No. 04-150

In the Supreme Court of the United States

CHARLESTON COUNTY, SOUTH CAROLINA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether both courts below erred in determining that petitioners had failed to show, for purposes of this case alleging that petitioners' at-large method of electing its County Council violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, that partisanship, not race, was the cause of the racially divergent local voting patterns.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 365 F.3d 341. The opinion of the district court granting judgment to respondents (Pet. App. 24a-102a) is reported at 316 F. Supp. 2d 268. The opinion of the district court adopting the Magistrate's Report and Recommendation (Pet. App. 103a-122a) is reported at 318 F. Supp. 2d 302. The Magistrate's Report and Recommendation (Pet. App. 123a-154a) is reported at 318 F. Supp. 2d at 313, following the district court opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 155a-156a) was entered on April 29, 2004. The petition for a writ of certiorari was filed on July 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

The United States and private plaintiffs, four Charleston County voters, filed suit against Charleston County, the Charleston County Council and its members, and the Charleston County Election Commission (collectively, the County), alleging that the County's at-large method of electing the nine-member County Council dilutes minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

1. Section 2 prohibits States or localities from imposing or applying any standard, practice, or procedure "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." 42 U.S.C. 1973(a). A violation of that provision is "established if * * * it is shown that the political processes leading to nomination or election * * * are not equally open to participation by members of [a protected class] * * * 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." 42 U.S.C. 1973(b). A Section 2 plaintiff thus need not prove that a voting process or structure was adopted or maintained with discriminatory intent; rather, a Section 2 violation occurs when a voting standard, practice, or procedure interacts with the effects of past discriminatory practices to result in "the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982); see *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991).

Claims that at-large or multimember elections dilute minority voting strength in violation of Section 2 are governed by the framework set forth in *Thornburg* v.

Gingles, 478 U.S. 30 (1986). Plaintiffs must demonstrate that the protected minority group is sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district; the protected minority group is politically cohesive; and the white majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate. *Id.* at 50-51; *Growe* v. *Emison*, 507 U.S. 25, 39-40 (1993). Proof of those three factors establishes a strong presumption that the challenged electoral structure itself is affecting voting patterns in a manner to "minimize or cancel out" the voting strength of minority voters. *Gingles*, 478 U.S. at 48; see, *e.g.*, *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *NAACP* v. *Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995).

The ultimate issue of vote dilution is a factual one to be determined based on the totality of circumstances in a particular jurisdiction. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994). The Senate Report accompanying the 1982 amendments to Section 2 lists a number of factors relevant to that analysis.[1] This Court

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[1] Those factors include the history of voting-related discrimination in the relevant political subdivision at issue; the extent to which voting in that political subdivision is racially polarized; the extent to which the relevant political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political processes; the use of racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office

has recognized the relevance of the Senate Report factors and has identified the two most important as (a) the extent to which voting in the jurisdiction is racially polarized, and (b) the extent to which members of the minority group have been elected to public office in the jurisdiction. See *Gingles*, 478 U.S. at 48 & n.15. Once a plaintiff proves racially polarized voting and minimal minority candidate success, the other factors are merely "supportive of, but *not essential to*" a plaintiff's Section 2 claim. *Id.* at 49.

2. The Charleston County Council consists of nine members elected at large to four-year staggered terms. Elections are conducted every two years on a partisan basis; candidates run from four residency districts.[2] According to the 2000 Census, Charleston County has a total population of 309,969, making it the third most populous county in South Carolina. Close to 65% of the voting age population is white, and almost 31% is black. U.S. Exhs. 106, 107. Since 1970, only three minority candidates have been elected to the County Council. Since 1990, only one minority candidate has been elected to the County Council, and that candidate has never been the preferred candidate of minority voters in Charleston County. Pet. App. 14a, 17a.

Statistical evidence supporting the three *Gingles* preconditions was undisputed: the minority population in Charleston County is sufficiently large and geographically compact to constitute a majority in a single-member district, minority voters are politically co-

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in the jurisdiction. S. Rep. No. 417, 97th Cong., 2d Sess. 28-39 (1982).

[2] Three candidates each are elected from two different residency districts, two candidates are elected from a third residency district, and one candidate is selected from a fourth district.

hesive, and Charleston County elections are characterized by substantial racial bloc voting. Pet. App. 10a. As to the third precondition, the evidence showed that in County Council general elections from 1988 to 2000, white voters cohesively supported a candidate in 31 of 33 (94%) elections, and minority voters cohesively supported a candidate in 28 of 33 (84.8%) elections. Jt. Exh. 2A, at 42, 53. The evidence also showed that 25 of 33 elections were racially polarized, in that white voters preferred candidates other than the candidates preferred by minority voters. *Id.* at 53-54. Finally, in 78.6% of the elections in which minority voters voted cohesively, they were nonetheless unable to elect their candidate of choice to the County Council. *Id.* at 54. See also Pet. App. 18a (noting testimony by the County's own expert that "minority-preferred candidates, whatever their race, generally were defeated by white bloc voting").

Evidence concerning the Senate Report factors was also largely undisputed. With respect to racially polarized voting, the County's expert found that white and minority voters were cohesive in support of different candidates for County Council elections in the overwhelming majority of elections, and that the "two groups of voters were either moderately or strongly polarized" 75.8% of the time. Jt. Exh. 2A, at 45; see *id.* at 53. The United States presented evidence showing that voting was racially polarized in all but one County Council election from 1984 to 2000. See U.S. Exh. 14, Tbls. 6-9; Tr. 295. The United States also presented evidence demonstrating that Charleston County presents an uncommonly large voting district, that residency requirements act as a de facto majority vote requirement, see Pet. App. 19a, and that past and

present racial discrimination continues to affect the right to vote in Charleston County.

While the County did not contest the United States' statistical evidence or that of its own expert establishing racial bloc voting, the County claimed that those results are due to partisanship, not race. Specifically, the County asserted that minority-preferred candidates are Democratic candidates, and that Democratic candidates simply no longer win elections in Charleston County. The County attempted to support its claim of partisan influence on voting only with the specific outcomes of a few elections. The County relied on the recent success of one minority Republican candidate, decreased minority support for two candidates after they switched from the Democratic to the Republican party, and the election of minority candidates to the school board. See Pet. App. 20a-21a.

To counter the County's evidence, the United States introduced statistical evidence demonstrating that racially divergent voting patterns are present even in elections in which partisan cues are controlled or absent. Using the same type of statistical analyses employed in *Gingles*, the United States' evidence showed that, in partisan elections for County Council, minority voters provide more cohesive support to minority Democratic candidates than they do for white Democratic candidates, and white voters provide less support to minority Democratic candidates than to white Democratic candidates. See U.S. Exh. 14, Tbl. 9. Those differences result in minority-preferred minority candidates losing more often than minority-preferred white candidates. U.S. Exh. 68A; Tr. 316-318; U.S. Exh. 14, at 28-29. The County's evidence showed similar results. Jt. Exh. 2B, Fig. 8. The United States also provided evidence that, in non-partisan school

board elections involving minority and white candidates, white voters provide more cohesive support for white candidates than for minority candidates, and minority voters provide more cohesive support for minority candidates than for white candidates. U.S. Exh. 14, Tbl. 16. The County's own data show that white voters are cohesive in their refusal to support minority candidates. Jt. Exh. 2B, Figs. 11, 12, 13; Jt. Exh. 2B, at H48-H66. Over a ten-year period, in all contests in which a minority candidate was running against a white candidate, or in which one or more minority candidates were running against one or more white candidates, the minority candidate finished first among the minority voters, and a white candidate finished first among the white voters. U.S. Exh. 25.

3. The district court found that the at-large method of electing Council members in Charleston County diluted minority voting strength, thereby violating Section 2 of the Voting Rights Act. The court first determined that the United States' and private plaintiffs' evidence satisfied the three *Gingles* preconditions.[3] As to the third *Gingles* precondition, the district court found that "in a legally significant portion of [recent County Council elections] white bloc-voting was sufficient to defeat the combined efforts of non-white voters and any white crossover votes." Pet. App. 121a-122a. As the court noted, "[the County's] expert admits no less." *Id.* at 122a.

After considering the totality of circumstances, the court held that the at-large method of electing Council

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[3] In its Order granting summary judgment to the United States as to the three *Gingles* preconditions, the district court adopted and incorporated the findings of the magistrate court, which had first considered the issue. See Pet. App. 103a-122a.

members dilutes minority voting strength. The district court found evidence of the two most important factors —the polarization of voting in the political subdivision and the fact that members of the minority group have not been elected to public office in the jurisdiction in significant numbers, see *Gingles*, 478 U.S. at 48-49 n.15 —weighed heavily in favor of a Section 2 violation. Pet. App. 48a. The district court also noted that Charleston County was an uncommonly large voting district, that the County had a de facto majority vote requirement, and that racial discrimination continued to affect minority voting. *Id.* at 96a-97a.

The district court rejected the County's partisanship defense. Following Fourth Circuit precedent, the district court considered the evidence of partisanship when it analyzed the "totality of the circumstances." See *Lewis* v. *Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). The court found that the County's evidence "fails to demonstrate that race-neutral [partisanship] factors explain the voting polarization in Charleston County." Pet. App. 96a. The district court also found that "there is no evidence that anything other than race explains the severe voting polarization observed in Charleston County." *Ibid.*

4. The court of appeals affirmed. The court began by rejecting the County's claim that the district court erred in considering the County's causation evidence only in the "totality" analysis. The court relied on its earlier decision in *Alamance County* which held, in agreement with the majority of courts of appeals that have addressed the issue, that causation evidence is to be considered only in the "totality of circumstances" stage. Pet. App. 13a.

The court then rejected the County's contention that the district court's finding of vote dilution was clearly erroneous. While the court of appeals acknowledged that the County had provided some evidence of partisanship, it concluded that "there was no systematic proof to support [the County's] claim" that partisanship differences drive racially polarized voting patterns. Pet. App. 20a. The court noted that each party's expert admitted that race and partisanship, as determinants of voting, are "inextricably intertwined," and that evidence that might isolate and measure the influence of each on voting patterns was not presented to the district court because it was either unavailable or uncollected. *Ibid.* The court also characterized the County's evidence of partisanship influences on voting patterns as purely "anecdotal." *Ibid.* The court noted that the evidence of racial polarization and minimal minority electoral success, the two most important factors to consider in Section 2 cases, *Gingles*, 478 U.S. at 48 n.15, was "uncontroverted." Pet. App. 15a. The court concluded that the district court "was faced with inconclusive evidence of partisanship as the determinant of voting, but decisive[] evidence of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district." *Id.* at 21a (internal quotation marks omitted). In those circumstances, the court held, "it was not clearly erroneous" for the district court to conclude that racially polarized voting in Charleston was not caused by some other, non-racial factor, and the court affirmed the district court's judgment that the County's electoral system violated Section 2. *Id.* at 22a-23a.

ARGUMENT

Petitioners urge this Court to grant the petition for a writ of certiorari in order to resolve the question of the proper stage in the Section 2 analysis at which evidence of non-racial causation should be considered. Petitioners argue that if causation evidence is relevant to the *Gingles* precondition analysis, the courts below erred by considering their causation evidence (*i.e.*, that divergent voting patterns among black and white voters were better explained by partisanship differences rather than race) only in the "totality of circumstances" analysis. Further review is not warranted, because the decision below is correct and both courts below correctly concluded that petitioners' evidence was insufficient to prove non-racial causation at *any* stage of the analysis. Accordingly, this case does not provide an appropriate vehicle to address the question of whether, if non-racial causation were proven, it would have to be taken into account at the precondition stage of the analysis or in the course of determining whether a Section 2 claim has been made out based on the totality of the circumstances.

1. The court of appeals correctly held that causation should be considered as part of the inquiry into the totality of the circumstances, after the three *Gingles* preconditions have been satisfied. In *Gingles*, eight Justices agreed that causation evidence was not the focus of the inquiry into the three *Gingles* preconditions. Justice Brennan, joined by three Justices, rejected the need for *any* causation inquiry at any stage, stating that "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent." 478 U.S. at 62. Although Justice O'Connor, joined by three other Justices, believed that causation

evidence was ultimately relevant, she "agree[d] [with the plurality] that defendants cannot rebut" the showing of minority political cohesion and usual minority defeat due to racial bloc voting by the majority —the second and third *Gingles* factors—"by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." *Id.* at 100. Accordingly, eight Justices in *Gingles* agreed that causation should not be considered as part of the inquiry into the *Gingles* preconditions.

The court of appeals followed *Gingles* in determining that "the approach most faithful to the Supreme Court's case law 'is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, but relevant in the totality of circumstances inquiry.'" Pet. App. 11a (quoting *Alamance County*, 99 F.3d at 615-616 n.12). As the court explained, the *Gingles* inquiry into the three preconditions is a "preliminary one, designed to determine whether an at-large system *potentially* violates § 2." Pet. App. 12a (citing *Growe* v. *Emison*, 507 U.S. 25, 40-41 (1993)) (emphasis added). An actual violation, however, is proven only after a court conducts an "inclusive evaluation of the totality of the circumstances" operating in a given jurisdiction, which "is tailor-made for considering why voting patterns differ along racial lines." Pet. App. 12a. To "expand[] the inquiry into the third *Gingles* precondition to ask not merely whether, but also why, voters are racially polarized * * * would convert the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Id.* at 12a-13a. Accord *Sanchez* v. *Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996) (third *Gingles* precondition asks "*how* voters vote, not *why* voters voted that way"), cert. denied, 520 U.S. 1229 (1997).

The majority of courts to have considered the issue agree. See *Goosby* v. *Town of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999), cert. denied, 528 U.S. 1138 (2000); *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997), cert. denied, 522 U.S. 1076 (1998); *Uno* v. *City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *Nipper* v. *Smith*, 39 F.3d 1494, 1513-1514 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). One court of appeals, however, appears to have adopted a different approach, under which causation is taken into consideration in the course of analyzing the third *Gingles* precondition. See *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994); cf. *Clarke* v. *City of Cincinnati*, 40 F.3d 807, 813 n.2 (6th Cir. 1994) (reserving the question whether to follow *Clements*), cert. denied, 514 U.S. 1109 (1995).

2. The question whether causation is properly considered in the Section 2 analysis as an aspect of the totality of the circumstances, or whether instead it should be viewed as evidence bearing on whether the *Gingles* preconditions have been proven, is not presented by this case. Both courts below concluded that petitioners had failed to show that partisanship, rather than race, explained the voting patterns at issue in this case. Because petitioners did not prevail on their partisanship causation theory, the stage of the analysis at which partisan causation is considered does not matter in this case, and further review is not warranted.

a. Petitioners' causation argument would require them to demonstrate that partisanship differences (or some other race-neutral factor) better explain divergent voting patterns than does race. Petitioners failed

to carry that burden. They did not conduct a statistical causation analysis to show the effect of partisanship on voting patterns.[4] Indeed, both of petitioners' experts conceded that they could have collected, but did not collect, the necessary data to measure for partisanship, and therefore they could not perform causal analyses isolating the effects of partisanship on voting behavior. Tr. 1991-1992, 2060-2061, 2065-2067, 2904-2905, 2908-2909. Moreover, one of those experts acknowledged that race and partisanship are highly correlated in Charleston County, and that he could not determine the extent to which either racial attitudes or partisan attitudes contributed to polarized voting. Tr. 2039.

Rather than provide the district court with a probative causal analysis of the effects of partisanship on voting patterns to support their claim, petitioners presented only limited, anecdotal evidence. The entirety of this evidence consisted of (1) the recent election of one minority Republican to the County Council; (2) decreased minority support for two Republican candidates for County Council after the candidates switched parties; and (3) the election of minority candidates to the school board in non-partisan elections. See Pet. App. 20a-21a.

b. The district court concluded that, absent any statistical analyses to support petitioners' claim, their causation evidence was "insufficiently comprehensive" and that a "more exacting inquiry" is required. Pet. App. 91a. Because the County's evidence was "inherently more speculative and subjective than the other

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[4] After the close of discovery, the County attempted to supplement its evidence with an additional statistical analysis. That analysis was properly rejected as untimely, and the County did not challenge that ruling on appeal. Pet. App. 92a n.38.

methodologies identified by the experts for proving cause," the court correctly gave it limited weight in the court's overall analysis. *Ibid.* As the court explained, it "simply [could not] conclude on the strength of isolated instances that party affiliation better explains the patterned-defeat [of minority-preferred candidates] in Charleston County." *Ibid.*

c. The court of appeals affirmed the district court's finding that petitioners had failed to prove their causation case. The court characterized the County's evidence of partisanship as "anecdotal" and "far from persuasive," Pet. App. 20a, 21a, and noted that "there was no systematic proof to support [the County's] claim," *id.* at 20a. Based on its own review of the evidence, the court of appeals found that "[i]n the end, the district court was faced with inconclusive evidence of partisanship as the determinant of voting." *Id.* at 21a. By contrast, the court explained that the district court had before it "decisive evidence of severe voting polarization, minimal minority electoral success, and an uncommonly large voting district." *Ibid.* (internal quotation marks omitted). Under those circumstances, the court of appeals correctly concluded that the district court, having "conducted a searching practical evaluation of local electoral conditions," *id.* at 22a-23a (internal quotation marks omitted), had reached factual conclusions about the presence of vote dilution that were "not clearly erroneous." *Id.* at 23a.

3. The conclusions of both courts below that petitioners were unable to show that partisanship, rather than race, could explain the usual defeat of minority-preferred candidates in Charleston is sufficient to resolve the case. This Court does not ordinarily undertake review of such concurrent findings of fact by two lower courts, see *Graver Tank & Mfg. Co.* v. *Linde Air*

Prods. Co., 336 U.S. 271, 275 (1949), and, indeed, petitioners do not seek such review. But because the concurrent factual findings of the two lower courts are sufficient to resolve this case, this case is not a suitable vehicle to consider the correct analytical approach to a case in which voting behavior *is* shown to be caused by partisanship, rather than race. Accordingly, further review is not warranted.[5]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[5] It may well be that the analytical question petitioners attempt to present is in any event of insufficient practical importance to warrant this Court's review. A Section 2 defendant who is able to show that partisanship provides a better explanation than race for a pattern of usual defeat of minority-preferred candidates is likely ultimately to prevail, regardless of the precise stage of the inquiry in which that evidence is considered.