No. 83-1968

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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LACY H. THORNBURG, ET AL., APPELLANTS

*v.*

RALPH GINGLES, ET AL.

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

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether preclearance of a redistricting plan by the Attorney General pursuant to Section 5 of the Voting Rights Act precludes subsequent adjudication by private plaintiffs of the validity of the plan under Section 2 of the Voting Rights Act.

2. Whether the district court correctly construed amended Section 2 of the Voting Rights Act as invalidating certain multi-member legislative districts in which minority candidates had achieved significant electoral successes.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General submits this brief in response to the Court's order inviting a brief expressing the views of the United States regarding this appeal.

### STATEMENT

1. In July 1981, as a result of the 1980 census, the General Assembly of the State of North Carolina enacted redistricting plans for the state's House of Representatives and Senate. In September 1981, appellees filed suit in the United States District Court for the Eastern District of North Carolina, alleging that the districting plans had been enacted pursuant to provisions of the North Carolina Constitution that required, but had not received, preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and that the use of large multi-member districts submerged concentrations of black voters and diluted minority voting strength in violation of the Constitution and Section 2 of the Voting Right Act of 1965, 42 U.S.C. (1976 ed.) 1973 (J.S. 3a-4a). The state constitutional provision to which the suit referred was a provision adopted in 1968 prohibiting

the division of counties for the purpose of creating electoral districts.

After this action was filed, the State submitted its constitutional provision for Section 5 clearance (J.S. App. 6a). While this submission was pending, the General Assembly passed a revised redistricting plan for the House, leaving the Senate plan untouched (*ibid.*). In November 1981, the Attorney General interposed an objection pursuant to Section 5 to the constitutional provision against dividing counties. The objection stated that the provision required the use of large multimember districts and that this " 'necessarily submerges cognizable minority population concentrations into larger white electorates' " (*ibid.* (citation omitted)). Thereafter, on December 7, 1981, and January 20, 1982, the Attorney General objected to the Senate and House plans. The Attorney General's review pertained only to the 40 North Carolina counties (out of 100) that are covered jurisdictions for purposes of Section 5. See § 4, 42 U.S.C. 1973b.

On February 11, 1982, the General Assembly enacted revised Senate and House plans, to which the Attorney General again interposed objections on April 19, 1982. The objections pertained to Senate District 2, which had been drawn to encompass fewer black voters than Section 5 required, and to a proposed House district for Cumberland County, which submerged a cognizable black population in a large multimember district. See J.S. App. 6a-7a. On April 27, 1982, the General Assembly enacted the redistricting plans that are the subject of this litigation. Both the House and Senate plans were precleared by the Attorney General on April 30, 1982. *Id.* at 7a.

2. After the districting plans were adopted, appellees amended their pleadings to challenge five newly-adopted House districts and two Senate districts, and to conform to the newly-amended Section 2. Only two of the districts—House District 8 and Senate District 2—were subject to and had received preclearance under Section 5 of the Voting Rights Act. Each of the other, unprecleared, districts is a multimember district. The "gravamen" of

appellees' claim with reference to these multimember districts, as explained by the district court (J.S. App. 4a),

> is that the plan makes use of multi-member districts with substantial white voting majorities in some areas of the state in which there are sufficient concentrations of black voters to form majority black single-member districts, * * * all in a manner that violates rights of the plaintiffs secured by section 2 of the Voting Rights Act of 1965.

The case was tried before a three-judge court on the basis of extensive stipulations of fact, documentary evidence, and oral testimony taken during eight days in July and August 1983 (J.S. App. 8a). On January 27, 1984, the court entered an order and opinion containing extensive findings on the various factors identified in the legislative history and prior caselaw as relevant to a vote dilution claim. See J.S. App. 21a-51a. The court held that, under the totality of the relevant circumstances, the redistricting plan in all seven challenged districts denied black citizens an equal opportunity to participate in the political process in violation of Section 2 of the Voting Rights Act, and enjoined elections in the challenged districts.[1] In reaching this ultimate conclusion, the district court set forth the following interpretation of amended Section 2 (42 U.S.C. 1973) (J.S. App. 14a-15a (citation omitted)):

> The essence of racial vote dilution in the *White v. Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority

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[1] The district court denied the State's petition for a stay, as did the Chief Justice on February 24, 1984, and the full Court on March 5, 1984. The State has since adopted, under protest, a plan that has been approved by the district court in all respects. The district court deferred decision on House District 8 pending preclearance by the Attorney General. On October 1, 1984, the Attorney General objected to the revised plan for House Districts 8 (three member) and 70 (single member). On November 16, 1984, the Attorney General precleared plans for those districts, and the court ordered their implementation.

with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior.

3. The district court also reviewed at length the racial demographics and voting history of each challenged multimember district.

*House District 21.* House District 21, in Wake County, elects six representatives to the General Assembly on an at-large basis. The population of the district is 21.8% black,[2] and black voters constitute 15.1% of all registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw one single-member legislative district within the present boundaries of District 22, with a black population of 67% (*id.* at 20a). Under the challenged plan and its predecessor (which was substantially the same (*id.* at 19a)), one black legislator was elected in 1980 and reelected in 1982 (*id.* at 35a). In those elections, respectively, he received the votes of 31% and 39% of the white voters in the primary, and the votes of 44% and 45% of the white voters in the general election (*id.* at 44a).

*House District 23.* House District 23, in Durham County, elects three at-large representatives to the General Assembly. The population of the district is 36.3% black, and black voters constitute 28.6% of the registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw one single-member legislative district within the present boundaries of District 23, with a black population of 70.9% (*id.* at 20a). Under the challenged plan and its predecessor, one of the three district representatives has been black, every year since 1973 (*id.* at 35a). The black leg-

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[2] The district court did not have available data on the voting age population of the challenged districts, which is the preferred measure. *Wyche* v. *Madison Parish Policy Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981).

islator was unopposed in the general election in [illegible] in both primary and general elections in [illegible] he was elected with 16% of the white vote in the [illegible] and in 1982, he received 37% of the white [illegible] primary and 43% of the white vote in the [illegible] tion. A second black candidate also garnered 2[illegible] white vote in the 1982 primary. *Id.* at 43a-44a.

*House District 36.* House District 36, in Mecklenburg County, has an eight-member House delegation, elected at large. The population of the district is 26.5% black, and black voters make up 18% of the registered voters (J.S. App. 19a). The black population of the district is so situated that it would be possible to draw two single-member legislative districts that would be 68% and 71.2% black (*id.* at 20a). Under the present plan, one black representative was elected in 1982; he is the first black citizen to be elected to the House from Mecklenburg County in this century (*id.* at 34a). He received 28% of the votes of white voters in the primary election, and 42% in the general election (*id.* at 41a). A second, unsuccessful, black candidate received 39% of the white vote in the 1982 primary and 29% in the general election.

*House District 39.* House District 39, in a part of Forsyth County, has five at-large seats in the General Assembly. The population of the district is 25.1% black, and 20.8% of the registered voters are black (J.S. App. 19a). The black population is so situated that one single-member legislative district, with a 70.0% concentration of black voters, could be drawn (*id.* at 20a). Under the challenged plan, two of the five representatives elected in 1982 were black; under the predecessor plan, a black representative was elected in 1974 and reelected in 1976 (*id.* at 35a). The two black representatives elected in 1982 received 25% and 36% of the white vote in the primary election, and 42% and 46% in the general elec-

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[3] In addition, the district court observed that a black citizen has been elected mayor of the City of Charlotte, receiving 38% of the white vote in the general election against a white Republican (J.S. App. 35a).

tion (*id.* at 43a). One of these representatives had previously won the Democratic nomination in 1978 and 1980 (with 28% of the white vote in 1978 and 40% of the white vote in 1980), but lost the general election in those years (*id.* at 42a-43a).

*Senate District 22.* Senate District 22, in Mecklenburg and Cabarrus Counties, is a four-member district. The population is 24.3% black, and 16.8% of the registered voters are black (J.S. App. 19a). The black population is so situated that one single-member district could be created with a 70.0% black population (*id.* at 20a). Under the present plan, no black Senator is part of the district delegation; however, one black citizen was elected from 1975-1980 (*id.* at 34a). The black senatorial incumbent (Alexander) received 47% of the white votes in the primary election in 1978 and 41% in the general election; his share of the white vote dropped to 23% in the 1980 primary. A second black candidate (Polk), running in 1982, garnered 32% of the white votes in the primary and 33% in the general election. *Id.* at 42a.

## ARGUMENT

1. Appellants' second question presented is not, in our view, substantial. Appellants' challenge to the district court's invalidation of House District 8 and Senate District 2 is based solely on the ground that, since these districts had been precleared by the Attorney General pursuant to Section 5 of the Act, 42 U.S.C. 1973c, they are therefore not subject to challenge in court under Section 2, 42 U.S.C. 1973. This position, however, is contrary to the plain language of the statute, has been rejected by this Court in closely analogous circumstances, and is inconsistent with general principles of collateral estoppel. As to these districts, the Court should summarily affirm the judgment of the district court.

Section 5 of the Voting Rights Act expressly contemplates that judicial actions may be brought to enjoin election practices that have received Section 5 preclearance from the Attorney General. It states (42 U.S.C. 1973c):

> 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 judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

In *Morris* v. *Gressette*, 432 U.S. 491, 505 (1977), this Court interpreted that language to mean that a private plaintiff could challenge the constitutionality of a voting plan notwithstanding the Attorney General's preclearance decision. There is no reason to suppose that a statutory challenge would be barred where a constitutional challenge is not. See *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983); *Seamon* v. *Upham*, No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), aff'd summarily *sub nom. Strake* v. *Seamon*, No. 83-1823 (Oct. 1, 1984).[4]

In any event, collateral estoppel can only prevent parties from relitigating an issue they have previously litigated unsuccessfully in another action. *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 4, 5 n.4. It is thus difficult to understand how preclearance by the Attorney General in an administrative process to which appellees were not parties could collaterally estop these plaintiffs from asserting their rights in court.[5]

Nor do we believe that appellants' fourth question—whether the district court erroneously rejected certain evidence—is substantial. The district court did not exclude the evidence, but simply gave it less weight than

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[4] This interpretation was pointed out to the State in the Attorney General's April 30, 1982 preclearance letter, which stated:

> Finally, 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.

[5] We would expect a district court to accord the Attorney General's conclusions appropriate deference where subsequent litigation implicates some of the same questions considered during the preclearance process. Appropriate deference, however, is not the same thing as collateral estoppel.

appellants would wish (J.S. App. 48a). That might have relevance to a claim that the district court's factual findings were clearly erroneous; it does not present an issue warranting this Court's plenary review.

2. We conclude that appellants' other questions, pertaining to racial bloc voting and minority electoral success, are substantial and that the district court's treatment of these issues warrants plenary review. The legislative background of amended Section 2 underscores the centrality of these legal concepts to the 1982 Voting Rights compromise. Amended Section 2 reflects the consensus of an overwhelming majority of the Congress, reached only after intensive and divisive debate. The language was proposed by Senator Dole as a means of resolving a deadlock in the Senate Judiciary Committee that occurred after the Constitution Subcommittee had rejected the House of Representatives' version of Section 2. As revealed by the legislative history,[6] the compromise encompassed three key areas of consensus.

First, there was widespread agreement that direct evidence of intent to discriminate should not be necessary to establish a violation under Section 2. Proponents of an effects test argued that this Court's holding in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), insulated discriminatory practices from review because of the difficulty of obtaining evidence regarding the subjective motivations of legislators—especially when the practices in question were adopted long ago. See, *e.g.*, H.R. Rep. 97-227, 97th Cong., 1st Sess. 29 (1981) [hereinafter cited as House Report]; 1 *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the*

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[6] In light of the compromise character of the ultimate legislation, undue emphasis must not be accorded the views of any one faction in the controversy. Accordingly, statements of the majority in the Senate Report must be evaluated against statements of additional views and the record established before the body as a whole. The statements and explanations of Senator Dole, the sponsor of the compromise, must be given particular weight, as well as the views of the President, whose support for the compromise ensured its passage.

*Judiciary*, 97th Cong., 2d Sess. 199 (1982) (opening statement by Sen. Mathias) [hereinafter cited as Senate Hearings]; *id.* at 813-819 (testimony of Armand Derfner). And opponents of the effects test agreed, in essence, that a finding of unlawful vote dilution could and should be made on the strength of objective evidence. See, *e.g.*, *id.* at 516 (statement of Sen. Hatch); *id.* at 1409 (testimony of Prof. Irving Younger).

Second, during the course of the debate, a consensus—Senator Dole described it as "a unanimous consensus"—developed against permitting Section 2 claims to be based on the inability of a group to achieve representation in proportion to its population within the jurisdiction. S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982) (Additional Views of Sen. Dole) [hereinafter cited as Senate Report]. See House Report 30; Senate Report 33; 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982) (President's signing statement). The most significant feature of the compromise was to modify and expand the language of the House-passed bill to ensure that "equal opportunity" and not "proportional results" would be the legal test. See Senate Report 193-194 (Additional Views of Sen. Dole); *id.* at 199 (Supplemental Views of Sen. Grassley). This was accomplished in two ways: first, by introducing "additional language delineating what legal standard should apply under the results test" [7] and, second, by "clarifying

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[7] One of the principal criticisms levelled against the amended Section 2 as it had passed the House of Representatives was that it contained no "core value"—no "ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it"—other than the repudiated notion of "equal electoral results for defined minority groups, or proportional representation" (Senate Report 137 (Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Judiciary Comm.)). The response of the proponents of the change was to point to the language in *White* v. *Regester*, 412 U.S. 755, 769 (1973), that "the plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election are not equally open to participation by the group in question." See 1 Senate Hearings 959 (testimony of Prof. Norman Dorsen). Part of the compromise eventually adopted was to incorporate this language in the statute as the governing legal

that this test is not a mandate for proportional representation." [8] 2 Senate Hearings 60 (statement of Sen. Dole).

Third, both sides in the controversy agreed that the concepts of unconstitutional vote dilution developed by this Court in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and applied by the lower courts prior to *City of Mobile* should govern Section 2 cases. See House Report 30 & n.104; Senate Report 27-28, 67-68 (majority views); *id.* at 104 n.24, para. 6 (Additional Views of Sen. Hatch); *id.* at 194 (Additional Views of Sen. Dole).

The language and structure of amended Section 2 reflect these areas of consensus. The provision now explicitly establishes both the nature of the evidence to be considered by the district court in resolving a vote dilution claim and the legal standard by which this evidence is to be evaluated. The evidence to be considered is the "totality of the circumstances," by which Congress meant the various so-called "objective factors" identified by

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standard. As Senator Dole explained, the "legal standards to be applied under the 'results' test" were delineated "in order to address the proportional representation issue" (Senate Report 194 (Additional Views of Sen. Dole)).

[8] The proportional representation disclaimer, as it appeared in the House-passed bill (H.R. 3112, 97th Cong., 1st Sess. § 2 (1981) (emphasis added)), provided:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, *in and of itself*, constitute a violation of this section.

Critics of the House bill objected that under this language, a lack of proportional representation, if accompanied by any one of numerous possible "objective factors," could support a finding of a violation. This would render the disclaimer meaningless. See, *e.g.*, Senate Report 142-146 (Subcomm. Report). The compromise amendment, adopted by the full Congress, eliminated the phrase "in and of itself," which the critics had found so troubling. Senate Report 68 n.225. The majority views portion of the Senate Report expressly rejects the interpretation of the disclaimer under which "the lack of proportional representation, * * * plus the addition of one other 'factor,'" would establish a violation (*id.* at 34).

this Court and other courts in constitutional vote dilution claims prior to *City of Mobile*, notably those in *White* v. *Regester*.

The district court here faithfully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous. The issue in this case is solely whether the district court correctly interpreted the legal standard under which these factors may bear upon the ultimate conclusion that there has been impermissible vote dilution. Appellees are thus mistaken when they characterize this appeal as one challenging findings of fact subject to the clear error standard of Fed. R. Civ. P. 52(a). It appears to be their view that, so long as the district court has ostensibly trudged through each of the factors listed in the Senate Report, and its subsidiary findings on each of those factors are not plainly incorrect, there remains nothing for an appellate court to do. See Mot. to Dis. 21, 35-36. We believe this position is both shortsighted and incorrect—shortsighted because it would disable future plaintiffs from effectively challenging decisions where, on an essentially standardless basis, a district court determines that the "totality of the circumstances" did *not* support their case, and incorrect because it confuses the issue of relevant evidence with the issue of legal standard.

The drafters of the compromise Section 2 were quite specific regarding the legal standard to be applied (see Senate Report 194 (Additional Views of Sen. Dole)); this was thought necessary, in part, because in the absence of an explicit standard the courts might adopt some version of a proportional representation theory. Moreover, states and localities need an intelligible and predictable standard to which they can conform. Appellate court review, at more than a perfunctory level, is needed to hold the district courts accountable to the intention of Congress. In any event, appellate courts both before *City of Mobile* and since the passage of amended Section 2 have engaged in more searching analysis of legal standard than appellees advocate in this case. See,

*e.g.*, *Whitcomb* v. *Chavis*, *supra*; *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1563 (11th Cir. 1984), appeal dismissed and cert. denied, No. 84-243 (Nov. 5, 1984); *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Nevett* v. *Sides*, 533 F.2d 1361, 1364-1365 (5th Cir. 1976).

3. As appellants contend (J.S. 7-12 (Question 1); *id.* at 17-21 (Question 3)), the district court's interpretation of amended Section 2 is flawed in two fundamental, and related, respects. First, the court found a violation of Section 2 in the absence of evidence that the "results" of the multimember districts challenged in this case were to deny black voters an equal opportunity to participate in the political process. In light of the significant electoral successes of candidates supported by the black community—in three of the five districts, success as great as or greater than that which would be expected under a single-member districting plan—the only explanation for the district court's conclusion is that it erroneously equated the legal standard of Section 2 with one of *guaranteed* electoral success in proportion to the black percentage of the population. The decision thus conflicts with the legal standard prescribed by Congress (see, *e.g.*, Senate Report 194 (Additional Views of Sen. Dole)), and with this Court's summary affirmances in *Strake* v. *Seamon*, No. 83-1823 (Oct. 1, 1984), and *Brooks* v. *Allain*, No. 83-1865 (Nov. 13, 1984).[9]

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[9] In *Seamon*, the district court rejected a Section 2 claim that minority voters were entitled to a " 'safe' district in which the minority population approaches 65% of the overall population" (slip op. 11-12); under the challenged plan, minority voters, while not guaranteed the ability to elect one of their own to office, were found to "exert a significant impact" and to "play pivotal roles in key elections" in two high minority impact districts (*id.* at 15). Similarly, in *Brooks*, minority voters asked this Court to overturn a court-ordered districting plan creating a district with a "razor-thin 52.8 percent black voting age population" in favor of one in which black candidates would be effectively guaranteed the seat. 83-1865 J.S. at 16. This Court's summary affirmances establish that minority voters do not have a right under Section 2 to the crea-

Second, and more explicitly, the court adopted a definition of racial bloc voting—which it correctly identified as the "linchpin" of a vote dilution case (J.S. App. 15a)—under which racial polarization is deemed to be "substantively significant" or "severe" whenever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election" (*id.* at 39a-40a). This means, of course, that even a minor degree of racial bloc voting is "substantively significant" or "severe," and that it does not matter whether or not the bloc voting actually "results" in black electoral defeats.[10] This interpretation places the court below in direct conflict with *Terrazas* v. *Clements*, 581 F. Supp. 1329, 1351-1352 (N.D. Tex. 1984) (three judge court) (test is whether "such bloc voting as may exist" operates so as to "persistently defeat [minority] candidates"); accord, *Seamon* v. *Upham*, slip. op. 10 n.4. Indeed, under the district court's definition, virtually any electoral district in the country might be deemed to suffer "substantively significant" racial bloc voting. But see 1 Senate Hearings 821 (emphasis added) (testimony of Armand Derfner) ("Section 2, of course, will apply only in those places where there is already an *extraordinary* amount of [racial] division"); Senate Report 33 (in "most communities" minority candidates "receive substantial support from white voters"). In our view, if

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tion of "safe" minority-controlled districts—even where other objective factors contribute to the finding of a violation under the "totality of the circumstances."

[10] Appellants' restatement of the district court's standard for racial bloc voting (J.S. 17) is imprecise. Other than in passing (J.S. App. 40a), the district court did not state that polarization exists unless white voters support black candidates in numbers at or exceeding 50%. Rather, the court would find bloc voting whenever the votes of the white population, standing alone, would not be sufficient to elect a black candidate (J.S. App. 39a-40a). Under North Carolina's electoral system, this test could be satisfied by fewer than 50% of the white votes.

white voters are willing to cross racial lines in sufficient numbers that "minority candidates [do] not lose elections solely because of their race" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)), then it is largely irrelevant whether the black candidate would have won even if the election "had been held among only the white voters" (J.S. App. 40a).[11]

4. Appellees do not dispute that these are substantial issues. They respond only (Mot. to Dis. 40) that the district court did not "requir[e] guaranteed election," but "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."[12] This reading of the opinion is best evaluated by examining the court's treatment of the districts at issue.[13]

Each of the districts is a multimember district; however, it is well established that multimember districts are not inherently unlawful. Senate Report 33; see 2 Senate Hearings 81 (statement of Sen. Dole); *White* v. *Regester*, 412 U.S. at 765. And while it is true that in each of the districts at issue in this case it would be possible to create one or more single-member districts with effective black voting majorities (see pages 4-6, *supra*), this point cannot be determinative. Minority voters have no right to the creation of safe electoral dis-

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[11] Nonetheless, even under the district court's standard, House District 21 and House District 23 should have been upheld; the white voters in those districts supported the black legislators in such numbers that they would have been elected on the strength of the white vote alone, as the district court found (J.S. App. 40a n.31).

[12] If appellees mean to suggest (Mot. to Dis. 15, 21) that electoral results are merely "one circumstance" among many to be considered, in the sense that a Section 2 case could be proven even where minority candidates had achieved significant successes at the polls, we disagree. A finding of adverse electoral "results" is a necessary—though not sufficient—element in the plaintiff's case.

[13] We do not discuss House District 8 or Senate District 2, since appellants' only argument concerning them is based on the supposed collateral estoppel effect of preclearance.

tricts merely because they could feasibly be drawn. *Brooks* v. *Allain, supra*; *Strake* v. *Seamon, supra*; *Whitcomb* v. *Chavis, supra*; *Terrazas* v. *Clements*, 581 F. Supp. at 1354. Nor can it be presumed that "safe" seats for minority *officeholders* would necessarily be in the interests of minority *voters*. See *United States* v. *Board of Supervisors*, 571 F.2d 951, 956 (5th Cir. 1978). Thus, if the "gravamen" of appellees' claim is simply that North Carolina chose to use multimember districts where "there are sufficient concentrations of black voters to form majority black single-member districts," as the district court stated (J.S. App. 4a), their claim necessarily falls short of establishing a violation.

In three of the districts, black candidates supported by the black community have been elected under the challenged plan in numbers as great as *or greater than* would be expected under a single-member plan, and black voters have wielded influence over other seats as well. Ever since 1973, the black voters of House District 23, who make up 36.3% of the population and 28.6% of the registered voters, have succeeded in electing one black member of the three-member delegation. See pages 4-5, *supra*. In House District 21, the 21.8% black minority has elected one of the six representatives since 1980, with the support of between 31% and 45% of the white voters in the district. See page 4, *supra*. Indeed, the district court found that the black representative in District 21 would have been elected in 1982 even if the election had been held only among whites (J.S. App. 39a-40a). And in House District 39, where black persons make up 25.1% of the population, a black candidate was elected to the five-member delegation in 1974 and 1976, and two black candidates—40% of the delegation—were elected under the challenged plan in 1982, both with substantial white support. See pages 5-6, *supra*.[14] By contrast, under the

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[14] Appellees seek to minimize the significance of this electoral success on the ground (Mot. to Dis. 26-27) that the 1982 election year was "obviously aberrational"—attributing this conclusion

alternative favored by appellees, in each of these districts black voters would be relegated to one single-member district with a large black majority; black voters would effectively lose the opportunity to contest the remaining seats and (more importantly) to exert electoral influence on the other representatives. Judged simply on the basis of "results," the multimember plans in these districts have apparently enhanced—not diluted—minority voting strength.

In the two remaining districts at issue—House District 36 and Senate District 22, both in Mecklenburg County—black candidates have been less successful. Even there, however, the 26.5% black minority in the House district elected one black member to the eight-member delegation in 1982, and a second black candidate (who lost in the general election) received 39% of the white vote in the primary. In the Senate district, although the 24.3% black minority has not been able to elect a black Senator in the 1980s, a black candidate prevailed throughout the period 1975-1980.

The district court never articulated a standard under which "results" such as these could support a conclusion

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to the district court. However, the district court's words have been taken out of context. The court's finding (J.S. App. 37a (footnote omitted)) was as follows:

> There are intimations from recent history, particularly from the 1982 elections, that a more substantial breakthrough of success could be imminent—but there were enough obviously aberrational aspects present in the most recent elections to make that a matter of sheer speculation.

In a footnote, the court observed that both parties had offered evidence to establish either that the 1982 elections presaged a "breakthrough" or that they were "aberrational." The court stated that its "finding" in text (quoted above) "reflects our weighing of these conflicting inferences" (*id.* at 37a n.27). It is thus inaccurate for appellees to assert that the district court adopted their view that the 1982 election results should be disregarded as "aberrational." At most, it can be said that the court rejected the opposing view—that the 1982 results should be deemed evidence that black

that the multimember electoral system in these districts is "not equally open to participation" by black voters. The court only stated—without reference to actual results in any challenged district—that "the success that has been achieved by black candidates to date" is "too minimal in total numbers and too recent" to support a finding that a black candidate's race is no longer "a significant adverse factor" (J.S. App. 37a-38a).[15] However, the election of representatives in numbers as great as or greater than the approximate black proportion of the population—as in House Districts 21, 23, and 39—is surely not "minimal."[16] And in House District 36 and

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candidates would achieve even greater success in the "imminent" future.

Appellees also remark disparagingly that black electoral successes in 1982 occurred "after this lawsuit was filed" (Mot. to Dis. 39); however, the districting plan they challenge was only enacted in 1982. To disregard the results of the 1982 election would be to disregard the only election ever conducted under the challenged plan.

[15] It is particularly troubling that, although the court made factual findings on a district-by-district basis, it drew its ultimate legal inferences regarding racial bloc voting and the effect on minority electoral opportunities on the basis of "the overall results achieved to date at all levels of elective office" (J.S. App. 37a). It is only on such a basis that the court could conclude that black electoral success is "minimal" in a district such as House District 39, where the 25.1% black minority has, with substantial white support, elected 40% of the at-large representatives. To invalidate a specific district on the basis of generalized statewide results at "all levels of elective office" is clear legal error. See *White* v. *Regester*, 412 U.S. at 769 (requiring an "intensely local appraisal" of the electoral scheme).

[16] Appellees suggest (Mot. to Dis. 27, 41) that the district court's disparagement of the black electoral success in the challenged districts is supported by language in the Senate report. However, the report simply states (Senate Report 29 n.115) that the election of a "few" minority candidates should not be deemed conclusive, since it would enable members of the majority to evade the law by engineering the election of "a 'safe' minority candidate." The record here shows that minority candidates in the challenged

Senate District 22, while the results admittedly fall short of a standard of proportional representation, minority candidates either are or have been successful and plainly are competitive.[17]

Congress could not have expressed more clearly its intention not to invalidate multimember 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. See, *e.g.*, Senate Report 33; *id.* at 193 (Additional Views of Sen. Dole).[18] Supporters of amended Section 2 repeatedly assured the Senate Subcommittee that this would not be the result. As Armand

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districts have been elected repeatedly; and there is not the slightest suggestion that they were elected because the majority considered them "safe."

[17] It is also significant that candidate slating has not been dominated by white voters, that anti-single shot voting or equivalent requirements have not been employed, and that there are no present barriers to minority registration or candidacy. In pre-*City of Mobile* cases in which multimember districts have been invalidated, some or all of these factors were usually present. See, *e.g.*, *White* v. *Regester*, 412 U.S. at 766-767; *Wallace* v. *House*, 515 F.2d 619, 623-624 (5th Cir.), vacated on other grounds, 425 U.S. 947 (1975); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305-1306 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); cf. *Whitcomb* v. *Chavis*, *supra*; *Black Voters* v. *McDonough*, 565 F.2d 1, 6 (1st Cir. 1977); *Bradas* v. *Rapides Parish Police Jury*, 508 F.2d 1109, 1112 (5th Cir. 1975).

[18] The district court evidently misapprehends the significance of Congress's rejection of the proportional representation standard. The court dismissed the "proportional representation" disclaimer in Section 2(b) as meaning no more than that the fact that blacks have not been elected in numbers proportional to their percentage of the population "does not *alone* establish that vote dilution has resulted" (J.S. App. 15a & n.13 (emphasis added)). As discussed above (note 8), the disclaimer was expressly drafted to avoid such a narrow interpretation. In effect, the district court has interpreted the Act as imposing a "proportional representation plus" standard rather than an "equal opportunity" standard.

Derfner, head of the Voting Rights Project, explained to the Senate Subcommittee (1 Senate Hearings 803):

> the at-large elections that I * * * have been focusing on are those in which the result of those at-large elections is basically to shut out the minority voters. It is not a question of whether they will get more or less or whether the majority voters will get more or less. It is a question of some versus nothing.

See also *id.* at 1209 (testimony of Frank Parker); cf. *Rogers* v. *Lodge*, 458 U.S. at 616 (emphasis in original) ("multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district"); *Whitcomb* v. *Chavis*, 403 U.S. at 158-159 (multimember districts challenged for "their winner-take-all aspects").

The pre-*City of Mobile* decisions of this and other courts bear out that multimember districts are not unlawful where, as here, minority candidates are not effectively shut out of the electoral process. The closest analogy to this case is *Dove* v. *Moore*, 539 F.2d 1152 (8th Cir. 1976), in which the court of appeals upheld the validity of an at-large system under which the 40% black minority elected one member to an eight-member city council. Indeed, in many cases prior to *City of Mobile* involving at-large voting systems where the aggregate of factors was unquestionably *less* favorable to minority voters than in this case—most particularly, where no black citizen had ever been elected under the system—challenges to the voting plans were nonetheless held to be insufficient. See, *e.g.*, *Black Voters* v. *McDonough*, 565 F.2d 1 (1st Cir. 1977); *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir. 1977); *David* v. *Garrison*, 553 F.2d 923 (5th Cir. 1977); *McGill* v. *Gadsen County Comm'n*, 535 F.2d 277 (5th Cir. 1976). It is significant that the Senate majority and other supporters of amended Section 2 pointed especially to these cases in which the defendant jurisdictions prevailed—including *Dove* v. *Moore*, *supra*—as indications of the way in which the new provision

should be interpreted. Senate Report 33; 1 Senate Hearings 795-796, 797 (testimony of Armand Derfner).

The decision below thus raises serious and substantial questions regarding the interpretation of Section 2(b). Can the central—the "linchpin"—finding of racially polarized voting be sustained in the face of substantial, and decisive, white support for black candidates, merely because a white candidate would have won if the election had been held only among white voters? Is a district court justified in insisting on "safe" single-member seats even where, as its own factual findings unequivocally demonstrate, black voters under a multimember plan have an equal opportunity to participate in the political process and to elect representatives of their choice? The debates in Congress focused in large part on these issues, and the compromise adopted by Congress depended in large part upon the answer. As this decision demonstrates, guidance from the Court is needed to ensure that the congressional intention will be honored in this and future cases.[19]

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[19] If the Court were to conclude that the district court erred, without the need for further briefing and argument, the appropriate disposition would be to remand for further proceedings. As to House District 36 and Senate District 22, there may well be a basis in the record, not reflected in the opinion of the district court, for concluding that the relative lack of success of black voters at the polls is attributable to aspects of the electoral system that constitute a denial of equal opportunity for effective participation, in violation of Section 2. It is difficult to imagine any basis, given the factual findings, for invalidating House Districts 21, 23, or 39.

## CONCLUSION

The decision of the district court should be summarily affirmed insofar as it holds that House District 8 and Senate District 2 are unlawful under Section 2 of the Voting Rights Act. This Court should note probable jurisdiction to review the decision of the district court with respect to the remaining districts.

Respectfully submitted.

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