No. 94P02 **ELEVENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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ASHLEY STEPHENSON, individually, and as a resident and registered voter of Beaufort County, North Carolina; LEO DAUGHTRY, individually, and as Representative for the 95th District, North Carolina House of Representatives; PATRICK BALLANTINE, individually, and as Senator for the 4th District, North Carolina Senate; ART POPE, individually, and as Representative for the 61st District, North Carolina House of Representatives; and BILL COBEY, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated, Plaintiff-Appellees, v. GARY O. BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROBERT B. CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE, as members of the State Board of Elections; JAMES B. BLACK, as Speaker of the North Carolina House of Representatives; MARC BASNIGHT, as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, as Governor of the State of North Carolina; and ROY COOPER, as Attorney General of the State of North Carolina, Defendant-Appellants.	)	From Johnson County No. 01 CV 02885

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***AMICI CURIAE* BRIEF OF THE DKT LIBERTY PROJECT AND THE CENTER FOR VOTING AND DEMOCRACY**

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No. 94P02 **ELEVENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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ASHLEY STEPHENSON, *et al.*,	)	
Plaintiff-Appellees,	)	
	)	From Johnson County
v.	)	No. 01 CV 02885
	)	
GARY O. BARTLETT, *et al.*,	)	
Defendant-Appellants.	)	

* *

***AMICI CURIAE* BRIEF OF**
THE DKT LIBERTY PROJECT AND
THE CENTER FOR VOTING AND DEMOCRACY

* *

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The DKT Liberty Project ("Liberty Project") and the Center for Voting and Democracy ("Center") respectfully submit this brief as *amici curiae* in support of the Plaintiff-Appellees in accordance with North Carolina Rule of Appellate Procedure 28(i).

INTEREST OF AMICI CURIAE

As Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is a not-for-profit organization that advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to vote because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. To help preserve these essential rights, the Liberty Project advocates for the rights of individual Americans to choose the officials who will represent them. Increasing electoral fairness and providing voters with meaningful options to select public officials ? rather than

granting advantages to the re-election of incumbent officeholders ? is a paramount goal of the Liberty Project and at the heart of its mission.

The Center is a non-partisan, non-profit corporation incorporated for educational purposes. The Center researches and distributes information on electoral systems that promote full voter participation and fair representation, particularly alternatives that will enable more voters to elect candidates of their choice than in traditional elections. The Center's mission is founded on the belief that implementing such voting systems would: restore vitality to our democracy; ensure fairer representation of our society's diversity in elected bodies; and assist local, state, and national governments in solving the complex problems facing our nation. The Center has been active in encouraging government officials, judges and the public to explore systematic alternatives to the use of territorial districting.

This case directly and fundamentally implicates the ability of North Carolina citizens to participate in fair elections and have meaningful electoral choices. Because both the Liberty Project and the Center have strong interests in protecting such rights and opportunities for all citizens, they are well-situated to provide this Court with additional insight into the issues presented in this case.

INTRODUCTION

The North Carolina Constitution mandates that the General Assembly not divide counties in the formation of State House and Senate districts. N.C. Const. Art. II., §§ 3(3), 5(3) (1971). Nevertheless, all parties agree that the plan enacted by the General Assembly divides counties throughout North Carolina. According to Defendant-Appellants, this violation of the State Constitution is "necessary" in order not to run afoul of the federal Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c (2001) ("Voting Rights Act" or "Act"), and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. As shown below, that is not the case.

Indeed, the State Constitution's command that the legislature respect county lines can be honored without violating federal law if multimember districts that employ alternative voting mechanisms that have been approved for use in a number of States including North Carolina – such as cumulative voting, limited voting or preference voting – are instituted. The General Assembly's recognized violation of the State Constitution therefore is distinctly *unnecessary* and, thus, patently unlawful. Accordingly, this Court should affirm the decision of the Superior Court awarding summary judgment to Plaintiffs on Count II and lift the stay imposed under Paragraph 9 of the Superior Court's Order, thus requiring the General Assembly to adopt a redistricting scheme that does not divide counties in violation of state law.

STATEMENT OF THE CASE

This case presents the question whether a state constitutional requirement that strictly prohibits the division of counties in the formation of State House and Senate districts may be disregarded by the General Assembly despite being wholly unnecessary to comply with federal statutory and constitutional law.

A. Applicable State and Federal Law

1. State Constitutional Requirements

Article II of the North Carolina Constitution strictly prohibits the division of counties in the formation of State House and Senate districts. N.C. Const. Art. II, §§ 3(3), 5(3) (1971). This requirement was included in the 1968 Amendments to the North Carolina Constitution but this component of the 1968 Amendments did not represent any change in the North Carolina Constitution's redistricting requirements. Although the earliest evidence in the Record that this requirement historically had been included in the North Carolina Constitution is the 1776 Constitution, *see* Exhibit 30, legislative districts were required to and did keep counties whole throughout the State's history prior to 1979. *See* Exhibits 5, 5A (North Carolina legislative

districting maps from 1670 to 1979). While the precise language of the requirement has changed over time, its substance and effect – the prohibition on the division of counties when drawing House and Senate districts – has remained the same. *See* Exhibits 30-34. There is no exception to this requirement.

Article I of the North Carolina Constitution, however, explicitly recognizes the supremacy of federal constitutional and statutory law pursuant to the Supremacy Clause of the U.S. Constitution. *See* U.S. Const., Art. VI. Accordingly, the provisions of the North Carolina Constitution, including the prohibition on dividing counties, must be exercised "consistently with the Constitution of the United States." N.C. Const. Art. I, § 3 (1971); *see also id.* at § 5 ("no law or ordinance of the State in contravention or subversion" of the U.S. Constitution "can have any binding force.").

2. Federal Statutory Limitations

The Voting Rights Act is the principle mechanism for evaluating the legality of redistricting schemes under federal law. Section 5 of the Act places limitations on the redistricting processes of "covered jurisdictions" by requiring that these jurisdictions obtain federal "preclearance" prior to the implementation of any new redistricting plan; Section 2 advances the right to vote guaranteed by the Fifteenth Amendment of the U.S. Constitution by prohibiting the drawing of district lines that "dilute" the voting strength of minority populations.

a. The Section 5 Preclearance Requirement

Section 5 applies to nine entire States and parts of seven others, including forty of North Carolina's one hundred counties. Record on Appeal ("Record") at 161. These "covered jurisdictions" must obtain preclearance from either the Attorney General of the United States ("DOJ") or the United States District Court for the District of Columbia before implementing

any changes to voting practices or electoral districts. *Id.; Beer v. United States*, 425 U.S. 130, 133 (1976). To obtain preclearance, a State must show that a new redistricting plan does not have the purpose, and will not have the effect, of abridging a minority group's right to vote. *See* 42 U.S.C. § 1973c. Both the "purpose prong" and the "effects prong" of the Section 5 test require a showing that a redistricting plan will not have a "retrogressive" impact on the voting strength of members of a minority group. *Id.; see also Beer*, 425 U.S. at 141 (reviewing requirements of same).

b. The Section 2 Prohibition on Minority Vote Dilution

Unlike Section 5, Section 2 of the Voting Rights Act applies nationwide. It prohibits States from adopting any electoral practice or procedure that dilutes the voting strength of a racial or language minority group. 42 U.S.C. § 1973. Such dilution need not be intentional. It is sufficient to demonstrate that, in operation, a redistricting scheme has the effect of diluting the minority vote. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986) (*citing* Senate Report accompanying 1982 amendments to Section 2, S. Rep. No. 97-417, at 2, 15-16, 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205). This can occur either by "packing" a minority group into a small number of districts (depriving it of a majority in other districts), or by fragmenting the minority group so that it does not constitute a majority in any district ("fracturing" or "cracking"). *See McGhee v. Granville County, North Carolina*, 860 F.2d 110, 116 n.7 (4th Cir. 1988) (noting that "packing" or "fracturing" dilutes minority voting power).

The remedy for minority vote dilution typically has been the creation of new single-member "majority-minority" districts in which a majority of residents are members of a protected minority group. *See, e.g., Gingles*, 478 U.S. at 42 (affirming single-member districting remedy in Voting Rights Act challenge to North Carolina multimember state legislative

districts). Although single-member districts typically have been the preferred remedy for curing minority vote dilution, they are by no means the exclusive remedy. Many States instead have remedied potential Voting Rights Act violations by utilizing multimember districting plans that employ what are known as alternative voting mechanisms. *See, e.g., McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 985 (N.D. Ill. 1998) (ordering cumulative voting as remedy for Section 2 violation); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1247 (M.D. Ala. 1988) (approving settlement involving limited voting as remedy for Section 2 violation); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988) (approving settlement involving cumulative voting as remedy for Section 2 violation), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

3. Federal Constitutional Limitations

Two federal constitutional principles animate the design and operation of the Voting Rights Act. Both emanate from the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14, § 1. The first constitutional principle is "population equality," also known as the "one person, one vote" requirement. This principle requires "equal representation for equal numbers of people." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). In the state legislative redistricting context, the Supreme Court has interpreted the Equal Protection Clause as requiring States to make "an honest and good faith effort" to create population equality among districts. [1] *Brown v.*

[1] For federal congressional districts, the same requirement stems from Article I, § 2 of the Constitution.

Thompson, 462 U.S. 835, 842 (1983) (citing cases). The "one person, one vote" principle is not in dispute in this case.[2]

In the 1993 landmark case *Shaw v. Reno*, 509 U.S. 630 (1993), the United States Supreme Court recognized a second constitutional voting rights cause of action under the Fourteenth Amendment for "racial gerrymandering." 509 U.S. at 657-58. In *Shaw*, the Court held that, except in extraordinary circumstances, excessive use of race in redistricting – even in an attempt to remedy minority vote dilution – is prohibited by the Equal Protection Clause. *Id.* The use of race in redistricting thus is unconstitutional if race is the "predominant factor" motivating the configuration of a district. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Race is a "predominant factor" if a districting plan subordinates "traditional race-neutral districting principles" such as "compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests" to racial considerations. *Id.* at 916. *Shaw* and its progeny severely limit a State's ability to remedy minority vote dilution by creating single-member districts for the primary purpose of increasing a minority group's voting strength.

B. Alternative Voting Mechanisms

The Supreme Court consistently has held that multimember districts are not per se unconstitutional. Rather, it is the traditional "winner-take-all" approach that often leads to minority vote dilution in the context of multimember districts. *See, e.g., Rogers v. Lodge*, 459 U.S. 613, 616-17 (1982) (noting same); *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1971) (same). The traditional "winner-take-all" form of at-large elections in multimember districts

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[2] Even if it were, alternative voting systems easily can be implemented in multimember districts to comply with this requirement. *See Chapman v. Meier*, 420 U.S. 1, 15 (1975) (reaffirming prior holding that States may devise apportionment plans in multimember districts to comply with one person, one vote principle); *McCoy*, 6 F. Supp. 2d at 984 ("By allowing each voter the same number of votes, cumulative voting subscribes to the one-person, one-vote requirement with numeric exactness.").

allows each voter to cast only one vote for each candidate, up to the number of available seats in the district. But a number of alternative voting mechanisms exist for use in multimember districts that do not employ a winner-take-all approach and thus avoid this constitutional pitfall. Three alternative voting mechanisms in particular have been employed most often by States and have received the most attention from the courts: cumulative voting, limited voting, and preference (or choice) voting.

1. Cumulative Voting

In a cumulative voting system, voters in a multimember district are given a certain number of votes that they can distribute among a group of candidates in any proportion they choose. Typically, voters receive as many votes as there are seats to fill. Voters may give all of their votes to one candidate ("plumping"), give one vote to each of several candidates, or distribute their votes in any other combination they choose. For example, in the case of an at-large district in which ten seats are available, voters would be assigned ten votes. They may cast ten votes for a single candidate, cast one vote for each of the ten candidates, or make intermediate distributions with some candidates receiving multiple votes and some candidates receiving single votes. Cumulative voting gives minority groups that vote as a bloc the option of concentrating their votes on a few candidates and ensuring their election.

In *Dillard v. Chilton County*, the court approved a settlement imposing cumulative voting as a remedy for a vote dilution claim in a multimember district. 699 F. Supp. at 876. The court focused its analysis specifically on whether the minority voters in the county would have the potential to elect the representatives of their choice, even in the face of the "worst case scenario" - the most racially polarized voting pattern. Under that scenario, it is assumed that the majority group sponsors only as many candidates as there are seats to fill and spreads its votes evenly

among its candidates, with no "cross-over voting" for the minority preferred candidate. *Id.* at 874. The court found that a minority group could elect its preferred candidate in a cumulative voting system - even under such most unfavorable conditions - as long as it had a population meeting or exceeding the "threshold of exclusion."[3] If the minority population exceeds or approaches the threshold of exclusion, cumulative voting has virtually the same effect as the creation of single-member, majority-minority districts. Because this number typically is similar to the number necessary for the creation of a single-member, majority-minority district, the two remedies generally have virtually the same effect. Accordingly, the *Dillard* court found that cumulative voting was an appropriate, alternative remedy for curing the alleged Section 2 violation. *Id.* at 875.

Cumulative voting has been used in a number of States, including Alabama, Texas and Illinois. *See McCoy*, 6 F. Supp. 2d at 974 (adopting cumulative voting system for election of city aldermen and park board members); *Dillard*, 699 F. Supp. at 876 n.7 (M.D. Ala. 1988) (approving cumulative voting as proposed remedy for violation of the Voting Rights Act and noting that cumulative voting "is becoming rather common in Alabama"); Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Different Texas Communities*, 78 Soc. Sci. Q. 973, 974 (1997) ("By mid-1997, at least fifty-seven local governments in five states had adopted cumulative voting to elect their legislative bodies."); Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority*

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[3] As an empirical matter, the threshold of exclusion is "the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances," typically expressed as "1 / 1+ # of seats." *Dillard*, 699 F. Supp. at 874. An analysis of the threshold of exclusion can be undertaken with respect to any alternative voting mechanism and the details of the chosen voting mechanism (such as the number of counties and thus the number of seats at stake) can be tailored to fit the actual characteristics of the district in question.

Vote Dilution, 21 Stetson L. Rev. 743, 757 (1992) (describing the use of cumulative voting in Peoria, Ill.); Richard L. Engstrom, et al., *Limited and Cumulative Voting in Alabama: An Assessment After Two Rounds of Elections*, 6 Nat'l Pol. Sci. Rev. 180, 185-189 (1997) (describing the use of cumulative and limited voting by localities in Alabama since 1988).

2. Limited Voting

Limited voting operates in a manner similar to cumulative voting. In a limited voting system, each voter casts one vote per candidate to fill a number of seats, but the total number of votes that each voter may cast is fewer than the total number of seats to be filled. In a ten-seat district, for example, each voter may receive four votes. This limitation prevents a majority voting as a bloc from filling every available seat with its chosen candidates, thus affording minority groups the opportunity to fill the void. Because the number of votes allotted to each voter in a limited voting scheme is malleable, such schemes can be tailored to satisfy the unique circumstances of a particular district so that if a minority group votes as a bloc it will have the ability to elect its candidate of choice.

Limited voting has been court-approved for use and implemented for local elections in some parts of North Carolina as well as in Alabama, Connecticut and Pennsylvania. *See, e.g.*, *Moore v. Beaufort*, 936 F.2d 159, 164 (4th Cir. 1991) (approving settlement that included a multimember district with limited voting to elect the Beaufort County, North Carolina Board of County Commissioners); *Orloski v. Davis*, 564 F. Supp. 526, 536 (M.D. Pa. 1983) (rejecting equal protection, State Constitution and Voting Rights Act challenges to limited voting scheme for judicial elections in Pennsylvania); *LoFrisco v. Schaffer*, 341 F. Supp. 743, 751 (D. Conn. 1972) (upholding statute calling for limited voting scheme for Boards of Education elections in Connecticut); *Kaelin v. Warden*, 334 F. Supp. 602, 609 (E.D. Pa. 1971) (upholding limited

voting scheme to elect County Commissioners in Bucks County, Pennsylvania). *See also* Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 266 (1995) ("Between twenty and twenty-three jurisdictions in Alabama use limited voting[.]").

3. Preference (or Choice) Voting

Preference voting – also known as choice voting – requires voters to rank candidates in their order of preference by placing numbers on the ballot next to each candidate's name. Votes are then tallied in a series of rounds. In the first round, candidates receiving a specified percentage of first-choice votes win a seat. That percentage is the fewest number of votes that a candidate must receive to win a seat.[4] After the first round, the winning candidates' excess votes (the number received above the minimum needed to win a seat) are reassigned based on the second choice preferences of all the voters who ranked the winning candidates as their first choice. Following this reassignment, the second round of counting is undertaken and any candidate receiving more than the minimum in that round is awarded a seat. If no candidate reaches the minimum, the lowest vote-getter in the election is disqualified and that candidate's votes are reassigned based on the second choices selected by the voters. This process of seating and disqualifying candidates in rounds of counting continues until every seat is filled.

Preference voting has been employed successfully in elections in Cambridge, Massachusetts, New York City, and at least two dozen other jurisdictions expressly for the purpose of increasing minority representation in those jurisdictions. *See* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1879 (June 1999). These efforts have met

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[4] This number is the same as the threshold of exclusion.

with marked success. When New York City began using preference voting in 1970, for example, the number of successful African-American and Hispanic candidates increased such that the number of representatives from these minority groups nearly matched the percentages of those groups in the overall population. *Id*. at 1893. Representation for these groups also proportionally increased in elections following 1970 as their percentages of the population increased. *Id*.

SUMMARY OF THE ARGUMENT

The State of North Carolina presents a false conflict to justify the General Assembly's violation of the North Carolina Constitution. The North Carolina Constitution expressly prohibits the legislature from splitting counties in the creation of districts for the election of state Senators and Representatives. N.C. Const., Art. II, §§ 3(3), 5(3) (1971). Such division is permitted *only* where necessary to comply with federal law. N.C. Const., Art. I, §§ 3, 5; U.S. Const., Art. VI. The General Assembly's districting plan nevertheless divides counties in both Senate and Representative districts in direct contravention of this constitutional mandate. Here, the General Assembly's plan divides counties unnecessarily and without justification because neither the Voting Rights Act nor the U.S. Constitution requires this result. By using appropriate alternative voting mechanisms – *e.g.*, cumulative voting, limited voting and/or preference voting – in multimember districts, the requirements of the North Carolina Constitution, U.S. Constitution and Voting Rights Act can be harmonized, and the General Assembly *can satisfy all* applicable federal and state mandates. The current plan therefore must be vacated and the decision of the Superior Court affirmed, with instructions for the Superior Court to lift the stay and to order the enactment of a plan that does not divide counties in violation of the North Carolina Constitution.

ARGUMENT

I. THE GENERAL ASSEMBLY CANNOT ABANDON THE REQUIREMENTS OF THE NORTH CAROLINA CONSTITUTION IF ITS PROVISIONS CAN BE SATISFIED IN A MANNER CONSISTENT WITH FEDERAL LAW.

Article II of the North Carolina Constitution mandates that counties remain undivided in any redistricting plan used to elect members of the State Senate or General Assembly. *See* N.C. Const. Art. II, § 3(3) ("No county shall be divided in the formation of a senate district."); N.C. Const. Art. II, § 5(3) ("No county shall be divided in the formation of a representative district."). There are no exceptions to these prohibitions. Indeed, compliance with the Article II provisions precluding the splitting of counties had been the practice in North Carolina from 1670 to 1979. *See supra* at 3-4; Exhibits 5, 5A, 30-34. This Court expressly upheld the validity of these provisions as recently as 1989. *Martin v. Preston*, 325 N.C. 438, 461 (1989) ("Our Constitution *specifically requires* that county boundaries be followed in creating legislative districts.") (emphasis in original).

The North Carolina Constitution recognizes, as it must, that state law must cede to federal law in the event of a conflict. N.C. Const. Art. I, §§ 3, 5; U.S. Const., Art. VI. Where the requirements of both federal and state law can be satisfied, however, there is no conflict and, thus, no justification for the State's refusal to comply with either law. If no conflict exists, principles of federalism dictate that state law governs. *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("the Constitution leaves with the States primary responsibility for apportionment of their . . . state legislative districts"); *Cleveland County Ass'n for Gov't By The People v. Cleveland County Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (vacating consent decree pertaining to method of elections because it disregarded state law and was unnecessary to remedy finding of liability regarding deprivation of federal statutory or constitutional right); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 217-18 (7th Cir. 1995) (vacating consent decree that disregarded

state law because federal law had not been found to override it); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846-48 (5th Cir. 1993) (en banc) (same).

Defendant-Appellants assert as their primary argument, however, that the legislature need not comport with the North Carolina Constitution's whole county districting requirements at all, because these requirements were incorporated in amendments that were not precleared under Section 5 of the Voting Rights Act. Def-App. Br. at 9-12, 27-50. This contention both is remarkable in its cavalier disregard of the will of the citizens of North Carolina and is wholly without merit.

Section 5 preclearance procedures "uniquely deal only and specifically with changes in voting procedures." *Reno v. Bossier Parish School Board*, 528 U.S. 320, 334 (2000) *("Bossier Parish II").* The 1968 Amendments to the North Carolina Constitution ("1968 Amendments") – which reaffirmed North Carolina's centuries-old whole county districting requirements that are now at issue – represent neither a "voting procedure" nor a "change." Accordingly, the 1968 Amendments did not require preclearance.

First, Section 5 only requires a covered jurisdiction to "obtain either judicial or administrative preclearance before *implementing* a voting" procedure. *Lopez v. Monterey County, California*, 519 U.S. 9, 20 (1996) (emphasis added).[5] The whole county requirement is not such a "voting procedure" - only the General Assembly's attempt to implement that requirement in a redistricting plan would constitute a "voting procedure" subject to preclearance.

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[5] S*ee also* 28 C.F.R. § 51.1 (2002) (Section 5 "prohibits the *enforcement*" of a different voting practice or procedure prior to receiving preclearance) (emphasis added); 28 C.F.R. § 51.10 ("prior to *enforcement* of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change" must obtain preclearance) (emphasis added).

It is beyond dispute that any redistricting plan emerging from this litigation cannot be administered or enforced in the 40 North Carolina counties covered by Section 5 unless and until that plan is precleared. *See, e.g.,* Record at 162 (the court below recognizing the need for any redistricting plan to be precleared). But it is not until the General Assembly enacts such a plan implementing the state constitutional requirements that Section 5 is implicated. At that point, the appropriate entities (the Attorney General or the U.S. District Court for the District of Columbia) will have ample opportunity to review the 1968 Amendments *as they are implemented in a redistricting plan* to determine whether the redrawn districts satisfy federal law.[6] Before that point, any such determination is premature. Because it also is beyond dispute that the 1968 Amendments were properly adopted by the people of North Carolina and incorporated into the North Carolina Constitution, however, there is no legal basis for Defendant-Appellants' contention that the whole county districting provisions do not apply. To the contrary, the General Assembly is bound by the State Constitution, including all of its validly-enacted amendments, unless and until any of its provisions are repealed or held to be unenforceable.

Second, the practice of keeping counties together in drawing state legislative districts does not represent a *"change"* in North Carolina's districting practices in any event because

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[6] Although North Carolina has not attempted to implement the 1968 Amendments since 1981, the State may do so at any time as long as it obtains preclearance prior to the critical point under Section 5 ? that is, the point of implementation or enforcement of any new districting plan in the 40 covered counties. This is true for any new plan that the General Assembly enacts and, in fact, the State still may ask for reconsideration of exactly the plan that the Attorney General refused to preclear in 1981. 28 C.F.R. § 51.45 ("The submitting authority may at any time request the Attorney General to reconsider an objection."). Furthermore, if the Attorney General's refusal to preclear the 1968 Amendments in 1981 is significant at all, that determination only affects the State's ability to *enforce* those provisions in a redistricting scheme that has not first been precleared. It does not affect the *validity* of those provisions as a matter of State law. *See* 28 C.F.R. § 51.1 (Section 5 "prohibits the *enforcement*" of a different voting standard, practice or procedure prior to receiving preclearance).

North Carolina had imposed such a whole county requirement expressly and consistently from 1670 through 1979. *See supra* at 3-4; Exhibits 5, 5A, 30-34. Only a change to a "standard, practice, or procedure with respect to voting . . . *from that in force or effect on November 1, 1964*" requires preclearance. 42 U.S.C. § 1973c (emphasis added). *See also Beer*, 425 U.S. at 138; *Perkins v. Matthews*, 400 U.S. 379, 394 (1971) ("In our view, Section 5's reference to the procedure 'in force or effect on November 1, 1964,' means the procedure that would have been followed if the election had been held on that date."). Practices instituted prior to November 1964 thus are not subject to the preclearance requirement. *Beer*, 425 U.S. at 138 (even "'[d]iscriminatory practices . . . instituted prior to November 1, 1964 . . . are not subject to the requirement of preclearance'") (citation omitted). By its own terms, therefore, Section 5 does not apply to the enactment of the state constitutional amendments at issue here because the State Constitution prohibited the division of counties throughout North Carolina's history – well before 1964 – and the General Assembly in fact followed this practice for nearly 300 years prior to the adoption of the 1968 Amendments. [7]

II. ALTERNATIVE VOTING MECHANISMS REMEDY CONSTITUTIONAL AND VOTING RIGHTS ACT CONCERNS IN MULTIMEMBER DISTRICTS.

The Supreme Court consistently has held that multimember districts are not per se unconstitutional, but that it is the traditional "winner-take-all" approach to at-large electoral schemes that tends to dilute minority voting strength in multimember districts. *Rogers*, 459 U.S.

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[7] A Section 5 determination, moreover, "is nothing more than a determination that the voting change is no more dilutive [of minority voting strength] than what it replaces." *Bossier Parish II*, 528 U.S. at 335. The benchmark measurement is the jurisdiction's existing plan. *Id.* at 336; *Lockhart v. United States*, 460 U.S. 125, 132-33 (1983) (using system of election in use without exception between 1917 and 1973 as benchmark). Because North Carolina's legislative districts not only preserved counties in 1968, but had done so for nearly 300 years prior to that, the 1968 Amendments could not have had any prohibited dilutive effect under Section 5 because they did not effectuate any change from the status quo.

at 616-17; *Whitcomb*, 403 U.S. at 158-159. Alternative voting mechanisms resolve that concern, as they are proven to be effective in enhancing minority electoral opportunities. Indeed, several Justices have suggested that alternative voting mechanisms are "more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of power according to race." *Holder v. Hall*, 512 U.S. 874, 912 (1994) (Thomas, J., concurring, joined by Scalia, J.). Moreover, unlike the establishment of single-member majority-minority districts, alternative voting mechanisms enhance minority voting strength in a wholly race-neutral manner, thus avoiding constitutional equal protection concerns. Their utility also is unrivaled where – as here – they render any violation of a State's own constitutional districting requirements wholly unnecessary.

A. Alternative Voting Mechanisms Comply With Section 2 Of The Voting Rights Act.

1. The *Gingles* Test

Section 2 of the Voting Rights Act prohibits any voting procedure that "results in a denial or abridgement of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. The essence of a Section 2 claim is a charge that an electoral law, practice, or structure will "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Proof of a discriminatory motive is unnecessary. Rather, a violation of Section 2 is established by showing that, "based on the totality of the circumstances," members of a protected minority group "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). [8]

Gingles thus establishes a "results oriented" test for evaluating when and how a State must draw district lines to enhance the voting power of a minority group. At the heart of *Gingles* is the admonition that politically cohesive minority groups may not have their voting power impermissibly "diluted" by multimember districting or at-large electoral processes that "submerge" the minority group in a constituency in which a "bloc voting majority" usually is able to defeat candidates of the minority group's choice. *Gingles*, 478 U.S. at 47-49. Minority vote dilution typically occurs in a single-member districting context when a plan fragments large concentrations of minority populations and disperses them into separate electoral districts ("fracturing" or "cracking") or, conversely, concentrates minorities into districts so that they constitute an excessive "super-majority" and thus deprives the group of voting power in multiple districts ("packing"). *See id.* at 46 n.11.

Under *Gingles*, a Section 2 prima facie case requires proof of three "preconditions:"

> (1) The minority group is large enough and located in a sufficiently geographically compact area to make up a majority in a single member district;
>
> (2) The minority group is politically cohesive; and
>
> (3) There is bloc voting by the white majority such that the minority's preferred candidate usually is defeated.

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[8] The Senate Judiciary Report accompanying this provision (as amended in 1982) listed a number of factors that may be used to prove a Voting Rights Act violation, including the history of voting-related discrimination in the state or political subdivision; the extent to which voting is racially polarized; and the extent to which members of the minority group have been elected to public office in that jurisdiction. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. These factors are neither comprehensive nor exclusive. *See Gingles*, at 45.

478 U.S. at 50-51. The first and second *Gingles* factors together establish that a minority group has sufficient potential to elect its representative of choice in a single-member district; the second and third factors together establish that the challenged district(s) thwarts a distinctive minority vote by cracking or packing the minority voting group, or by submerging it in a larger white voting population. *Growe*, 507 U.S. at 40-41 (citing *Gingles*). If all of these preconditions are not satisfied, *Gingles* dictates that there has been no wrong, and Section 2 thus requires no remedy.[9] *Id.*

Where the *Gingles* preconditions are satisfied, the remedy typically has been the creation of single-member districts in which a majority of residents are members of the minority group on whose behalf the Section 2 challenge was asserted. The use of single member districts to remedy minority vote dilution, however, creates significant practical and constitutional problems. As a practical matter, minority populations often are dispersed geographically, making it difficult to create majority-minority districts in the first instance. To overcome this problem, majority-minority districts may be drawn with unsightly and uneven district boundaries that are subject to constitutional challenge under the Equal Protection Clause. *See infra* at II.B (discussing *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny).

In practice, although single-member majority-minority districts have been the more common remedy for redressing minority vote dilution, by no means have they been the exclusive

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[9] Even where all three preconditions are satisfied, a finding that Section 2 has been violated is not automatic. *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (finding no violation of Section 2, despite proof of preconditions, based on the "totality of the circumstances").

remedy. To the contrary, several jurisdictions have implemented alternative voting mechanisms in multimember districts to remedy alleged voting rights violations.[10]

2. Alternative Voting Mechanisms Are Fully Permissible Under *Gingles* Because They Enable Cohesive Minority Groups To Elect Their Candidates of Choice.

As discussed above, the central purpose of the *Gingles* test is to evaluate whether a minority community that is unable to elect its preferred candidate(s) under a challenged districting scheme would be able to seat its candidate(s) of choice under an alternative districting scheme. Use of an alternative voting system in a multimember district has the same effect as the creation of a single-member majority-minority district – it allows for the election of the minority group's preferred candidate(s) if the group is sufficiently large and politically cohesive. All three alternative voting mechanisms discussed above – cumulative, limited and preference voting – enable minority groups to secure the election of their preferred candidates, even in the face of racially polarized voting. They do this by effectively fragmenting the voting power of electoral *majorities* – irrespective of race, ethnicity or any characteristic other than pure political preference. For racial minorities, the effect is the same as it would be through the creation of a single-member majority-minority district.

Cumulative voting accomplishes this result by giving all groups the opportunity to concentrate their votes on a few candidates and secure their election. *See Dillard*, 699 F. Supp. at 875 (cumulative voting "provides black voters [] with a realistic opportunity to elect

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[10] *See, e.g.*, *Moore*, 936 F.2d at 164 (approving settlement that included a multimember district with limited voting in North Carolina); *McCoy*, 6 F. Supp. 2d at 985 (adopting cumulative voting as complete and adequate remedy to Section 2 violation); *Dillard*, 699 F. Supp. at 876 (approving cumulative voting scheme as Section 2 remedy in Chilton County, Alabama); *Orloski*, 564 F. Supp. at 536 (rejecting Voting Rights Act challenges to limited voting scheme in Pennsylvania); *LoFrisco*, 341 F. Supp. at 751 (upholding statute calling for limited voting scheme in Connecticut); *Kaelin*, 334 F. Supp. at 609 (upholding limited voting scheme in Pennsylvania).

candidates of their choice, even in the presence of substantial racially polarized voting."). If five seats are open in a district, for example, voters would have five votes each to distribute as they choose. Because the same majority cannot concentrate its votes on all five seats, they cannot dominate the election. Instead, voters in a sufficiently large minority group – more than one-sixth of the electorate in a five-seat race – can assure their candidate's election regardless of how other voters, including a majority, cast their ballots. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 254.

Limited voting operates similarly, except that voters have fewer votes to cast than the number of seats to fill. By limiting each voter to, for example, one or two votes in a five-seat election, the same majority group cannot dominate every seat. As under a cumulative voting system, cohesive minority groups that are sufficiently large are empowered to control the outcome of at least one seat. *Id.*

Under a preference voting system, the vote-transferring process increases the proportion of voters who vote for a winning candidate. It does this by transferring "wasted" votes – votes that are cast for a candidate who would win without them or who could not win with them – onto the next ranked candidates of a voter's ballot. Preference voting thus enables electoral minorities to control some seats in a multimember race even in the face of extreme majority opposition. In a race for five seats, for example, a candidate with just over one-sixth of the total vote will win a seat. A minority voting block of that size is thus sufficient to ensure election of at least one representative of its choice. *Id.*

Evidence from several multimember jurisdictions that have employed such alternative voting mechanisms demonstrates that these systems are in fact useful in enhancing minority representation. In Alabama, for example, nine counties began using limited voting in response to

Section 2 challenges to districting plans in the late 1980s. In the first elections following implementation, an African-American candidate won in thirteen of the fourteen municipalities in which an African-American candidate ran for office. Mulroy, 77 N.C. L. Rev. at 1891. The only unsuccessful African-American candidate lost by a single vote. *Id.* In ten of the thirteen Alabama municipalities that employed alternative voting systems, the minority candidates were the first African-Americans ever elected to office in those jurisdictions. *Id.*

The results of elections in Chilton County, Alabama following the settlement achieved in *Dillard* demonstrate the effectiveness of a cumulative voting system. In the first election following the settlement, Chilton County elected its first African-American representative to the County Commission since Reconstruction. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 272. In fact, that candidate was the leading vote-getter in the election despite the fact that he received support from only 1.5 percent of white voters. *Id.* This was because he received votes from virtually every African-American voter in the county, many of whom cast multiple votes for him. *Id.* An African-American candidate also was elected to the Board of Education in Chilton County in the first two elections held with cumulative voting in place. *Id.*

Alternative voting systems also can remedy minority vote dilution in situations where a single-member districting scheme might fail, such as where a single member districting plan would leave some members of the minority group outside the remedial minority district. *See, e.g., Dillard*, 699 F. Supp. at 876 (noting the usefulness of alternative voting systems where minority populations are dispersed). Moreover, because alternative voting mechanisms can be tailored to the size of the minority population within a county (or counties) such that minority groups will be able to elect as many or more candidates of choice as they can under single-

member majority-minority districts, such mechanisms are in many circumstances preferable to majority-minority districts.

B. Alternative Voting Systems Satisfy The Equal Protection Clause And Present Clear Advantages For Districting Efforts In The Wake Of *Shaw v. Reno*.

As demonstrated above, the use of alternative voting mechanisms in multimember districts enhances the ability of cohesive minority groups to elect their preferred candidates at the polls. In this regard, they are at least as effective as the creation of single-member majority-minority districts. Because alternative voting mechanisms accomplish this objective in a race-neutral fashion, however, they also offer clear advantages in terms of a State's compliance with the federal constitutional constraints on the redistricting process.

In *Shaw v. Reno*, the Court recognized a new "racial gerrymandering" cause of action under the Equal Protection Clause when it invalidated a narrow and bizarrely-shaped majority-minority district winding along Interstate 85 in North Carolina.[11] 509 U.S. at 648. The Court held that a district is an unconstitutional "racial gerrymander" if it segregates voters into separate voting districts because of their race when that separation is not "narrowly tailored to further a compelling governmental interest." *Shaw*, 509 U.S. at 658. In order to trigger such "strict scrutiny," a plaintiff must show that race was the "predominant factor" motivating the configuration of a particular district such that the challenged redistricting plan "subordinated traditional race-neutral districting principles," such as compactness, contiguity, respect for political subdivisions, or communities defined by shared interests in favor of race. *See Miller*, 515 U.S. at 915-917.

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[11] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person with in its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14, § 1. Its central purpose is to prevent the States from intentionally discriminating against individuals on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

Since 1993, courts have invoked *Shaw* to invalidate majority-minority districting plans in a number of States on the grounds that race was the predominant factor motivating the shape and size of the district. *See, e.g., Miller*, 515 U.S. at 915-917 (invalidating Georgia legislative district because race was predominant factor motivating boundary lines); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (invalidating North Carolina districting plan because race was predominant factor used to draw majority-minority district); *Bush v. Vera*, 517 U.S. 952, 955-57 (1996) (invalidating Texas legislative redistricting plan that demonstrated "substantial disregard for traditional districting principles" in favor of establishing majority-minority districts based on race). Factors such as unusually-shaped district boundaries, statements by legislators, and the nature of reapportionment data used to draw districts influence the determination of whether race impermissibly was the predominant factor in a districting scheme. *Miller*, 525 U.S. at 917. *Shaw* and its progeny thus severely restrict a State's ability to draw districts that enhance minority representation because, if race is too central to a district's boundary determination and there is no compelling justification for using race as a proxy, then the district will violate the Equal Protection Clause.

Unlike single-member majority-minority districts, multimember districts that are drawn in a race-neutral manner – such as by conforming to political subdivisions – by definition do not implicate *Shaw*. Similarly, if the primary rationale underlying the creation of district boundary determinations is conformance with a state constitutional requirement prohibiting the division of counties, then the districting scheme, by its very nature, is not using race as the predominant factor. Accordingly, any argument that compliance with the North Carolina constitutional requirement not to divide counties would violate the Equal Protection Clause must be rejected.

Alternative electoral systems, moreover, avoid the pernicious assumption that the *Shaw* line of cases rejects as "odious to a free people whose institutions are founded upon the doctrine of equality," 509 U.S. at 643 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) – that voting behavior can be predicted based solely on skin color. At the heart of the Court's objection in *Shaw* was the notion that members of the same racial group – regardless of their age, education, status, or community – think alike, share the same political views, and will prefer the same candidates at the polls. *Shaw*, 509 U.S. at 647; *see also Gingles*, 478 U.S. at 46 (a court may not presume bloc voting within a minority group). *Cf. Holland v. Illinois*, 493 U.S. 474, 484 n. 2 (1990) (finding assumption that black juror will be partial to black defendant based on skin color to be unconstitutional racial stereotype). Alternative voting systems do not assume voting behavior for any group, minority or otherwise. Instead, they simply provide a mechanism for groups voting as a bloc – *i.e.*, groups that thus demonstrate electorally that they *do share* the same political views and prefer the same candidates at the polls – to ensure the election of their preferred candidates.[12]

By the same token, alternative voting systems avoid the "representational" harm caused when a district is created solely to effectuate the perceived common interests of one racial group. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 352 (1998). Because alternative voting mechanisms treat voters of all races alike, they do not "stigmatize individuals by reason of their [race]," and because they do not create "safe" districts for minorities,

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[12] *See also* Brischetto & Engstrom, *78* Soc. Sci. Q. at 989 ("Cumulative voting can provide minority electoral opportunities while avoiding what the Supreme Court views as objectionable features of some single-member districting schemes – the 'segregation' of voters into racially identifiable election units . . . .Dilution can be combated, therefore, while retaining an incentive for coalition building across a jurisdiction based on interests that are not necessarily defined by race . . . .").

incumbents are discouraged from believing that "their primary obligation is to represent only the members of [a racial] group, rather than their constituency as a whole." *United States v. Hays*, 515 U.S. 737, 744 (1995) (*citing Shaw*, 509 U.S. at 643). *See also* Mulroy, 33 Harv. C.R.-C.L. L. Rev. at 352.

Because alternative voting systems do not employ racial classifications in any manner, districting plans that use them are not subject to heightened scrutiny under *Shaw* and its progeny. This conclusion applies with equal force even if alternative voting mechanisms are employed for the purpose of facilitating minority representation. It is the classification of individuals on the basis of race, not the mere motivation to facilitate equal opportunity for representatives of all races, that requires heightened scrutiny. *See Shaw*,509 U.S. at 653; *see also Bush v. Vera*, 517 U.S. at 993 (Section 2 "must be reconciled with the complementary commitment of our Fourteenth Amendment jurisprudence to eliminate unjustified use of racial stereotypes") (O'Connor, J., concurring).

For the foregoing reasons, a redistricting plan that does not divide counties but, instead, utilizes multimember districts with alternative voting not only avoids violating the North Carolina Constitution, but also comports with the U.S. Constitution by affirmatively promoting fundamental principles of fairness and equal protection under the laws.

III. MULTIMEMBER DISTRICTS THAT EMPLOY ALTERNATIVE VOTING MECHANISMS QUALIFY FOR PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT.

"Section 5 of the Voting Rights Act authorizes preclearance of a proposed change that 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" *Bossier Parish II* , 528 U.S. at 324 (*quoting* 42 U.S.C. § 1973c). The key question under Section 5 is "'whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by

the change affecting voting . . . .'" *Beer*, 425 U.S. at 141 (*quoting* H.R. Rep. No. 94-196, p. 60). "In other words the purpose of § 5 has always been to insure that no voting-procedure change would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141; *see also Bossier Parish II*, 528 U.S. at 329 (holding that retrogression is the focus of the analysis under both the "purpose" and "effect" components of the Section 5 inquiry).

The use of properly constructed alternative voting mechanisms in multimember districts satisfies the Section 5 non-retrogression requirement because, as discussed at length above, such mechanisms expand the "effective exercise of the electoral franchise" for all voters. Indeed, although traditional at-large electoral schemes disable minority groups from electing candidates of their choice by submerging them in larger multimember districts, the use of alternative voting mechanisms cures any such vote dilution by enabling cohesive minority groups to elect the candidates of their choice. *See supra* at Section II.A. And, as the Supreme Court only recently reiterated, "'[i]t is [ ] apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.'" *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997) ("*Bossier Parish I*") (*quoting Beer*, 425 U.S. at 141).

In addition, because the fundamental objective of the use of alternative voting mechanisms is to allow any sufficiently large and cohesive voting bloc to elect candidates of choice, the ability of such a group to elect candidates of choice should correspond closely to the relative voting strength of that group, if the alternative voting mechanisms are properly constructed. In *City of Richmond v. United States*, 422 U.S. 358 (1975), the Supreme Court

made clear that such voting changes that "'fairly reflect[] the strength of the [minority] community'" cannot be said to violate Section 5. *Bossier Parish II*, 528 U.S. at 330 (*quoting Richmond*, 422 U.S. at 371).[13]

The plain language of the North Carolina Constitution should end the inquiry for this Court in any event, because the power to determine whether federal law requires the division of counties or whether a particular districting scheme in fact warrants preclearance is reserved under Section 5 exclusively for DOJ and the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c. No other court – and certainly no state legislature – can determine in lieu of an authorized preclearance determination when the division of counties would be required under Section 5. Defendant-Appellants admit exactly this fundamental point. *See* Def. App. Br. at 35.[14] Yet, in order to preserve their illegal districting scheme for another election cycle, Defendant-Appellants ask this Court to ignore this precept and to accept their contention that a districting plan that comports with the State Constitution will not be precleared. Def-App. Br. at 51 (claiming that the Superior Court's order will violate *Shaw*); Def-App. Resp. to Renewed Motions ¶ 3 (claiming that multimember districts dilute minority voting).

Defendant-Appellants' contention, moreover, is without merit. DOJ's prior administrative preclearance efforts demonstrate that multimember districting plans that employ

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[13] *Richmond* "involved requested preclearance for a proposed annexation that would have reduced the black population of the City of Richmond, Virginia from 52% to 42%." *Bossier Parish II*, 528 U.S. at 330. The *Richmond* Court found that if the City's pre-existing multimember at-large voting scheme for the nine-person city council were replaced by a voting system that "fairly reflects the strength of the Negro community as it exists after the annexation," such an annexation cannot be found to be barred by Section 5. *Richmond*, 422 U.S. at 371.

[14] Defendant-Appellants state that "[o]nly the United States Attorney General or the federal courts, however, can make determinations as to when federal law would require the division of counties." Def-App. Br. at 35. In fact, not all federal courts – but only the United States District Court for the District of Columbia – is vested with this power under Section 5. 42 U.S.C. § 1973c; *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (cited in Def-App. Br. at 35).

alternative voting mechanisms qualify for preclearance under Section 5. Since 1985, for example, at least 52 jurisdictions have submitted electoral plans incorporating alternative voting mechanisms to DOJ for preclearance. Of these, 47 received final determinations from DOJ and, in all but one of these submissions, preclearance was granted. Steven J. Mulroy, *Limited Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 Nat'l Civic Rev. 66, 67 (1995). All 29 of the submissions that employed limited voting in at-large districts were precleared, including the voting plan adopted by several Alabama municipalities in a settlement of a vote dilution claim, and that settlement was upheld in *Dillard v. Baldwin County*, 686 F. Supp 1459 (M.D. Ala. 1988). *See* Mulroy, 84 Nat'l Civic Rev. at 67. In addition, cumulative voting plans were precleared in all but one of the 18 submissions that proposed their use in multimember districts.[15] *Id.* Significantly, several of the Section 5 submissions that utilized alternative voting mechanisms involved districts in which it would have been possible to draw single-member minority-majority districts to enhance minority electoral opportunities. *Id.* at 67. DOJ also has entered into consent decrees under which limited voting mechanisms were adopted. *See id.* at 69 (discussing litigation settlements to which DOJ consented involving multimember districts with limited voting systems for elections in North Carolina and Georgia).

There thus appears to be no question that multimember districting plans that employ properly constructed alternative voting mechanisms warrant preclearance under Section 5.

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[15] Even in the one cumulative voting submission to which DOJ initially objected, the Department ultimately did preclear a revised cumulative voting plan for the jurisdiction in question. *Id.* at 68. The initial objection was based on evidence that the city council had failed to investigate whether the minority community understood the cumulative voting system or would require bilingual education regarding the new system.

CONCLUSION

For the foregoing reasons, the Court should affirm the award of summary judgment in favor of Plaintiff-Appellees on Count II of the Complaint and enter an order directing the Superior Court to lift the stay imposed in Paragraph 9 of its Order and to require the General Assembly to seek Section 5 preclearance of a districting scheme that does not divide counties in violation of Article II of the North Carolina Constitution.

Respectfully submitted, this 28th day of March, 2002.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing *AMICI CURIAE* BRIEF OF THE DKT LIBERTY PROJECT AND THE CENTER FOR VOTING AND DEMOCRACY was served by facsimile and U.S. mail, first class, postage prepaid, this 28th day of March 2002, upon:

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