

No. 83-1968

Supreme Court, U.S.

F I L E D

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In the Supreme Court of the United States

October Term, 1985

— 0 —
LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

— 0 —
On Appeal From the United States District Court
for the Eastern District of North Carolina

— 0 —
BRIEF OF THE
APPELLEES INTERVENORS

— 0 —
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QUESTIONS PRESENTED

- I. Whether the District Court erred in finding a violation of Section 2 of the Voting Rights Act when, based upon the totality of the circumstances, the political process in the challenged districts is not equally open to minorities because (a) the weighted average differential between the registration of black and white age-qualified voters exceeds 15%, (b) elections have been and are marred by persistent and severe racially polarized voting and (c) in the last 15 years, only eight different blacks have been elected to an aggregate of 248 potential seats?
- II. Can a few black victories negate a finding of vote polarization when the difference between the percentage of blacks and the percentage of whites who voted for black candidates is so substantial as to display a consistent pattern of voters casting ballots along racial lines?
- III. Regardless of the definition of racially polarized voting, should the lower Court's finding of a violation of Section 2 be set aside in light of Congress' clear intent to incorporate the analysis of *White v. Regester*, 412 U.S. 353 (1973), into amended Section 2 and the fact that *White* found impermissible vote dilution even without a finding of racial polarization?

PARTIES TO THE PROCEEDING BELOW

PLAINTIFFS (APPELLEES) in the action below are Ralph Gingles, Sippio Burton, Fred Belfield and Joseph Moody, individually and on behalf of a certified class of all black residents of North Carolina who are registered to vote.

PLAINTIFFS / INTERVENORS (APPELLEES) are Paul B. Eaglin, Mason McCullough and Joe B. Roberts, members of the certified class.

DEFENDANTS (APPELLANTS) are Lacy H. Thornburg, Attorney General of North Carolina; Robert B. Jordan, III, Lt. Governor of North Carolina; Liston B. Ramsey, Speaker of the House; the State Board of Elections of North Carolina; Robert N. Hunter, Jr., Chairman; Robert R. Browning, Margaret King, Ruth T. Semashko, William A. Marsh, Jr., members of the State Board of Elections; and Thad Eure, Secretary of State.

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BRIEF OF THE
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STATEMENT OF FACTS

For seventy years, the State of North Carolina officially, systematically and effectively discriminated against black citizens with regard to the electoral franchise. From 1900 until 1969, a combination of literacy tests, the poll

tax, multi-member districts,¹ anti-single shot laws, numbered-seat plans, majority vote requirements, blatant racist appeals, intimidation, and socio-economic discrimination prevented the election of any black to either the House or the Senate of the North Carolina General Assembly. (J.S. at 22a-33a)

Through the inexorable march of no longer passive public opinion, federal legislative pressure and judicial decisions, the greater part of these discriminatory mechanisms were dismantled, but a few, including multi-member districts, remain.

It was in this context that plaintiffs Gingles, et al., and plaintiffs-intervenors Haglin, et al., challenged the 1982 redistricting plan adopted by the North Carolina General Assembly, on the grounds that "based upon the totality of the circumstances," (a) six multi-member districts with substantial white voting majorities in areas where there are sufficient concentrations of black voters to form majority black single-member districts and (b) one single-member district which fractures into separate voting minorities a comparable concentration of black voters, in conjunction with the historical, social and political factors elaborated in *Zimmer v. McKeithen*, 485 F.2d 1297

¹ Multi-member districts are, the State asserts, the result of the historical practice in North Carolina of not dividing counties in forming legislative districts. (App. Brief p. 3) The State seeks to imply (App. Brief p. 3, n. 2) that, because Art II §§ 3(3) and 5(3) of the 1968 revision to the North Carolina Constitution "merely" codified historical practice, no discriminatory intent can be inferred. In light of the absence of any requirement for population balance by district prior to *Baker v. Carr*, 369 U.S. 186 (1962) and *Drum v. Seawell*, 271 F.Supp. 193 (M.D. N.C. 1967), however, the chronological coincidence of the 1968 constitutional amendment is remarkable.

(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), violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (J.S. at 4a). In particular, plaintiffs contended that their class "have less opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

After an eight day trial before a three judge court consisting of the Honorable J. Dickson Phillips, Jr., Circuit Judge, W. Earl Britt, Jr., Chief District Judge, and Franklin T. Dupree, Jr., Senior District Judge, all North Carolinians, the Court held that the black registered voters in the challenged districts were submerged as a voting minority and thereby had less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. (J.S. at 52a)

In the course of its factual examination and conclusions, the Court below made three critical findings relative to whether the members of the plaintiff class have an equal opportunity (a) to participate in the political process and (b) to elect representatives of their choice:

1. In the challenged districts, only 55% of the black voting age population is registered to vote as compared to 70% of the white voting age population, a differential of 15%. (J.S. at 24a-25a; Answer to Interrogatory 1)

2. Elections in the challenged districts have been and are marred by persistent and severe racially polarized voting. (J.S. at 38a)

3. Even in the context of progressive attitudes, legislation and court decisions, only eight different black candidates have been elected in the challenged districts in an aggregate of approximately 248 elections since the first black was elected in 1969.²

While the State and the Solicitor-General place different interpretations upon these facts or attack them as a matter of law, they are not seriously challenged. Plaintiffs contend that they are essentially dispositive of this appeal.

SUMMARY OF ARGUMENT

Amended Section 2 of the Voting Rights Act, 42 U.S.C. Section 1973, protects the right of minorities to equal opportunity to participate in the political process, judged in the context of the totality of the circumstance. A violation is established if members of the minority (1) have less op-

<u>Challenged District</u>	<u>No. of Different Blacks Elected</u>	<u>Source</u>
House District 36	1 (Berry)	(J.S. 34a and 41a)
Senate District 22	1 (Alexander)	(J.S. 34a and 42a)
House District 39	3 (Erwin, Kennedy, A., Hauser)	(J.S. 35a and 42a-43a)
House District 23	2 (Michaux, Spaulding)	(J.S. 35a and 43a)
House District 21	1 (Blue)	(J.S. 35a and 44a)
House District 8	—O—	(J.S. 36a)
Senate District 2	—O—	(J.S. 36a)

From 1969-1983, there have been eight elections in the challenged districts which elect 31 members of the House and Senate. (J.S. at 19a and 20a)

portunity than their counterparts in the electorate to participate in the political process and (2) have less opportunity than others to elect representatives of their choice. Congress took the language of amended Section 2 from *White v. Regester*, 412 U.S. 753 (1973), and intended thereby to incorporate the analysis of it and its progeny, including *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).

White, *Zimmer* and the legislative history of Section 2 enumerate the factors which are relevant to the determination of the two ultimate findings which establish a violation. In the instant case, the District Court held that each and every *Zimmer* factor considered in conjunction with the suspect mechanism of multi-member districts, worked to deny the minority of their statutory rights to equal opportunity to participate in the political process.

In a slightly different analysis than has previously been made, these factors may be appropriately allocated between the two halves of the statutory framework. In particular, minority blacks currently have less opportunity to participate in the political process as a result of (a) the undisputed history of intense and pervasive official discrimination against blacks, the effects of which continue to persist despite the State's recent efforts, (b) the current depressed level of black participation in politics because of the lingering effects of racial discrimination in facilities, education, employment, housing and health, (c) a differential of over 15% between the percentage of age-qualified black and white voting registration, (d) minimal black participation in legislative politics in comparison to black population and (e) the tenuous nature of the state policy, e.g.

not dividing counties, which necessitated multi-membered districts but which had been violated in other districts, to meet population deviation requirements or to obtain Section 5 preclearance.

Similarly, minority blacks currently have less opportunity to elect representatives of their choice because of (a) discriminatory voting procedures, such as a majority vote requirement in primaries (which dilutes or negates the efficacy of "single-shot" voting) and a lack of a sub-district residency requirement in multi-member districts, (b) a consistent history of inflammatory appeals to racial prejudice in political campaigns up to and including the most recent elections, (c) the election of only eight different black candidates to the nearly 250 legislative seat positions available since the first black in this century was elected to the House in 1969 (including the fact that, in two of the challenged districts, no black has ever been elected to the legislature) and (d) persistent and severely racially polarized voting.

With regard to factor (c)—limited black election success—the lower Court *did not* hold that Section 2 had been violated because minorities had not achieved representation in proportion to their percentage of the population. The finding of underrepresentation only triggered the use of the *Zimmer* factors in order to investigate this anomaly under the totality of the circumstances; further, both Congress and the courts accord slight weight to a few minority victories in Section 2 cases. Finally, particularly localized factors such as single-shot voting and some black candidates who are acceptable to and serve the purposes of the dominant majority, mask the discriminatory effects of the submergence of the minority in multi-member districts.

With regard to factor (d), the lower Court *did not* find polarized voting whenever less than 50% of the white voters cast ballots for minority candidates. Instead, the Court properly defined it as existing whenever the difference between the percentage of blacks and the percentage of whites who voted for black candidates is substantial enough to display a consistent pattern of voters casting ballots along racial lines. In other words, it is necessary to examine how both white and black electors vote and the *extent* to which the votes of each are cast along racial lines, together with other, particular circumstances of a given electoral contest, such as whether the black was opposed or unopposed. Once the plaintiff established a *prima facie* case of racial bloc voting through accepted regression analysis techniques, it was the State's burden to introduce evidence of other causative factors, other than race, as rebuttal. Here, the State failed to offer any alternative explanation and should be bound by the findings below.

Even if the lower court did not articulate the proper definition of vote polarization, a finding in this regard is not necessary to establish a violation of Section 2. In *White v. Regester*, this court considered *Zimmer* factors remarkably similar to the one involved here and found impermissible vote dilution without making a finding of vote polarization.

I. THE DISTRICT COURT PROPERLY FOUND THAT, BASED UPON THE TOTALITY OF THE CIRCUMSTANCES, THE POLITICAL PROCESSES IN THE CHALLENGED DISTRICTS ARE NOT EQUALLY OPEN TO PARTICIPATION BY THE PLAINTIFF CLASS.

A. Introduction.

The question in this case is whether the plaintiff class has been denied the rights guaranteed to it by § 2 of the Voting Rights Act, 42 U.S.C. § 1973(a) and (b). The State asserts a minimal definition of these rights—that they are limited to the bare indicia of the political process which are satisfied if minorities enjoy “active and meaningful participation in politics” (App. Brief p. 15; Sol. Gen. Brief dated July, 1985 p. 20 n.43). Similarly, the State attempts to characterize plaintiffs’ contentions and the decision of the Court below as requiring the very proportional representation prohibited by the proviso to § 2(b). (App. Brief at 14, 15, 19, 20, 21, 33; Sol. Gen. Brief dated July, 1985 pp. 6-7)

The Court below expressly eschewed any requirement of proportional representation (J.S. at 15a) and plaintiffs certainly do not urge that result, which is clearly contrary to the statutory command. On the other hand, that statutory command is equally clearly broader than the State’s contentions. Section 2 defines the denial of the protected right—that “the political process [be] . . . equally open to participation by” the minority—in two terms: that its “members have less opportunity . . . to participate in the political process” and that its “members have less opportunity . . . to elect representatives of their choice.” The definition urged by the State—“active and meaningful participation” applies only to the first half of the statutory framework.

The task before this Court, and the parties to this case, is to define the second half of the statutory framework, the meaning the phrase dealing with plaintiffs' showing they have been denied equal "opportunity . . . to elect representatives of their choice." Thus, we must locate the point on that complex spectrum where, by virtue of the application of a legal standard, minorities are so electorally successful that they have, in fact, had an equal opportunity to elect representatives of their choice. This point must not, however, be so extreme as to be a requirement of proportional representation.

B. The Interaction between the Zimmer Factors Present and the Use of Multi-Member Districts Denies Minorities an Equal Opportunity to Participate in the Electoral Process and to Elect Representatives of Their Choice.

As presaged by the foregoing Introduction, plaintiffs urge that the *Zimmer* factors and the challenged electoral mechanism be examined in light of the double framework of § 2. We will allocate the *Zimmer* factors to that half of the framework to which they are actually more, or solely, applicable.³ In this fashion, "equal opportunity to participate" is defined in terms of (a) the history of racial discrimination against black citizens in voting matters, (b) the effects of racial discrimination in facilities, education, employment, housing and health, (c) limitations on actual voting by black citizens, (d) the increased participation, if

³ This mode of analysis allows for the use (and proper allocation) of additional factors which are not foreclosed by the legislative history or *Zimmer* and which may be applicable to this or any other case.

any, by black citizens in the political process and (e) the fairness of the State legislative policy underlying the challenged redistricting.

Similarly "equal opportunity to elect" may be circumscribed by (a) limiting voting procedures, (b) the use of racial appeals in political campaigns, (c) the limited extent of election of blacks to public office and (d) racial polarization in voting.

It is plaintiffs' crystal conviction and the unambiguous factual findings of the Court below that the combination of the *Zimmer* factors with the use of multi-member districts has deprived them of *both* (a) the equal opportunity to participate in the electoral process *and* (b) the equal opportunity to elect representatives of their choice.

1. Equal Opportunity to Participate

(a) The history of racial discrimination against black citizens in voting matters.

In contrast to the State's assertion, the Court below did not saddle the State of North Carolina with "an original sin." (App. Brief at 27) Instead, the Court found that, because of the extent and virulence of the undisputed history of official discrimination, its effects were still being currently felt. (J.S. at 22a) Even after most of the impediments to black voting were removed and some efforts were made by the State to increase black registration, the registration of age-qualified blacks is overwhelmingly less than that of age-qualified whites in

each of the counties which make up the challenged districts.⁴ (J.S. at 24a-25a)

In fact, in five of the counties, including one of the largest (Wake), the registration differential between whites and blacks has remained virtually unchanged during the very period (1978-1982) relied upon by the State to demonstrate the so-called "progress" upon which it depends to overcome the findings and conclusions of the Court below. (*Id.*) In contrast, the Solicitor-General recognizes that these registration differentials are an appropriate and, here, telling point. (Sol. Gen. Brief July, 1985 p. 26) Indeed, plaintiffs urge that they are dispositive proof that minorities are currently denied an equal opportunity to participate in the political processes of the challenged districts. As such, the registration differentials are discussed in greater detail at subsection (c) *infra*.

(b) The effects of racial discrimination in facilities, education, employment, housing and health.

The Court below also found that the socio-economic effects of racial discrimination had depressed minority political participation. (J.S. at 26a) The State contends that the Court jumped to this conclusion despite the absence of proof that "participation by blacks in the electoral process is depressed." (App. Brief at 29) In fact, however, the evidence was that economically disadvan-

⁴ The Court acknowledged the preceding governor's attempt to increase the registration of blacks, but found that, unlike the multi-member districts which, absent this lawsuit, would be with us forever, there was no guarantee that the efforts to increase black registration will be continued past the end of that administration. (J.S. at 25a)

tagged blacks, for whom political contributions are a burden, are even more hampered by the extra cost of multi-member campaigns. It is noteworthy that the Solicitor-General does not share the State's misconception; in fact, his brief does not challenge the lower Court's finding in this regard.

Even more important, the State's attempt to show that black political participation is not depressed is disingenuous. The litany of Democratic party offices, political positions and elected offices held by minorities in the challenged districts is virtually all either intra-party, appointive or local in nature. While there may be less question that black participation is depressed at the local level, the important inquiry is whether it is depressed at the legislative district level. The only relevant proof of black political participation at the legislative district level which the State can cite are the few black representatives and senators elected since 1969, both in the challenged districts and elsewhere.⁵ Even with regard to these electoral successes, the critical fact is that many of them are the result of single-member districts, the very relief sought in this case.⁶

(c) Limitations on actual voting by black citizens.

The fact that blacks are registered to vote at a far lower rate than whites is virtually definitional of the

⁵ Discussed in detail below in Section IB under heading "2-Equal Opportunity to Elect Representatives of Their Choice."

⁶ In the course of the 1982 redistricting, the legislature created single-member districts in counties not involved in this case, such as Guilford (Greensboro). As a result, blacks have enjoyed increased electoral success.

lack of equal participation. Based upon the registration statistics presented in this case, it is painfully evident that blacks do not, indeed, cannot, equally participate in the electoral process with whites. In the two largest counties involved in this case (Mecklenburg and Wake), the disparity between white and black registration is well over 20%. In only a few of the smaller counties does the voter registration disparity decline to a still crippling 10%. Thus, in the counties that contain the most blacks, their opportunity to participate, as defined by registration rates, is the least. In fact, when the percentage registration statistics for each county in the challenged districts are applied to the absolute numbers of the voting age population in the county, the effect of the vast differential between black and white registration in the more populous counties is clear. While the numerical average of the registration differentials is 12.6%,⁷ the weighted average is 15%.⁸

This current indicium of the lack of equal opportunity to participate is even greater in light of the fact that, between 1980 and 1982, statewide white registration has dropped by 112,000 and black registration has increased by 12,096. (App. Brief at 13) Even with these black gains and white losses, black registration still lags so substan-

⁷ This figure is the numerical average of the difference between the percentage of blacks of voting age who are registered and the percentage of whites of voting age who are registered, as set forth in the opinion of the Court below in J.S. at 24a-25a (10/82 figures).

⁸ This figure is the weighted average obtained by applying the differentials from J.S. at 24a-25a to the voting age population statistics for each county found in Plaintiffs' Exhibit 87.

tially behind white registration as to constitute irrefutable proof that, in the challenged districts, blacks do not have an equal opportunity to participate in the political process.⁹

(d) Increased participation, if any, by black citizens in the political process.

The trial court found that, despite the very recent increase in black participation in politics, this factor did not overcome "entrenched racial vote polarization" and, compared to the overall black population, black participation remained "minimal." (J.S. at 47a) While the State's Statement of the Case does contain references to some facts which the trial court weighed in reaching this finding, the State does not separately dispute this finding in its brief, and therefore, this finding is not subject to review. *See generally Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

(e) The fairness of the State Legislative policy underlying the challenged redistricting.

As a final factor bearing upon the lack of equal opportunity to participate, the Court found that the State's justification for creating the challenged districts did not overcome other factors which established vote dilution. The Court quoted the Senate Committee Report which evidences Congress' intent that "even a consistently applied practice premised on a racially neutral policy would not

⁹ According to the testimony of Mr. Spearman, Chairman of the Board of Elections, even at this extraordinary rate of "catch up", over a decade would be required to equalize the registration percentage.

negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." (J.S. at 49a, quoting S. Rep. at 29, n.117) Plaintiff Gingles made a compelling showing using the other *Zimmer* factors that "no state policy, either as demonstrably employed by the legislature in its deliberations, or as now asserted by the state in litigation, could 'negate a showing here' [of] actual vote dilution. . ." (*Id.*)

The Court specifically examined the proffered justification. The State argued it had an unbroken historical policy of not dividing counties in the formation of legislative districts and that, as a result, the use of multi-member districts was necessary. Prior to *Baker v. Carr*, 369 U.S. 186 (1962), however, multi-member districts were not "necessary" to avoid splitting counties because there was no requirement that districts be balanced in population. Thus, at most, the State's interest was in preserving a hoary relic.¹⁰ Moreover, the Court below found that, whatever its genesis, this policy could not justify diluting the votes of minorities, especially when it was not sufficiently sacred to forestall the splitting of counties to meet population deviation requirements or to obtain Section 5 pre-clearance. (J.S. at 50a) Put another way, the State's alleged "policy" was properly viewed as a smokescreen.

2. Equal Opportunity to Elect Representatives of Their Choice.

(a) Limiting voting procedures.

The second prong of the *Zimmer* factor dicotomy concerns the equal opportunity of the minority to elect repre-

¹⁰ Please also see footnote 1, *supra*.

sentatives of their choice. In Section 1(c) above, we discussed *direct* limitations on participation, the most important being diminished black voter registration. In this section, the concern is with the *indirect* effects of voting procedures on the practical capacity of minorities to elect the candidates of their choice.

In this connection, the Court found that North Carolina voting procedures, such as the majority vote requirement in primaries and a lack of a subdistrict residency requirement, had an adverse impact on black voting strength. (J.S. at 29a-30a) In multi-member districts, majority vote requirements have the practical effect of eliminating the possibility that the majority voters will so spread their votes over the white candidates as to allow a minority candidate to rank sufficiently high to obtain a seat because of concentrated support from the minority.

This requirement diminishes the effectiveness of "single-shot" voting—the primary technique that minorities have to combat vote dilution in a multi-member district. With this requirement, minorities can no longer elect their candidate by concentrating their votes. They must depend upon some cross-over votes from the white voters in order to attain majority status for any black candidate.

Even though the Court found no black candidate for election to the General Assembly had failed to win an

election solely because of the majority vote requirement,¹¹ it "exists as a continuing practical impediment to the opportunity of black voting minorities in the challenged districts to elect candidates of their choice." (J.S. at 30) Congress did not, however, require that a plaintiff in a Section 2 case must actually show that this limitation had affected an election in the past. Congress was concerned with the interplay between this rule and the suspect voting procedure (multi-member districts). Thus, the statutory focus is on the *potential* for affecting *future* elections. In approving the relevance of this factor, the Congressional report noted that the inquiry was "the extent to which the state . . . has used . . . majority vote requirements . . . or other voting practices or procedures that *may* enhance the opportunity for discrimination against the minority group . . ." S. Rep. at 28 (emphasis added) If Congress had desired to impose a showing of actual impact on electoral success, it would have used "have enhanced", not "may enhance".

Additionally, North Carolina lacks a subdistrict residency requirement; therefore, all candidates for the legislature in the multi-member district may be from areas outside black neighborhoods. See *White*, 412 U.S. 766, n.10. This factor makes it far more likely that the majority

¹¹ The State asserts that, because of this fact, the lower Court's finding in this regard is "absurd." We argue in the text following this footnote that Congress did not intend the factor to be interpreted only in the past tense. In addition, the Court below was well aware of the fact that a black candidate [H. M. Michaux, currently a member of the House from challenged District 23 (Durham)] lost his 1980 bid for Congress from the district which includes challenged district 23 because of the majority vote requirement in the Democratic primary.

voters will elect all of the representatives in the multi-member district, as was actually the case in the challenged districts. (Plaintiffs' Exh. 4-8)

(b) The use of racial appeals in political campaigns

The use of racial appeals in political campaigns affects the opportunity that blacks have to elect candidates. The Court found that "[t]he record in this case is replete with specific examples of this general pattern of racial appeals in political campaigns." (J.S. at 31a) Additionally, for the past thirty years the Court found racial appeals to be "widespread and persistent." (J.S. at 32a)

A logical inference to be made from these findings is that these appeals have been successful in electing majority candidates. If they were not, then candidates using them would have been weeded out in the political marketplace. With this inference, it is easier to understand the syllogistic relationship between racial appeals and multi-member districts. As shown by the fact that appeals to race is a successful election technique, voters in these districts tend to vote along racial lines. Because of the use of multi-member districts, the majority voter's practice of voting along racial lines lessens the opportunity for minorities "to elect representatives of their choice."

In an attempt to cast doubt on the lower Court's findings, the State has selectively chosen six campaigns in which it concedes that racial appeals were made. The State then implies that these six national campaigns were the only campaigns which underlay the Court's finding. (App. Brief at 31) In fact, however, the Court explicitly found that "[n]umerous other examples of assertedly more subtle forms of 'telegraphed' racial appeals in a

great number of local and statewide elections, abound in the record." (J.S. at 32a)

Once again the State makes an excellent argument for this Court to defer to the findings of the lower Court which were based on days of testimony, hundreds of exhibits and an intimate knowledge of the North Carolina political environment. (See Appellee's Motion to Dismiss or Affirm at pp. 8-42 for a full discussion of this argument.)

(c) **The extent of election of blacks to public office.**

(d) **Racial polarization in voting.**

The extent to which blacks have been elected to office and racially polarized voting bear directly and critically on the question of whether blacks have an equal opportunity to elect candidates of their choice. For a full discussion of each item, see Section III and Section II C and D, respectively, *infra*.

C. The Court Did Not Hold that Section 2 Had Been Violated because the Multi-Member Districts Prevented Proportional Representation for Minorities.

In an attempt to substantiate its claim that the Court has committed an error of law, the State has seriously misconstrued the opinion below. The State quotes the Court's language that minorities are "effectively denied the political power to further those interests that numbers alone would presumptively give [them] in a voting constituency not racially polarized in its voting behavior," (App. Brief at 20) and then claims that this statement was the only factor upon which Court based its findings of vote dilution. (*Id.*)

This interpretation is erroneous for two reasons. First, the District Court explicitly acknowledged that a violation of Section 2 cannot simply be based on "the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population." (J.S. at 15a) (citation omitted) Second, if the District Court believed this one fact was enough to warrant a finding of a statutory violation, it would not have been necessary for the Court to discuss and weigh the numerous other *Zimmer* factors that are present in this case.

Instead, the lower court correctly analyzed the evidence and found that blacks were "presumably" underrepresented so as to trigger a further investigation into the causes of this underrepresentation anomaly. If blacks are not represented proportionately in a jurisdiction, this is not a *per se* violation of Section 2. Rather, it is an anomaly which might be caused by illicit denial to a minority of their opportunity to participate in the political process or which might be founded in some other benign factor. This very underrepresentation is, however, one circumstance that courts are explicitly allowed to use in finding that the minority have less opportunity to elect representatives of their choice. 42 U.S.C. § 1973(b).

In contrast, it is the State which seeks to disregard the "totality of circumstances" standard by focusing on one *Zimmer* factor. The State asserts that, "[t]he degree of success at the polls enjoyed by black North Carolinians is sufficient *in itself* . . . to entirely discredit the plaintiffs' theory that present legislative districts deny blacks equal access to the political process." (App. Brief at 24) (em-

phasis added) Ignoring Congressional as well as judicial statements that the extent to which blacks are elected is just one factor to consider in a Section 2 claim, the State asserts that, solely because there have been 18 black victories in the challenged districts, no violation can be found. *Id.* The State's argument fails for two reasons.

First, the number 18 is triply misleading (a) because it includes two blacks elected from districts not challenged here (House Districts only partially within Senate District 2), (b) because it aggregates all of the black victories attained in the *seven* challenged districts and (c) because this number of victories is infinitesimal in the context of the number and years of elections since 1900 in which black candidates were not even at the starting block, let alone the finish line. Lumping victories together masks the true effects that these multi-member districts have on the minority's ability to participate in the electoral system. Adhering to the judicial mandate which requires an intensely localized examination of the facts involved in Section 2 claims, *White v. Regester*, 412 U.S. at 769, the number of victories are put in their proper perspective only when disaggregated into their respective districts and compared to the number of elections lost.

In both House District 8 (Edgecombe, Nash, Wilson) and Senate District 2 (Eastern North Carolina), no black has ever ¹² been elected to the legislature.¹³ To the ex-

¹² As pointed out above, it must be remembered that "ever" is a long time in North Carolina politics—since 1900, eighty-five years and three generations ago.

¹³ Two representatives have been elected from House Districts within Senate District 2, but these two House Districts are not being challenged in this lawsuit.

tent that the State relies on black victories in order to outweigh the rest of the *Zimmer* factors, the State must concede a violation in at least these two districts.¹⁴ The State acknowledges this fact when it cites the authoritativeness of the House report's statement that

[i]t would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates. H. Rep. at 30.

The white majority having always defeated the minority candidates in House District 8 and Senate District 2, there should be no question left of the propriety of the lower Court's conclusions and order with regard to them.

In the rest of the districts, the asserted "substantial" black successes actually constitute only a pitiful "few" victories when they are disaggregated. In House District 36 (Mecklenburg) and Senate District 22 (Mecklenburg/Cabarrus) only one black from each district has ever been successful. (J.S. at 34a) In House District 21 (Wake) only one black candidate has ever been successful, and he was reelected only once. (J.S. at 35a) In House District 39 (Forsyth), three blacks were elected but only one of these was elected for two terms and the two elected in 1982 were successful only after this litigation was begun. It is important that the black victor, Hauser, testified at the trial that whites had suddenly become extremely supportive of his campaign. (See Hauser Deposition) (J.S. at 35a) House District 23 (Durham) has had the most rep-

¹⁴ In addition, as the Solicitor-General correctly notes in his brief (Sol. Gen. Brief July, 1985 p. 7, n.11), this Court's notation of jurisdiction does not encompass the State's challenge to the District Court's conclusions with regard to House District 8 and Senate District 2. As a result, summary affirmance would seem required. They are discussed here only because the picture of racial vote dilution in those districts is illustrative of the other challenged districts.

resentation by blacks, having a black member of the House every year since 1973. (*Id.*) Even these five victories are, however, insignificant when one considers that there have been only two individuals involved and that the incumbent since 1978 (Kenneth Spaulding) has run uncontested each time in either the primary, the general election, or both. The Court below, all of whose members are from North Carolina, was well able to understand this phenomenon based upon its judicial notice of the fact that Mr. Spaulding is a member of one of the most prominent Durham business families.¹⁵ In this connection, Mr. Lovett, the President of the Durham Committee on the Affairs of Black People, testified without contradiction that a necessary factor in the Committee's solicitation of black candidates was its perception of the black candidate's acceptance by the white community, with particular emphasis on

¹⁵ The State asserts that the minority's right to elect candidates of their choice is not tantamount to the right to elect candidates of their race. (App. Brief at 33) If this contention be true, the converse is equally so—the election of a particular black may not be probative of the minority's ability to elect candidates of *their* choice.

When minority candidates run unopposed in a political context with a history of very recent official discrimination and *persistent* racially polarized voting (including the refusal of whites to vote for even the unopposed blacks), a Court should give more than a passing scrutiny to the probative value of their election "success." A more appropriate inference would be that the black candidate in question was acceptable to the dominant white majority while alleviating potential racial unrest in non-political areas.

The other side of the same coin is the well-known political fact that Republicans do not contest the seats of many conservative Democrats in the South. In neither case, however, does the minority actually have the opportunity to elect representatives of *their* choice. In the first case, the black minority gets an official of their race but whose economic interests are more aligned with those of the dominant white majority;

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the candidate not being outspoken with respect to the particular concerns of the black community.

Second, Congress and the courts have been explicit with regard to the slight weight which should be afforded to a few minority victories in Section 2 claims. In *Zimmer*, the defendants argued that the victories of three blacks in a challenged district should foreclose a finding of vote dilution. 485 F.2d at 1307. The Court rejected this argument on the ground that it would "merely be inviting attempts to circumvent the Constitution" by encouraging those who wish to thwart a successful challenge to an electoral scheme to engineer the election of a few blacks. 485 F.2d at 1307. The mere possibility of encouraging attempts to thwart vote dilution cases in this manner was enough for the Court to reject the defendants' argument, without requiring a factual finding that such an attempt had actually occurred.

Congress has also emphasized that black success is just one factor among the totality of circumstances to be

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in the second, the Republican minority gets an official suitable to its economic interests but who will vote with the opposition on the critical question of organizing the House or Senate. In both cases, the result is a half-way house for a minority as yet only partly enfranchised. In the case of the black minority, however, the right to full political equality is guaranteed by § 2.

Perhaps even more important, the extent to which the political compromise suggested by the anomaly of a black running unopposed by the dominant white majority should be considered *pro* or *con* the State in the evaluation of this *Zimmer* factor, is uniquely a question for the trier of fact, in this case a Court of three distinguished citizens of the jurisdiction in question. With the benefit of their local knowledge, experience and appreciation, they have decided that the greater weight of the factor cuts against the State; that appropriately inspired conclusion should not be disturbed here.

considered. S. Rep. at 194. Thus, isolated victories are not dispositive of vote dilution; instead, their paucity confirms the lower Court's finding that blacks have been unable to elect candidates of their choice in the challenged districts.

D. Because of Single-Shot Voting Techniques, Limited Black Electoral Success May Mask the Results of a Discriminatory Law.

Single-shot voting may enable blacks to be elected, yet they will still have less than the statutorily required equal opportunity to elect candidates of their choice. By the use of single-shot voting, blacks will appear to enjoy some success at electing candidates of their choice, while they are actually being deprived of their right to vote for a full slate of candidates. (J.S. at 41a)

When minorities are placed in a multi-member district, one of the techniques they use in order to get a particular candidate elected is to "single-shot" their vote. In theory, the minority voters will all vote for the minority candidate and not cast the rest of their votes for any other candidates in the race. This tactic deprives the other candidates of the minority vote and, thus, the minority candidate has a better chance of being elected as one of the top vote getters.

In order to use this method to elect their candidate, the minority must forfeit their right to vote for any of the other representatives from their multi-member district. In contrast, the majority voters are able to cast all of their votes. The majority is able to influence the election of all representatives while the minority, by "single-shot" voting, is only able to influence the election of one represent-

ative. If the minority chooses not to "single-shot" vote in a multi-member district with several *Zimmer* factors present, they will be deprived of *all* opportunity to elect a candidate of their choice. Either way, they will have less of an opportunity to elect candidates of their choice than the majority voters and are thereby deprived of their statutorily guaranteed right.

II. THE COURT PROPERLY USED A DEFINITION OF VOTE POLARIZATION WHICH WOULD BE APPLICABLE TO JURISDICTIONS IN WHICH BLACKS WIN A FEW ELECTIONS.

- A. Vote polarization exists whenever the difference between the percentage of blacks and the percentage of whites who voted for black candidates is substantial enough to display a consistent pattern of voters casting ballots along racial lines.**

To interpret raw statistics under a vote dilution claim, the Court must look at the alternatives available to voters. The lack of white candidates in some races will uncharacteristically increase the minority candidates' vote totals. Even in races such as these, however, pieces of the pervasive vote polarization pattern can still be discerned. For example, black candidates may receive some white support in a few elections but that support is still far less than the almost unanimous support of black voters. This difference in voting conforms to the pattern of racial bloc voting already established in other races in these districts. In this case, the lower Court utilized precisely this analysis in its extensive discussion of and findings with regard to specific elections in the individual districts. (J.S. at 38a-46a)

Contrary to the assertion of the State (App. Brief at 36), the lower Court *did not* find racial bloc voting when-

ever less than 50% of the whites voted for the black candidate. This definition was implicitly disavowed by the lower Court. For example, in the Court's discussion of polarized voting in Mecklenburg County, it pointed to the fact that black candidate Berry received 50% of the white vote. The Court still found polarized voting in Mecklenburg despite this fact because, in the race in which Berry received these votes, there were only seven white candidates running for eight positions. (J.S. at 42a)

Similarly, in Durham County, when a black candidate received votes from 43% of the white voters in the 1982 General Election, the Court once again found evidence of polarized voting. (J.S. at 44a) The black in this election ran unopposed. Thus, the Court found that 57% of the white voters failed to vote for the black candidate *even when no other choice was available*. In comparison only 11% of the blacks failed to vote for the unopposed black. The Court held, compellingly so, that the voters in this election clearly voted along racial lines despite the fact that the black candidate obtained substantial white support and actually won the election.

In this same vein, vote polarization cannot simply be found as a matter of law if less than 50% of the whites vote for the black candidate. The appellants set up a "straw man" by accusing the lower Court of using this definition. It completely ignores the standard by which courts, including the District Court in this case, decide whether the percentage of white votes attained by the black candidate is aberrational. The standard actually used not only focuses on the white support for black candidates, but also includes an examination of the way blacks voted. Simply because less than 50% of the whites voted

for a black candidate tells the Court only half the story of polarization. If less than 50% of the blacks also voted for the black candidate, then no polarization is shown.

The Court below certainly understood and appreciated this principle when it cited the 1978 elections in House Districts 39 (Forsyth) and 23 (Durham) where the black candidates, Sumter and Barnes, each received less than 50% of the votes of both blacks and whites. Thus, inherent in any definition of polarization is a comparison between the voting habits of two groups.

The State argues that because blacks have received white support past certain numerical levels that polarization cannot be found. Vote polarization cannot be defined so discretely because it exists on a spectrum. Congress did not expect courts to generate an absolute cut-off point with respect to the percentage of white votes obtained which would foreclose a finding of vote polarization. In listing the *Zimmer* factors, Congress instructed the courts to examine "the *extent* to which the elections of the State or political subdivision is racially polarized." S. Rep. 97-417 at 29 (emphasis added). For Congress, the finding of racial polarization is just one factor which, itself, can exist at many different levels of intensity.

The Courts, also, have recognized that polarization cannot be defined discretely. In *United States v. Marengo County*, the Eleventh Circuit recognized that polarization can be shown through direct statistical evidence or it can "be indicated by a showing under *Zimmer* of . . . past discrimination in general . . . , large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts.' " 731 F.2d 1546, 1567,

n.34 (1984) [quoting *Neveett v. Sides*, 571 F.2d 209, 223, n.18 (5th Cir. 1978)]. Because polarization can be shown on the basis of nonstatistical evidence, it is not a concept rebutted by a defined cut-off point.

In the instant case, the finding of vote polarization was based on far more evidence than that which was held to be sufficient in *Rogers v. Lodge*, 458 U.S. 613 (1982). In *Rogers*, this Court affirmed a District Court's finding that the at-large system of electing commissioners in Burke County, Georgia, was being maintained for "invidious purposes." 458 U.S. at 616. In this Court's examination of the *Zimmer* factors present, evidence of vote polarization was deemed "overwhelming". 458 U.S. at 623, based solely on statistics generated when two blacks ran for county commissioner.¹⁶

In *Rogers*, the District Court had examined three precincts with a clear majority of blacks and one precinct with a bare majority of blacks. The Court compared the two black candidates' successes in these four precincts with their relative lack of success in predominantly white precincts. Statement as to Jurisdiction at 73a, *Rogers v. Lodge*, 458 U.S. 613 (1982). One black won in all four black precincts and lost in all of the white precincts. *Id.* The other black candidate won in three of the four black precincts and lost in the white precincts.¹⁷ *Id.*

There are two relevant points to make about this Court's finding of vote polarization based upon the facts in

¹⁶ In contrast, the *Gingles* District Court analyzed between five and 15 elections in each district.

¹⁷ It was not made clear whether this second black candidate lost in a district with a clear or bare majority of blacks.

Rogers. First, the Court did not require the blacks to win in every black precinct in order to find vote polarization. Thus, even though the blacks did not enjoy unanimous black support, polarization was still found. Similarly, as in the case at bar, even though some whites voted for a black candidate, this fact did not foreclose a finding of vote polarization.

Second, the *Rogers* Court relied on the District Court's finding of vote polarization and did not examine the record further to establish by how much the black candidates lost in each of the white districts. Instead, it was sufficient for a finding of vote polarization that blacks basically won in the black precincts and basically lost in the white precincts.

In contrast, in this case, the lower Court's conclusion is supported by a regression analysis which established the degree of black and white support for the black candidates in each race. As a result of this analysis, the Court found not only that blacks almost uniformly lost in white majority districts but also, and more importantly, that *in all cases* the support of black candidates by white voters differed fundamentally and dramatically from the support of black candidates by black voters. In other words, the lower Court in this case complied with Congress' mandate to determine the "extent" as well as the fact of racial polarization. S. Rep. 97-417 at 29.¹⁸

¹⁸ Both the State (App. Brief pp. 41-44) and the Solicitor-General (Sol. Gen. Brief July, 1985 p. 30 n.57) disparage the regression analysis relied upon by the lower Court. They are apparently unaware or ignore the fact that the State's own expert

By presenting a study that correlated a candidate's race with the race of voters, plaintiff Gingles made a *prima facie* showing of vote polarization. This showing could have been rebutted by the State if it had presented other studies which showed that factors other than race better explain the election results.¹⁹ For example, in *Terrazas v. Clements*, the District Court refused to find polarized voting when an hispanic candidate received 90% of the votes in "hispanic districts" and only 35% of the vote in "anglo districts." 581 F. Supp. 1329, 1352 (N.D. Texas, 1984). The defendant there rebutted plaintiff's *prima facie* case with evidence that hispanics and whites voted along party lines, which explained the results in more elections than did the racial polarization theory. 581 F. Supp. at 1352. In contrast, the State here made no such attempt to rebut Gingles' *prima facie* showing (J.S. at 38a, n.29) which, consequently stands unchallenged.

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"did not question the accuracy of the data, its adequacy as a reliable sample for the purpose use, nor that the methods of analysis used were standard in the literature." (J.S. at 39a, n.29)

In addition, the general reliability of the plaintiff's expert analysis "was further confirmed by the testimony of Dr. Theodore Arrington, a duly qualified expert witness Proceeding by a somewhat different methodology and using different data, Dr. Arrington came to the same general conclusion respecting the extent of racial polarization" (*Id.*)

¹⁹ The Solicitor-General concurs that the burden of going forward shifts to the defendant after the plaintiff has made out a *prima facie* case. Sol. Gen. Brief July, 1985 p. 30 n.57) See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).