not limit such actions to purely constitutional claims or contain any qualifications barring Section 2 actions.[11] Private plaintiffs are entitled to bring a subsequent action whether preclearance results from "a declaratory judgment entered under this section" or from "an affirmative indication by the Attorney General that no objection will be made." Id. Moreover, the language in Section 5

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[11] Appellants were so informed by the Assistant Attorney General in his April 30, 1982 preclearance letter to the State: "Finally," he wrote, "we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes."

should be viewed in the light of the recent amendments to Section 2, in which Congress made clear that private citizens have a statutory cause of action to enforce their rights in both Section 5 covered and uncovered jurisdictions. See House Report at 32; Senate Report at 42. Plaintiffs are therefore not barred from mounting a de novo statutory or constitutional attack upon a reapportionment plan notwithstanding preclearance. Major v. Treen, supra, at 327 n.1, citing United States v. East Baton Rouge Parish School Bd., 594 F.2d 56, 59 n.9 (5th Cir. 1977).

Secondly, the failure of the Attorney General to object under Section 5 cannot be probative of whether there is a Section 2 violation unless the standards under these two sections of the Voting Rights Act are the same. There is nothing in the record which demonstrates what standard the

Attorney General used in preclearing House District #8 or Senate District #2. It is particularly ambiguous since these two districts were precleared in April 1982, two months before the 1982 extension and enactment of amendments to Section 2. It is manifest, however, that the Attorney General did not use the standard of a statute yet to be enacted.

In addition, the legislative history of the amendment of Section 2 suggests that the use of the word "results" in the statute distinguishes the standard for proving a violation under the Section 2 totality of circumstances test from the Section 5 regression standard for determining discriminatory purpose or effect. Senate Report at 68 and n.224; 2 Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate

Comm. on the Judiciary, 97th Cong., 2d Sess. 80 (1982) (remarks of Sen. Dole), 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner, with which Rep. Edwards concurs).

In short, nothing in the statute itself, in the legislative history of the recent amendment of Section 2, in the case law of collateral estoppel,[12] or in the

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[12] There are four criteria that must be established before the doctrine of collateral estoppel can be invoked. 1) The issue sought to be precluded must be the same as that involved in the prior litigation, 2) the issue must have been actually litigated, 3) it must have been determined by a valid and final judgment, and 4) the determination must have been essential to the judgment. See generally, Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 4416 et. seq; Allen v. McCurry, 449 U.S. 90 (1980). The party asserting estoppel has the burden of proving all elements of the doctrine, especially the existence of a full and fair opportunity to litigate the issue. Id. at 95. Matter of Merrill, 594 F.2d 1064, 1066 (5th Cir. 1979); Kremer v. Chemical Construction Corporation. 456 U.S. 461, 481 (1982): "Redetermination of issues is warranted if there is reason to doubt the quality extensiveness, or fairness of pro-

treatment of other administrative agency determinations where there is a statutory right to trial de novo,[13] supports appellant-

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cedures followed in prior litigation." Even if all criteria are satisfied, relitigation may be appropriate because of the potential import of the first determination on the public interest or the interest of persons not parties to the original action. Porter and Dietsch, Inc. v. F.T.C., 605 F.2d 294, 300 (7th Cir. 1979) cert. denied, 445 U.S. 950 (1979).

13 This Court has held that a Title VII plaintiff's statutory right to a trial de novo is not foreclosed by submission of the claim to final arbitration, Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974), even though the complainant is a party to the administrative proceeding. Similarly, a federal employee whose employment discrimination claims were rejected by the Veterans Administration and the Civil Service Commission Board of Appeals and Review was nevertheles entitled to a trial de novo. Chandler v. Roudebush, 425 U.S. 840 (1976). Moreover, although admissible as evidence at the de novo proceeding, the agency decision was entitled only to the weight deemed appropriate by the court. Alexander v. Gardner-Denver, 415 U.S. at 59-60.

s' claim that Section 5 preclearance precludes subsequent litigation of a violation under section 2.

The nature of the administrative preclearance process itself exposes the vacuity of appellants' preclusion argument. Appellants concede that the Section 5 review was conducted ex parte as a nonadversary proceeding.[14] There was no formal hearing consistent with fundamental

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14 Jurisdictional Statement at 16: "In fact, these districts were designed by counsel and legislative drafters in daily contact with the Assistant Attorney General and members of the staff of the Civil Rights Division." Indeed, other than this admission, the record is devoid of the reasoning or facts behind the Assistant Attorney General's ultimate preclearance decision. In his preclearance letters, the Assistant Attorney General never even mentions House District 8 and there is absolutely nothing in the record to support appellants' claim that the Attorney General determined "that it was in the best interests of the black voters not to diminish black influence in (Senate) District 6 in order to 'pack' (Senate) District 2." J.S. at 16-17.

notions of due process,[15] and, unlike appellants, who were in "daily contact with the Assistant Attorney General," J.S. at 16, appellees could not be and were not parties to the preclearance determination. Nor were appellees entitled to appeal or in any form seek judicial review of the preclearance decision. Morris v. Gressette, 432 U.S. 491 (1977).

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15 The Justice Department Section 5 regulations provide that a covered jurisdiction must submit voting changes for preclearance review, but the reviewing official is not required to publish an opinion nor set forth reasons for the preclearance decision. See 28 CFR §51.41. The procedure is so informal that a determination may be made without the Justice Department taking any definitive action at all. If a state submits a plan and the Department takes no action within sixty days, the plan is presumptively approved. Id. A conference may be requested by the submitting jurisdiction on reconsideration of an objection, 28 CFR §51.46, but none is required initially. Parties opposing preclearance have no formal role in the deliberations.

Morris v. Gressette arose in the context of a claim that private plaintiffs had a right to judicial review of the administrative preclearance process. In holding that private parties had no such right to inquire into the reasoning behind the Attorney General's decision, to review the process by which he considered the change or to appeal directly his determination, this Court was persuaded that Congress had provided, through the statutory grant of a trial de novo, for black voters who disagree with the preclearance decision and who have no other means of protecting their interests. Morris v. Gressette, 432 U.S. at 506-07. Indeed, this is directly stated in the only other case, Donnell v. United States, 682 F.2d 240, 247 (D.C. Cir. 1982), which appellants cite to support their claim of pre-emption.

Neither Donnell nor Morris v. Gres-

sette supports the appellants' preclusion arguments. Indeed, they affirmatively recognize that the Attorney General may have interests other than the interests of minority voters and, more importantly, that the voters' interests are explicitly protected by the statutory right to a trial *de novo*.

Thus, the District Court properly found the Attorney General's preclearance determination "has no issue preclusive (collateral estoppel) effect in this action." (Citation omitted) J.S. at 54a. The decision below should be affirmed summarily.

CONCLUSION

Because appellants did not raise any substantial question which requires further argument, the Court should affirm the judgment of the District Court or dismiss the appeal.

Respectfully submitted

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