No. _____

In the Supreme Court of the United States

FERGUSON FLORISSANT SCHOOL DISTRICT,
Petitioner,

v.

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Voting Rights Act of 1965 forbids state and local voting processes that "result[] in a denial or abridgment of the right of any citizen of the United States to vote on account of race. . . ." As this Court recognized in *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 508 (2006), "the ultimate right of §2 is equality of opportunity, not a guarantee of electoral success for minority preferred candidates of whatever race."

The Ferguson Florissant School District is required by Missouri Statute (Sections 162.261 and 162.291 of the Revised Statutes of Missouri) to elect its School Board members through an at-large electoral system. Presently, three of the seven members are minority preferred candidates. Under the 2010 census data, those identifying as African-American accounted for 48.19% of the voting age population. Compelling evidence was presented at trial to suggest that those identifying as African-American now constitute a majority of the voting age population.

The question presented is:

Does Section 2 of the Voting Right Act of 1965 allow a minority group to bring a claim against a school district's statutorily imposed at-large electoral system where the minority group forms a numerical majority of the voting age population or, at a minimum, where the Non-Hispanic white population does not form a numerical majority?

PARTIES TO THE PROCEEDINGS

Petitioner Ferguson Florissant School District was the Defendant-Appellant below. As Petitioner is a governmental agency, a corporate disclosure statement is not required under Supreme Court Rule 29.6

Respondents Missouri State Conference of the National Association for the Advancement of Colored People, Redditt Hudson, F. Willis Johnson and Doris Bailey were the Plaintiffs-Appellees below.

At the District Court, the St. Louis County Board of Election Commissioners was a Defendant by virtue of being the election authority charged with administering elections for the Ferguson Florissant School District. The St. Louis County Board of Election Commissioners was not a party to the appeal before the Eighth Circuit.

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INTRODUCTION

This Petition asks this Court to clarify whether a claim under §2 of the Voting Rights Act ("VRA") challenging the use of an at-large electoral system itself can be maintained where the minority forms a majority of the Voting Age Population ("VAP") or at a minimum Non-Hispanic white voters do not have a majority of the VAP.

Despite compelling evidence to the contrary, the District Court below found that the African American VAP within the Ferguson Florissant School District ("FFSD") was still, marginally, a numerical minority, finding that neither African Americans, nor Non-Hispanic whites had a numerical majority of the VAP within FFSD. In any event, both the District Court and the Eighth Circuit Court of Appeals opined that even if the African American VAP constituted a numerical majority, Respondents still would have been able to maintain a §2 claim attacking the at-large electoral system itself. As discussed *infra*, such a finding is inconsistent with this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), and demonstrates a split among the appellate circuits.

Furthermore, this case raises issues of substantial importance as the District Court has ordered a remedial plan (cumulative voting) that will only serve to harm the African American community and undermine the very goals of the VRA. Thus raising the question, as Justice Thomas did in his concurring Opinion in *Holder v. Hall*, 512 U.S. 874, 114 S.Ct. 2581 (1994), as to whether a challenge to an at-large

electoral system is the type of action that §2 of the VRA intended to authorize:

> An examination of the text of §2 makes it clear, however, that the terms of the Act do not reach that far; indeed, the terms of the Act do not allow many of the challenges to electoral mechanisms that we have permitted in the past. Properly understood, the terms "standard, practice or procedure" in §2(a) refer only to practices that affect minority citizens' access to the ballot. *Districting systems and electoral mechanisms that may affect the 'weight' given to a ballot duly cast and counted are simply beyond the purview of the Act*.

Holder, 512 U.S. at 914 (Emphasis added).

The District Court found that the at-large electoral system itself violated §2 of the VRA and then ordered a remedy, cumulative voting, that will only exacerbate the harm it believes has been caused by the present system.

OPINIONS BELOW

The Eighth Circuit's decision is reported at 894 F.3d 924. <App.1>. The District Court's decision as to liability is reported, at 201 F.Supp.3d 1006. <App. 55>. The District Court's decision as to remedy, is reported, at 219 F.Supp.3d 949. <App. 28>.

JURISDICTION

On July 3, 2018, the Eighth Circuit issued its decision. On August 6, 2018, the Eighth Circuit denied a Motion for Re-hearing and Rehearing En Banc. The

Petition timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Voting Rights Act of 1965, and more specifically Section 2 thereof, which is codified at 52 U.S.C. §10301, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members

> of a protected class elected in numbers equal to their proportion in the population.

(Italicized in original).

Subsection 1 of Section 162.261 of the Revised Statutes of Missouri ("RSMo") provides:

> The government and control of a seven-director school district, other than an urban district, is vested in a board of education of seven members, who hold their office for three years, except as provided in section 162.241, and until their successors are duly elected and qualified. Any vacancy occurring in the board shall be filled by the remaining members of the board; except that if there are more than two vacancies at any one time, the county commission upon receiving written notice of the vacancies shall fill the vacancies by appointment. If there are more than two vacancies at any one time in a county without a county commission, the county executive upon receiving written notice of the vacancies shall fill the vacancies, with the advice and consent of the county council, by appointment. The person appointed shall hold office until the next municipal election, when a director shall be elected for the unexpired term.

Section 162.291 RSMo provides:

> The voters of each seven-director district other than urban districts shall, at municipal elections, elect two directors who are citizens of the United States and resident taxpayers of the district, who have resided in this state for one

year next preceding their election or appointment, and who are at least twenty-four years of age.

STATEMENT OF THE CASE

§2 of the VRA guarantees to minority voters the right to participate equally in elections free from any imposed "standard, practice, or procedure" that causes a denial or abridgment of that right. The VRA was enacted to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century." *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808 (1966). §2, however, guarantees the right of equal opportunity *not* equal electoral success. *LULAC*, 548 U.S. at 508.

A. Relevant history of population and demographic change within FFSD.

FFSD is a public school district organized under the laws of the State of Missouri. *See* Chapter 162 RSMo. FFSD is the result of court ordered desegregation which occurred in the 1970s. *United States v. State of Missouri*, 515 F.2d 1365 (8th Cir. 1975). Since the time of desegregation, FFSD has seen significant and meaningful changes to the racial balance of its population.

The 1990 decennial census found that 20.77% of the VAP in FFSD identified as being single race African American.[1] By the 2000 decennial census that percentage had increased to 32.61%, and to 47.33% by 2010. <App. 69>. In 2010, 48.19% of the District's VAP identified as any part African-American. <App. 69>. In 2010, the Non-Hispanic white VAP was 48.95% of FFSD. <App. 70>. As such, per the 2010 decennial census there was no single racial group that formed a numerical majority within FFSD, with Non-Hispanic whites having a marginal plurality.

For the years 2011-2013, the United State Census Bureau conducted its continuous sampling survey known as the American Community Survey ("ACS"), which is "designed to provide communities with reliable and timely demographic, housing, social and economic data every year." <App. 70-71>. The 2011-2013 ACS found that those identifying as single race African American represented 48.94% of FFSD's VAP, while 46.78% of the VAP identified as Non-Hispanic white. <App. 74>.

Although not counted by the 2011-2013 ACS, evidence was presented to the District Court that from the 2011-2013 data, individuals identifying as any part African American comprised more than 50% of the VAP. <App. 77>.

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[1] This Court can take judicial notice of the 1990 and 2000 census data. "United States census data is an appropriate and frequent subject of judicial notice." *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571–72 (5th Cir. 2011). This information was in the record before the District Court and 8th Circuit Court of Appeals.

The District Court recognized that the population trends suggested that African Americans would be a numerical majority within the FFSD's VAP, but declined to look beyond the census data with respect to the population and VAP data. <App 101-103>.

The evidence presented to the District Court by both Petitioner and Respondents was that the African American population under the 2010 decennial census was younger than the Non-Hispanic white population. <App. 78>. Respondents' expert, Dr. Gordon, testified that "there is a stark disparity in population by age, with the share of the African-American population much higher among school-age residents." <App. 78>. Similarly, Petitioner's expert, Dr. Rodden, testified that the "white population is considerably older than the African American population, as African American families tend to be younger. In the 2010 Decennial Census, there was a large number of African Americans on the cusp of turning 18, whereas there were far fewer in that category for whites." <App. 78>.

B. Statutory authority for the forms of elections.

Pursuant to Sections 162.261 and 162.291 RSMo, FFSD elects seven members to serve on its Board through an at-large electoral system. Each qualified voter may cast a number of votes equal to the number of vacancies to be filled, i.e. if three seats are being contested, each voter may cast three votes. <App. 30>. However, cumulative voting is not permitted under the statutorily mandated electoral system, i.e. a voter cannot cast more than one vote for a single candidate.

See Sections 115.439, 115.453 and 115.467 RSMo.[2] Voters are permitted to engage in "bullet voting," i.e. a voter can choose to cast fewer than all of their assigned votes. <App. 62>.

C. Recent Electoral History in FFSD

Just prior to the 2011 FFSD election, the School Board voted to provide the former superintendent and his spouse lifetime insurance. <App. 17>. This vote turned out to be controversial. <App. 17>. Every incumbent that was up for re-election in 2011 lost, which included one of the two minority preferred members. <App. 135-136>. The second minority preferred member lost his bid for re-election in 2013. <App. 140-141>. In the 2014 FFSD election, five African Americans (none of whom were incumbents) ran for the three available seats. <App. 143-144>. By comparison, three Non-Hispanic whites ran, with one of them being an incumbent. <App. 143-144>. The incumbent was reelected, and one minority-preferred candidate and one Non-Hispanic white won the other two seats. <App. 143-144>. Of note, more votes were cast for African American candidates than white candidates during the 2014 election. <App. 143-144>. The District Court discounted the 2014 election results "slightly," finding that African American voters were more motivated than usual due to concerns as to how a superintendent, popular with the African American

[2] It should be noted that in its remedial order the District Court opined that cumulative voting was not prohibited by statute in FFSD elections. <App. 43>. Such a statement is plainly at odds with Sections 115.439, 115.453 and 115.467 RSMo.

community, had been treated resulting in his resignation. <App. 146-148>.

In 2015, there were three African American candidates (no incumbents) for the two available seats on the Board, and two white candidates (including one incumbent). <App. 148-149>. One African American (who was minority preferred) and the incumbent won the two seats. <App. 148-149>. The successful minority preferred candidate received more votes than the incumbent. <App. 148-149>. Again, more votes were cast for African American candidates than white candidates. <App 148-149>. The District Court chose to afford the 2015 election "slightly less weight," due to special circumstances, namely the shooting of Michael Brown, by a Ferguson police officer, and the events that followed. <App. 150-154>.

The 2016 April election resulted in the addition of an African American board member, so that three of the seven members were African American (minority preferred candidates). <App. 64>. The 2016 election occurred after the close of evidence in this case, and while the District Court took judicial notice of the certified results, it did "not draw significant legal conclusions based on these facts." <App. 35>.

D. Procedural History

Respondents filed their Complaint on December 18, 2014, challenging the statutorily prescribed at-large voting system, seeking "to replace it with a system in which School Board members are each elected from single-member districts." <*Complaint* at ¶1, doc#1>. The Complaint alleged that African American voters constituted a minority of the VAP and, therefore, are

unable to elect their preferred candidates. <*Complaint* at ¶2, doc#1>. At the time the Complaint was filed, one of the seven board members was African American. <*Complaint* at ¶17, doc#1>. This increased to three of seven members during the pendency of this litigation. <App. 64>.

The District Court held a six day trial and issued a lengthy ruling. <App. 55>. In its ruling, the District Court applied the test set forth by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to analyze whether a §2 violation had occurred. <App. 55-211, *passim*>.

The District Court concluded that "Plaintiffs have never alleged that Defendants intentionally discriminate against African Americans, and I do not make any findings that Defendants engaged in intentional discrimination. Rather, it is my finding that the cumulative effects of historical discrimination, current political practices, and the socioeconomic conditions present in the District impact the ability of African Americans in FFSD to participate equally in Board elections." <App. 208>.

During the liability portion of the trial, Respondents advanced seven single member districts as the only suggested remedy for the alleged §2 violation. <App. 87-92>. However, evidence was presented to the District Court that such a resolution, was impractical and unworkable. <App. 92>.

In addressing FFSD's arguments about the deficiency of the requested relief, the District Court ruled that such a discussion was for the remedial stage of the proceedings, and did not impact upon the

liability determination. <App. 92>.[3] However, by the time the District Court held a hearing on the remedial phase, Respondents had determined that a multi-member system using cumulative voting was their remedy of choice. <App. 30>. Cumulative voting is a process by which each voter would have a number of votes equal to the number of vacancies to be filled, and is permitted to cast multiple votes for a single candidate. <App. 30>.

In its remedial order, the District Court concluded that cumulative voting would correct the §2 violation. <App. 37-41>.

In ordering cumulative voting, the District Court concluded that state law did not prohibit such a procedure, despite the wording of Section 115.439, 115.453 and 115.467 RSMo which indicate that voters cannot "vote for the same person more than once for the same office at the same election." <App. 41-45>.

On Appeal, the Eighth Circuit affirmed the District Court's finding of a §2 violation. <App. 1>. The Eighth Circuit did not consider the issue of cumulative voting, as it mistakenly stated that FFSD was not challenging its imposition. <App. 13>. FFSD is, and was, challenging the imposition of cumulative voting in this case.

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[3] During the remedial phase of the case, the District Court appeared to acknowledge the deficiency with the proposed single-member district plan as it would have resulted in pairing together of two of the minority incumbents in one ward, such that one would lose their seat. <App. 49-50>.

The Eighth Circuit deferred to the factual findings of the District Court and found that it was not error to rely upon the 2010 decennial census data. <App. 9>. The Eighth Circuit also did not find error in the finding of a §2 violation, despite the fact that the offered remedy at the liability stage of seven single member districts was unworkable. <App. 13>.

The Eighth Circuit also rejected the Petitioner's argument that if the African American population forms a majority of the VAP, then a §2 claim against the at-large electoral system itself does not lie. <App. 11>.

Following the denial of Petitioner's motion for rehearing, the matter has been remanded to the District Court for: (1) the parties to work on a remedial plan; and (2) consideration of Respondents' motion for attorneys' fees.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the present Petition to resolve the split between the Circuits as to whether a minority group that forms a numerical majority within an electoral district can maintain a claim under §2 of the VRA.

The decision of the Eighth Circuit conflicts with the Fourth Circuit, as well as the opinion of this Court in *Gingles*.

A. This Court in *Gingles* made clear that a white majority is an element in finding a §2 violation with a multi-member electoral structure.

"The essence of a §2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population." (quotations omitted – additions in original) *Gingles*, 478 U.S at 47.

This Court went on to further state in *Gingles* that the "theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48.

Thus, the requirement that the white community form a numerical majority in a multimember district is essential to the very theoretical underpinning of any §2 claim challenging an at-large electoral system. Accordingly, the Eighth Circuit's declaration that "minority voters do not lose VRA protection simply because they represent a bare numerical majority within the district" is wide of the mark in this case. <App. 11>. Of course minority voters rightfully retain all proper protections under the VRA even if they represent a numerical majority. However, where the minority forms a numerical majority *Gingles* makes clear that the mere use of an at-large voter system cannot be found to have violated §2.

As an illustration, if bullet voting was prohibited in a minority majority district (something this Court in *Gingles* found would be indicative of a §2 violation), the VRA would still serve to protect minority voters (even if they constitute a numerical majority) if a plaintiff could demonstrate that such a prohibition resulted in minority voter dilution. In fact, the evidence at trial in the case at bar demonstrated that one minority preferred candidate during the 2015 election ran a highly successful bullet voting campaign. <App. 153>. As such, one can readily see how if bullet voting had been prohibited, it may well have had a negative impact on the electoral success of a minority preferred candidate, and why such a prohibition is not favored by this Court. *See e.g. Gingles*.

The reasons for limiting challenges to an at-large electoral system to those where there is a white majority is readily apparent. Cumulative voting is a system designed to favor numerical minorities, by

striving to obtain proportional representation.[4] By contrast, the VRA is designed to prohibit mechanisms that negatively impact upon the opportunity for racial minorities to elect candidates of their choosing. To adopt a system that will allow Non-Hispanic whites to benefit disproportionately from cumulative voting as a supposed remedy to a §2 violation defies logic. Cumulative voting seeks to obtain proportional representation, not equality of opportunity. Such a process is inconsistent with the emphatically expressed language of §2 of the VRA., as recognized by this Court in *LULAC*, 548 U.S. at 508.

The remedy ordered by the Court is on its face harmful to the African American community, especially in light of the fact that the District Court found that whites vote more along racial lines than African Americans (<App. 125>). If this is true the increased cohesiveness of the white vote will allow them to better exploit the cumulative voting system. Furthermore, in recent elections there have been more African American candidates than Non-Hispanic white candidates, such that the potential benefits of "plumping"[5] votes on candidates likely would be realized by Non-Hispanic whites rather than African Americans.

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[4] *See e.g.* Shawna C. McLeod, Cumulative Voting as a remedial measure for Section 2 violations in Port Chester and Beyond, *76 Brook L. Rev. 1669*

[5] The casting of multiple votes for a single candidate. <App. 30>.

B. The third *Gingles* pre-condition requires a finding of submergence.

In addition to the presence of a white majority being a precursor for a finding of a §2 violation in the present case, the third *Gingles* precondition requires it as part of a finding of "submersion."

"The essence of a *submergence* claim is that minority group members prefer certain candidates whom they could elect were it not for the interaction of the challenged electoral law or structure with a *white majority* that votes as a significant bloc for different candidates." *Gingles*, 478 U.S. at 68 (emphasis added). Even if the 2010 census data is used, and the realities of the last eight years of population trends are overlooked, the evidence is undisputed that the Non-Hispanic white community is not a *majority* within the FFSD.

The absence of a white majority precludes a plaintiff from proving the third *Gingles* pre-condition and, therefore, negates the finding of a liability.

As such, in the case at bar, both the District Court and the Eighth Circuit have ruled in a manner that is inconsistent with this Court's holding in *Gingles*.

C. To the extent there is a split among the appellate circuits as to whether a numerical majority can bring a §2 claim to attack an at-large electoral system, the split should be resolved in favor of precluding such claims.

The Eighth Circuit in the case at bar, stated unequivocally that "minority voters do not lose VRA

protection simply because they represent a bare numerical majority within the district." <App. 11>. On this abstract statement of law, the Eighth Circuit Court is absolutely correct. However, this statement misses the central issue in this case, and is a natural consequence of the concerns raised by Justice Thomas in his concurring opinion in *Holder v. Hall*.

§2 crucially guarantees to minorities the right to have equal access to the electoral process. The VRA was, after all, adopted "as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated south." *Holder v. Hall*, 512 U.S. 874 at 893 (Justice Thomas concurring). Regardless of whether a racial minority has a numerical majority, they will have a remedy under the VRA to seek redress for any alleged violation that would seek to limit their ability to participate in the election process.

However, it is a different query to consider whether a numerical majority can challenge an at-large electoral system itself as a §2 violation. The basis for this Court opinion in *Gingles*, as discussed *supra*, would suggest such a claim cannot be made.

The Fourth Circuit in *Smith v. Brunswick*, 984 F.2d 1393 (4th Cir. 1993) held:

> In summary, we hold that when black voters have equal access to the polls and in fact represent a majority of those eligible to vote in a majority of the election districts relevant to the governmental body at issue, the rights afforded by the Fifteenth Amendment and the Voting Rights Act are satisfied. Under such

> circumstances, judicial inquiry into the electoral success of black candidates begins an inappropriate process of affirmatively establishing quotas to assure results and concomitantly denying other classes of persons equal access to the political system.

Smith, 984 F.2d at 1402.

Crucially, the opinion in *Smith* does not deny minorities the protection of the VRA, but recognizes that where minorities have "equal access to the polls" *and* a numerical majority, there can be no VRA violation.

In refusing to follow the Fourth Circuit's Opinion in *Smith*, the Eighth Circuit pointed to what it called the "weight of authority,"[6] being contrary and cited to cases from the Second, Fifth, Eleventh and D.C. Appellate Circuits.

The first case the Eighth Circuit cited to was *Pope v. County of Albany*, 687 F.3d 565 (2d Cir. 2012). However *Pope* did not address a challenge to an at-large electoral mechanism. Instead, the plaintiffs in *Pope* were challenging a redistricting plan that they alleged diluted African American and Hispanic voting strength under single-member districting plans. In a footnote, the *Pope* Court noted, quoting this Court's holding in *LULAC v. Perry*, 548 U.S. at 428, that "it may be possible for a citizen voting-age majority to lack real electoral opportunity." *Pope* at fn.8. This Court in *LULAC* was considering a single-member district when

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[6] The "weight of authority" in this context appears to be derived from the Fifth Circuit's Opinion in *Zimmer* discussed *infra*.

it made the statement referenced in *Pope*. Again, as discussed *supra*, it is of course possible that impediments could be adopted that would limit a minority group's access to participate in the electoral system, but nothing in this Court's holding in *LULAC* can be interpreted as allowing a challenge to an at-large electoral system itself, when the minority enjoys a numerical majority.

Next, the Eighth Circuit discussed *Kingman Park Civic Association v. Williams*, 348 F.3d 1033 (D.C. Cir. 2003). In *Kingman*, the D.C. Circuit Court of Appeals was considering a challenge to the legislative redrawing of D.C.'s eight electoral wards following the results of the 2000 census, based upon allegations that it has resulted in the dilution of African American votes. The D.C. Circuit affirmed the District Court's dismissal of the VRA claims finding that the plaintiffs had failed to establish that the African American voters were politically cohesive or that there was racially polarized voting. In analyzing §2 of the VRA, the Court opined in *dicta* that "[v]ote dilution claims must be assessed in light of the demographic and political context, and it is conceivable that minority voters might have "less opportunity … to elect representatives of their choice" even where they remain an absolute majority in a contested voting district." *Kingman*, 348 F.3d at 1041.

This statement does not indicate that a challenge to an at-large electoral system can be maintained by a minority that is a numerical majority. Instead it rightly recognizes that even where a minority is a numerical majority they *always* retain the protections afforded under the VRA against dilutive practices.

The Eighth Circuit also cited to the Eleventh Circuit's decision in *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990), wherein African American and Hispanic voters challenged an at-large electoral system as dilutive of their voting strength. The District Court in *Meek* had opined that "it is imperative that the plaintiffs demonstrate that the Non Latin White community not only vote [sic] as a bloc, but that they are a voting majority." *Meek*, 908 F.2d at 1545. The District Court in *Meek* also found that African Americans and Hispanic voters tended to vote for whites over candidates of a different minority group. It was on this point that the Eleventh Circuit ascribed error, finding:

> Keeping in mind the Court's admonition[7] that "[t]he essence of a § 2 claim is that a certain law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representative[,]" we consider the "functional effect" of the existing system. 478 U.S. at 48, 106 S.Ct. at 2765 n. 15. Here the social reality is that Black and Hispanic voters are hostile toward each other in the electoral arena. Similarly, Non Latin Whites are politically cohesive and tend not to vote for Hispanics or Blacks. The district court concluded that because Non Latin Whites by themselves could not block the electoral success of Blacks, Blacks had not succeeded in proving that Non Latin Whites caused the defeat of "minority"

[7] Referring to this Court in *Gingles*.

> voters. The district court erred in failing to recognize that coalitions can form a legally significant voting bloc, and that a coalition of Hispanics and Non Latin Whites could form the relevant majority voting bloc for the purpose of the third Gingles factor.

Meek, 908 F.2d at 1545–46.

Accordingly, the Eleventh Circuit found that a §2 violation could occur when Non-Hispanic whites form a cohesive voting bloc majority with another group of voters to the exclusion of a minority group, and remanded the case for further proceedings. There was no evidence in the case at bar to suggest that Non-Hispanic whites have formed a voting bloc with another group.

Finally, the Eighth Circuit considered three cases from the Fifth Circuit *Salas v. Southwest Texas Jr. College Dist.*, 964 F.2d 1542 (5th Cir. 1992), *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327 (5th Cir. 1989)*, opinion corrected on reh'g*, 897 F.2d 763 (5th Cir. 1990), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). Among the Fifth Circuit cases, the pre-*Gingles* decision in *Zimmer* is the seminal case.

In *Zimmer*, following an en banc re-hearing, a majority of the Court (10 to 5 vote) rejected the panel's conclusion "that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a *minority of registered voters*, comprise a majority of the total population of the parish." *Zimmer*, 485 F.2d at 1300 (emphasis added). The matter was remanded for further proceedings.

In reaching this conclusion, the Court in *Zimmer* found that a population majority was not synonymous with a majority of registered voters. It is telling, therefore, that in the case at bar, the parties focused on VAP as opposed to general population levels.

In *Monroe*, the Court cited to *Zimmer* when rejecting a *per se* rule that a racial minority, that is a majority within a political subdivision, cannot experience vote dilution. *Monroe*, 881 F.2d at 1333. However, the *Monroe* Court also opined that "the caveat should be added that in *Zimmer*, at least, the black majority had recently been freed from literacy tests and impediments to voting registration. As *de jure* restrictions on the right to vote mercifully recede further into the historical past, we should expect it to be increasingly difficult to assemble a *Zimmer*-type voting rights case against an at-large electoral district where a minority-majority population exists. Such a case is not, however, precluded as a matter of law." *Monroe*, 881 F.2d at 1333.

In *Monroe*, the plaintiffs, African American residents in Woodville, Mississippi, challenged the city's at-large electoral system. African Americans accounted for 64.3% of the total population and 60.5 of the VAP. At the time the suit was filed, Mississippi law prohibited bullet voting. Between 1965 and 1989 at least two African American candidates had stood at each election, but only one had ever been successfully elected (he was then subsequently reelected). During that same time there had been four African American candidates for Mayor and three for Marshall, all of whom had been unsuccessful.

In a prior appeal to the Fifth Circuit in the same matter, the Circuit Court had rejected an argument that African Americans in Woodville, Mississippi could not avail themselves of the protections of §2 of the VRA as a result of their numerical majority status. Ultimately the Court in *Monroe* rejected the plaintiffs' challenge to the at-large electoral system finding they lacked the political cohesiveness to maintain a challenge to the at-large system.

The Court in *Monroe* in analyzing *Gingles* (which it referred to as *Thornburg*) stated:

> A subtle error plagues the appellants' disagreement with the district court. The quoted portion of its opinion refers not to any general principle of illegal vote dilution but to the specific *Thornburg* threshold inquiry whether the white bloc vote is legally significant, *i.e.* whether it usually operates to defeat the black candidates. This narrower issue discussed by the district court requires a more focused attack than that levied by appellants. It seems possible to argue *both* (1) that a § 2 vote dilution violation may occur even if a minority is more populous in a political jurisdiction and (2) that *Thornburg's* threshold criterion of legally significant white bloc voting does not deal with such a circumstance. *Thornburg* repeatedly describes the submergence of black voters by a white majority. *See e.g.* 106 S.Ct. at 2764, 2765, 2767. The terms "majority" and "minority", in context, refer not only to the relative number of blacks and whites in our general population but to their relative representation in the electoral

district being challenged. Discussing its criterion of legally significant white bloc voting, the court explains,

> In establishing this last circumstance, the minority group demonstrates that *submergence in a white multimember district* impedes its ability to elect its chosen representatives. 106 S.Ct. at 2767 (emphasis added).

In light of *Thornburg's* emphasis when enunciating its threshold standards, that a vote dilution Section 2 claim depends upon a black minority submerged within a white majority, we can readily appreciate the district court's conclusion that Woodville did not experience "legally significant" white bloc voting in part because of the black majority population. Whether this prong of *Thornburg* was intended to address the case before us is a matter of speculation among several possible interpretations. The issue is, however, ultimately irrelevant because irrespective of *Thornburg's* meaning in a case like this, *Zimmer's* holding clearly was not abandoned when Congress amended Section 2.

Because we have already concluded that a *Thornburg* vote dilution claim is foreclosed here by lack of black political cohesion, and we conclude in the following discussion that

> a *Zimmer* totality of circumstances dilution claim was not proven by appellants, we need not opine further on this puzzling aspect of *Thornburg*.

Monroe, 881 F.2d at 1333–34 (5th Cir. 1989).

As evidenced by this statement in *Monroe* and the conflicting authorities on this point, clarification as to if and how the *Gingles* factors are to be applied in a case where the Non-Hispanic whites do not constitute a majority is required.

In *Salas*, Hispanic voters that formed part a numerical majority brought a claim under §2 of the VRA challenging an at-large electoral system. The electoral system under review was different to the one at issue in the case at bar, as it was a numbered post system. Each candidate must declare for a numbered seat and then run against the other candidates declaring for the same seat. Such an approach prevents the use of bullet voting. Hispanics formed approximately 63% of the total population and 57% of the VAP. The evidence demonstrated that during the first 44 years of the college district's existence only two of the 23 successful candidates were Hispanic, and in fact there was some dispute as to whether one of them was Hispanic. After trial, but before the Fifth Circuit ruled, two Hispanic candidates prevailed in the 1992 election. Despite the minority candidates' limited electoral success, the District Court found that the plaintiffs had failed to establish legally significant white bloc voting.

The *Salas* Court in reflecting on *Monroe* (and its reliance in turn on *Zimmer*) noted that it was

confronted with a slightly different scenario. *"Here, however, Hispanics constitute not only a sizeable population majority, but also a registered voter majority.* We must decide whether they fail, as a matter of law, in claiming that an at-large district can illegally dilute their vote in such a circumstance." *Salas*, 964 F.2d at 1547 (emphasis in original).

Deciding that this question was one of first impression, the *Salas* Court reviewed the history of the VRA and concluded that the "Act was aimed at measures that dilute the voting strength of groups because of their race, not their numerical inferiority." *Salas*, 964 F.2d 1548. As such, it concluded that the majority status of the Hispanic population did not preclude relief under the VRA. The Court also discussed at length the difficulty in applying the third *Gingles* pre-condition in a case where a minority has a numerical majority, but ultimately concluded that such difficulty was of little consequence as a consideration of the *Zimmer* factors was controlling. Ultimately the *Salas* Court found that there was no §2 violation.

It is noteworthy that in these conflicting opinions, the courts either did not find a §2 violation by virtue of an at-large electoral system, or remanded the cases for further proceedings. The present case is unique in that regard. It should be noted that the District Court expressly stated in its opinion that the "facts of this case, which include African American and white voting-age populations at levels of near numerical parity, and a trend in the District that suggests the African American voting-age population is growing, set it apart from most § 2 cases, making review especially challenging." <App. 48>.

Respectfully it is suggested that review was challenging in this case, because a *Gingles* analysis is not appropriately applied to a case where there is an absence of a white numerical majority.

The fallacy in attempting to apply the *Gingles* factors in this case became readily apparent during the remedial phase. At that time it was clear that single-member districts were not a viable option and the Court felt it could not leave the current system in place as it would conflict with its finding of liability. As such, the Court ordered the use of cumulative voting despite the fact that it will actually harm minority voting strength.

II. This case raises an important issue of federal law that requires resolution by this Court, namely the correct interpretation of §2 of the VRA.

A. Challenges to the at-large electoral system itself, as opposed to the underlying impediments, fail to address the real causes of harm to minority voting strength.

The holding in *Gingles* makes logical sense in a situation where there is a white majority capable of limiting the ability of a minority group to elect representatives of their choosing. For instance, consider the following simplistic hypothetical scenario:

- At-large electoral system with three open seats on a five person Board.
- African Americans constitute 20% of the VAP, and Non-Hispanic whites are 80% of the VAP.

- There are four candidates for the three open seats, one of whom is minority preferred.
- Voting is conducted proportionally along racial lines, with a total of 1000 votes cast.
- The African American candidate would receive 200 votes, and each of the Non-Hispanic White candidates would receive 800 votes (that is before considering the additional up to 400 votes cast by the African American voters for the other three candidates).

In such a scenario, African Americans would have no real opportunity to elect a preferred candidate. If such a system was changed to a five ward system (assuming the African American population is sufficiently contiguous) they would be able to form a minority majority ward and have a much better chance to elect a candidate of their choosing, and to be represented proportionally.

The same logic does not hold true when the minority majority population reaches parity and then a majority. In such circumstances, abolishing or altering the at-large system fails to address the cause of the important underlying inequities and issues.

B. Application of the VRA to the present case fails to advance the vital public policy goals advanced by the VRA.

During the liability phase, the District Court stated that "the facts of this case are so unique, however, the remedy that is ultimately warranted likely needs to be equally unique. Although I do not make any findings as to the proper remedy, I encourage the parties, each of whom have a vested interest in the FFSD

community, to work together in the remedy phase to devise a solution that effectively addresses the current inequalities impacting the electoral process and accommodates the special characteristics present in the FFSD population." <App. 210>.

Unfortunately, despite this statement, during the remedial phase of the case, at Respondents' behest the District Court ordered a remedy (cumulative voting) that does nothing to resolve the issues the District Court found to have a dilutive effect on minority voting, and in fact will cause more harm than good.

In the case at bar, the District Court found that "a range of socioeconomic and political factors negatively impact [African Americans'] ability to effectively participate in the electoral process. . . . it is clear that voting in the District is racially polarized and Black-preferred candidates have a much lower rate of success than white-preferred candidates, which indicates that, regardless of the precise size of Black VAP in the District, the existing at-large arrangement dilutes Black voting power." <App. 107-108>. What the District Court does not explain is how it is the at-large electoral system that uniquely causes or exacerbates this issue.

For instance, the District Court found that the ongoing effects of discrimination "have likely lead to decreased rates of registration and turnout among African Americans in FFSD." <App. 108>. However, there is no indication that this would be corrected by changing to a ward system, which was the only suggested remedy during the liability phase, or the adoption of cumulative voting. In short, striking down the at-large electoral system does not address this

issue. What needs to be addressed is the removal of the barriers to voter registration and participation borne disproportionately by African Americans, and ensuring the continued movement towards socioeconomic equality.

The District Court found that racially polarized voting was occurring, and weighed that factor heavily in favor of finding a §2 violation. <App. 167-168>. However, there is no indication that a change from the current at-large system will remedy this issue. To the contrary, the District Court found that Non-Hispanic whites vote more along racial lines than African Americans. < App. 125>. If this is correct, the change to cumulative voting will exacerbate the impact of the racially polarized voting as whites will be able to concentrate their voting power on the white preferred candidates with greater success than African Americans.

The District Court also found that historical and ongoing effects of discrimination in Missouri, the region and FFSD weighed in favor of finding the current at-large system violated §2 of the VRA. <App. 174-188>. Again, it is unclear how the past racial discrimination, coupled with the ongoing impacts, are either exacerbated by the at-large system or remedied by the implementation of a ward or cumulative voting system.

The District Court found that despite there being little evidence that African Americans were denied access to the formal slating process, that because it was undisputed that white candidates were endorsed more often than African American candidates, and that whites that had been endorsed were more likely to win than African American candidates that had been

endorsed, this also weighed "very slightly" in finding a §2 violation. <App. 194-199>. Again, there is no indication how this is exacerbated by the at-large voting system or would be remedied by either a ward system or cumulative voting.

The District Court found that there was some evidence that Board members in certain years had made subtle racial appeals and that this factor weighed "slightly" in favor of finding a §2 violation. <App. 199-201>. Again, it is unclear how this issue was exacerbated by the at-large system.

The District Court did find that the at-large system may negatively impact African American candidates as they are less likely to have the means for campaign related travel and advertising throughout a larger geographic area. <App. 203>. While this might be remedied by a ward system, it clearly is not remedied by the imposition of cumulative voting.

The District Court also found that holding elections in April as opposed to November and the staggering of terms could have a dilutive effect on minority voting power. <App. 203-206>. Neither of these are exacerbated by the use of the at-large system, nor cured by the imposition of cumulative voting or a ward system. Despite finding that these practices weighed in favor of finding a §2 violation, the District Court went on to find that FFSD's justifications for utilizing these practices were not tenuous, as: (1) they are required by state statute; (2) credible evidence supported the benefits of the at-large electoral system in that each board member represents everyone in the district, not just a single ward; (3) April elections make sense in the context of a school board as it allows new

members a time to learn while the school year is winding down; and (4) staggered terms allow mentoring of new members by old. <App. 206-207>. Despite these justifications, the District Court still stated that the existence of these practices have diluted the African American vote. <App. 207>.

The District Court was also concerned with felony disenfranchisement (<App. 205>), but as with the other factors, it will not be remedied by the imposition of cumulative voting or a ward system.

As the above demonstrates, guidance from this Court is required as to the proper analysis of a claim brought under §2 VRA, in circumstances where there is close to numerical parity, and where a ward system is impractical based upon the facts of the case.

C. This Court should consider the proper application of §2 of the VRA in the manner suggested by Justice Thomas in *Holder v. Hall*.

Justice Thomas in his concurring opinion in *Holder*, expressed his concerns about the direction the Courts were heading in reviewing §2 VRA claims:

> I believe that a systematic reassessment of our interpretation of § 2 is required in this case. The broad reach we have given the section might suggest that the size of a governing body, like an election method that has the potential for diluting the vote of a minority group, should come within the terms of the Act. But the gloss we have placed on the words "standard, practice, or procedure" in cases alleging dilution is at odds with the terms of the statute and has proved

> utterly unworkable in practice. A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an "undiluted" vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial "balkaniz [ation]" of the Nation.

Holder, 512 U.S. at 892 (Justice Thomas, concurring).

Justice Thomas further expressed concerns that:

> . . . under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the "correct" theories of democratic representation, the "best" electoral systems for securing truly "representative" government, the "fairest" proportions of minority political influence, or, as respondents would have us hold today, the "proper" sizes for local governing bodies. We should be cautious in interpreting any Act of Congress to grant us power to make such determinations.

Holder, 512 U.S. at 913.

These concerns have come to fruition in the case at bar. During the remedial phase, the District Court recognized that the remedial plan is not meant to guarantee success. <App. 37>. The District Court then discussed the concept of the "threshold of exclusion" as discussed in detail in *United States v. Village of Port Chester*, 704 F.Supp.2d 411, 450 (S.D.N.Y. 2010). <App. 37>. The "threshold of exclusion" is the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances. *Port Chester*, 704 F.Supp.2d at 450. The District Court found that the thresholds for exclusion in FFSD were 33.3% in a two seat election and 25% in a three seat election. <App. 38>. The District Court found that the single race African Americans in the FFSD were 47.33% of the VAP (the District Court discounted those who identified as any part African American, apparently because Respondents' expert had not included them). <App. 38>. As such, African Americans are well above the threshold of exclusion under the current system. Instead of remedying a violation, the District Court has imposed its preference as to what it believes is a better process for elections within the FFSD, something that falls outside the purview of a §2 claim.

In sum, if §2 of the VRA can be interpreted to require the imposition of a "remedy" that is harmful to the minority voters it is supposed to protect, then the existing jurisprudence requires re-examination.

It is also worth considering that §2 claims are meant to be reviewed considering the realities of the current situation as well as the past practices. *Gingles*, 478 U.S. at 32. Further, the Fifth Circuit's decision in

Zimmer permeates the jurisprudence addressing §2 claims. It is even heavily cited in *Gingles* itself. *Zimmer* was decided in 1973, two years before the desegregation cases that resulted in the creation of FFSD. It is appropriate, therefore, to consider whether the judicial framework created to review §2 claims itself no longer addresses the current realities faced in claims brought under the VRA.

Left unaltered, the District Court's ordered remedy in this case makes clear that this case will once again darken the dockets of the District Court, when the 2020 decennial census discloses that the imposition of cumulative voting is negatively impacting an undisputed African American voting majority population. Then, for the second time, FFSD will be facing paying significant attorneys' fees when it has done nothing more than run elections in the form that has been required of it. This will only harm the school children that FFSD serves, while doing nothing to advance socioeconomic equality.

III. This case is a good vehicle to address the question presented.

This case presents a single and straightforward question for the Court's consideration, namely whether §2 of the VRA allows an attack against an at-large system itself, in the absence of a numerical white majority. The Court in this case can address the question presented without needing to consider factual disputes or other peripheral issues that might otherwise muddy the resolution of the question presented.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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