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Statistical Pools and Electoral Success in Vote-Dilution Cases

John S. Wills†

In *Thornburg v Gingles*,¹ the Supreme Court established a two-tier test for determining whether a particular electoral system violates Section 2 of the Voting Rights Act ("VRA").² First, the Court delineated a three-part threshold test that all plaintiffs must meet to prove a claim of vote dilution in a multimember district.³ Second, the Court held that plaintiffs, once they have satisfied the threshold test, must demonstrate that under the "totality of the circumstances," the practice in question deprives them of their right to participate equally in the political process by diluting their votes.⁴

In some instances, Section 2 plaintiffs may challenge state or local electoral processes that narrow the field of eligible candidates by requiring that they meet certain professional criteria. Judicial elections in which candidates must be experienced lawyers represent such a situation. This Comment examines whether courts should consider the percentage of attorneys eligible to run for judicial office who are minority group members as an important factor in Section 2 judicial-election cases. In particular, this Comment will explore whether the best statistical pool to employ under the "totality of the circumstances" is: (1) the percentage of lawyers who are members of the minority group; (2) the percentage of the voting-age population in a given district that are members of the minority group; or (3) the percentage of the district's population that belongs to the minority group. While the Supreme Court has not addressed the question, the Fifth and Eleventh Circuits have split over which statistical pool to use in these judicial-election suits.

Part I of this Comment outlines the Supreme Court’s interpretation of the amended Section 2, the history of Section 2

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¹ 478 US 30 (1986).


³ Gingles, 478 US at 48-51.

⁴ Johnson v De Grandy, 114 S Ct 2647, 2657 (1994).
challenges to judicial elections, and the split that has developed between the Fifth and Eleventh Circuits. Part II suggests that the difference between those circuits remains important and that the Supreme Court should resolve the discrepancy. Part III demonstrates that the eligible attorney standard adopted by the Fifth Circuit is at odds with the policies underlying Section 2 of the VRA. This part looks particularly to the Senate Report that accompanied the 1982 Amendments, as well as the Supreme Court decision in Gingles, to illustrate that the Fifth Circuit approach is misguided and too narrow. Part IV proposes that courts should instead adopt the flexible approach of the Eleventh Circuit, because that approach upholds the policies underlying the VRA and provides better incentives for all parties. This part posits that this more flexible approach allows courts to apply the VRA as Congress intended—as a tool for achieving broader electoral participation by all citizens.

I. THE JUDICIAL HISTORY OF SECTION 2 DOES NOT RESOLVE WHICH STATISTICAL POOL TO USE IN EVALUATING THE SUCCESS OF MINORITY CANDIDATES UNDER THE TOTALITY OF THE CIRCUMSTANCES

A. Thornburg v Gingles Mandates a Broad Inquiry in Section 2 Vote-Dilution Cases Concerning Judicial Elections

The amended Section 2 of the VRA guarantees that every class of citizens shall have equal access to the "processes leading to nomination or election in the State or political subdivision . . . ."5 With its broad language and simple, results-oriented test,

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5 42 USC § 1973 (1988). Commonly referred to as Section 2 of the Voting Rights Act, this amended section states:

(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 abridgment 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 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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
the VRA provides a powerful weapon for individuals and groups to fight discrimination in, and exclusion from, electoral and political processes.

In interpreting the amended VRA, the Supreme Court has described a detailed analysis that courts must follow in deciding Section 2 “vote-dilution” cases.

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 . . . . 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.6

The Court stressed the primacy of objective factors in determining whether a Section 2 violation has occurred.7 Turning to the Senate Judiciary Committee Report (“Report”) which accompanied the 1982 Amendments, the Court enumerated a list of factors relevant in considering a Section 2 vote-dilution claim.8

members of a protected class elected in numbers equal to their proportion in the population.
7 Id at 44.
8 The list of factors includes:
(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
(6) whether political campaigns have been characterized by overt or subtle racial appeals;
(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.
Additional factors that in some cases have had probative value as part of
The Court emphasized that "the Committee determined that 'the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality," . . . and on a 'functional' view of the political process.'" To effectuate Congress's intent, the Court examined the relative importance of the Report factors, and delineated a three-part test that the plaintiffs must satisfy to establish a Section 2 claim. While satisfying these three factors is necessary to prove a Section 2 vote-dilution claim, satisfying those factors in and of themselves is not sufficient to prove such a claim. In addition, courts must inquire into the totality of the circumstances surrounding the claim. According to the Court, such an inquiry is necessary "because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts."

For years after the passage of the VRA, plaintiffs rarely utilized the VRA to challenge judicial elections. It was not until nearly two decades later, in 1984, that plaintiffs challenged a judicial election under the amended Section 2 in Martin v
Allain. Even during the remainder of the 1980s, plaintiffs filed suits in over a dozen states posing similar challenges to judicial elections.

Even as judicial election challenges under Section 2 became more widespread during the second half of the 1980s, courts continued to disagree over whether Section 2 applied to these elections. The Supreme Court finally resolved this dispute in a pair of 1991 decisions. In Chisom v Roemer, which challenged the election of Louisiana Supreme Court justices, the Court ruled that Section 2 applies to the election of appellate judges. The Court's decision in Houston Lawyers' Association v Attorney General of Texas, concerning the election of trial court judges in ten Texas counties, extended the VRA's coverage to trial court elections.

B. The Fifth and Eleventh Circuits Differ in Their Approaches to Section 2 Circumstantial Analysis

One issue that has arisen in the case law involving these challenges to judicial elections concerns the proper application of the totality of the circumstances test as outlined in Gingles and Johnson v De Grandy. In evaluating the circumstances surrounding a plaintiff's case, a court may resort to statistical inquiries. A dispute has developed between two circuits over the proper statistical pool in considering success of minority candidates in seeking elective office. In League of United Latin American Citizens, Council No. 4434 v Clements, 999 F2d 831 (5th Cir 1993) ("LULAC IV"), with Nipper II, 39 F3d at 1494. The decision in LULAC IV was a rehearing en banc of the case remanded by the Supreme Court in Houston Lawyers', 501 US 419, and then heard by a panel of the Fifth Circuit in League of United Latin American Citizens, Council No. 4434 v Clements, 986 F2d 728 (5th Cir 1993) ("LULAC III").
American Citizens, Council No. 4434 v Clements ("LULAC IV"), the Fifth Circuit, sitting en banc, held that Texas’s system for electing state trial judges did not violate Section 2 of the VRA. In a complex, lengthy opinion, the court found that the plaintiffs had not proved their claim and reversed a district court ruling granting relief. In making its circumstantial inquiry, the LULAC IV court used the percentage of qualified lawyers who are members of the minority group in assessing the electoral success of minority group members.

The court based this decision on the view that "[t]he office of district judge has more eligibility requirements than the age and citizenship prerequisites of many public offices . . . . The need for district judges to be experienced lawyers is obvious." Analyzing the issue in these terms, the court noted the Gingles Court’s emphasis on employing a “functional view of the political process” in Section 2 analyses. The LULAC IV court continued:

The cold reality is that few minority citizens can run for and be elected to judicial office. A functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges that has resulted . . . . The absence of eligible candidates goes a long way in explaining the absence of minority judges. Plaintiffs cannot emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urge that the number of minorities eligible to run is not relevant. Plaintiffs argue that this factor may not be considered because the limited number of minority lawyers was caused by state discrimination in education. We are not persuaded this argument merits exclusion of the evidence. The Voting Rights Act responds to practices that impact voting; it is not a panacea addressing social deficiencies.

\[999 \text{ F}2d \text{ at } 837.\]
\[\text{Id at } 894.\]
\[\text{Id at } 865-66.\]
\[\text{Id at } 865.\]
\[\text{LULAC IV, } 999 \text{ F}2d \text{ at } 865, \text{ quoting Gingles, } 478 \text{ US at } 45.\]
\[\text{LULAC IV, } 999 \text{ F}2d \text{ at } 865-66 \text{ (citations omitted)}.\]
Overall, the court’s opinion analyzed a number of factors, including whether the state’s interest in the challenged system outweighed the plaintiff’s claims and whether other explanations, such as party affiliation, could account for election outcomes. In its conclusion, the majority focused primarily on the question of minority-attorney eligibility. The court concluded with the observation that Section 2 does not empower courts to act where “the only disparity is between the minority population and minorities eligible to serve as judges.” The court explicitly declined to exercise its authority where the plaintiffs had asked the court to “reach for social questions beyond the Voting Rights Act by recasting its meaning and purpose.” The court’s decision appears to rest heavily on the issue of eligible attorneys.

The Eleventh Circuit took a different approach in Nipper v Smith (“Nipper I”). In Nipper I, the plaintiffs, eight individual voters and an association of black attorneys, appealed a lower court ruling that Florida’s system for electing trial judges had not violated Section 2 in three counties. In reaching that conclusion, the court found that the percentage of minority voters or citizens was the best measure of minority electoral success under the totality of the circumstances. The court rejected the eligible-attorney standard that the district court had embraced. Quoting the Florida State Supreme Court Racial and Ethnic Bias Commission, the court wrote:

A comparison of minority judges to the estimated eligible minority population alone is not responsive to the question of whether the Florida judiciary adequately reflects the racial and ethnic diversity of the citizens of Florida.

The Nipper I court emphasized its concern with the history of discrimination against African-American citizens and the effect of that discrimination on educational and professional opportuni-

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29 Id at 859, 876.
30 Id at 893.
31 Id.
32 LULAC IV, 999 F2d at 893-94.
33 1 F3d 1171 (11th Cir 1993), rev’d on other grounds, Nipper II, 39 F3d at 1494.
34 Nipper I, 1 F3d at 1173, 1174 n 2.
35 Id at 1183.
36 Id.
37 Id.

The Nipper I court focused, implicitly and explicitly, on two aspects of the case. First, the purpose of voting rights remedies, the court implied, is to ensure the ability of minority voters to elect the candidates of their choice. The status of an entire group, and not merely its better-educated attorneys, is the best barometer for answering this question. 39 Second, the court's argument that the district court should not have discounted the "evidence of Florida's history of racial discrimination" 40 also demonstrates the Eleventh Circuit's understanding that the eligible-attorney standard could help perpetuate the discriminatory regimes that the VRA seeks aggressively to eliminate. 41 The opinion also implies that the eligible-attorney standard may permit courts to avoid the more complex and critical subject of discrimination in educational and social institutions. 42

II. THE SUPREME COURT SHOULD RESOLVE THE DISPUTE BETWEEN THE FIFTH AND ELEVENTH CIRCUITS

The application of Section 2 to judicial elections is a relatively recent phenomenon. Ultimately, this new field of law could have an enormous impact on judicial elections throughout the country. As plaintiffs, lawyers, and advocates become more familiar with this issue, the number of such suits should continue to increase. As today's minority groups grow larger, they are likely to demand greater participation in the political and electoral processes. Meanwhile, minority groups, including Hispanic-Americans and African-Americans, continue to grow. 43 Indeed, if current trends continue, some of the groups that are today considered "minorities" will become majorities in some areas in the near future. 44 Each ethnic or racial group likely will become

38 Nipper I, 1 F3d at 1183.
39 Id.
40 Id.
41 S Rep No 97-417 at 6 (cited in note 8).
42 Nipper I, 1 F3d at 1183.
44 See George de Lama, Anti-Immigration Measure Flies in Face of Changing America, Chi Trib A1 (Nov 14, 1994). For instance, the Census Bureau estimates that non-Hispanic-American whites will represent about 34 percent of the population of California by the year 2020. Hispanic-Americans will have overtaken whites by that time, consti-
bolder in asserting their right to participate at all levels of politics, including the electoral process. Section 2 provides a potent means for such groups to assert those rights. Increased use of the VRA to challenge electoral arrangements appears likely to increase under this scenario.

The best approach to Section 2 liability would accommodate the growing pressures of American pluralism by extending participatory opportunities to the largest number of citizens. Such an approach not only serves the basic goals of participatory democracy, but will also enhance the confidence of various minority groups in the political and judicial processes. This increase in confidence will reduce the likelihood that members of these groups will resort to means outside the political and judicial systems to solve their problems.45

III. COURTS SHOULD NOT FOLLOW THE FIFTH CIRCUIT'S HOLDING IN LULAC IV REGARDING STATISTICAL POOLS

The Fifth Circuit adopted the eligible-attorney standard in *League of United Latin American Citizens, Council No. 4434 v Clements* ("LULAC IV"),46 as part of its analysis of the "totality of the circumstances." Although its analysis follows the two-tiered approach to Section 2 claims mandated by the Supreme Court in *Thornburg v Gingles*47 and *Johnson v De Grandy*,48 *LULAC IV* ultimately misconstrues those decisions and the policies underlying them. The decision not only contradicts the broad

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45 The Supreme Court's recent ruling in *Johnson v De Grandy* does not undermine the importance of resolving this conflict. 114 S Ct 2647 (1994). In that case, the Supreme Court affirmed in part and reversed in part a district court decision holding that a state plan in Florida to reapportion State Senate and House seats diluted the votes of African-Americans and Hispanic-Americans. Id at 2663. The Court in that case declined to address a conflict over the proper statistical pool to employ in evaluating a plaintiff's claim of vote dilution, stating that such analysis was unnecessary to evaluate the claim. Id at 2655-56. However, this holding does not diminish the importance of the statistical-pool conflict raised in *League of United Latin American Citizens, Council No. 4434 v Clements* and *Nipper v Smith*. Both the cases discussed here considered the question of statistical pools as a relevant factor in the totality of the circumstances test. *League of United Latin American Citizens, Council No. 4434 v Clements* 999 F2d 831, 865 (5th Cir 1993) ("LULAC IV"); *Nipper v Smith*, 1 F3d 1171, 1183 (11th Cir 1993)("Nipper I"). In *De Grandy*, the issue arose as a component of the first prong of the *Thornburg v Gingles* three-part threshold test. *De Grandy*, 114 S Ct at 2655-56. Thus, *De Grandy* does not dispose of the issue raised by the Fifth and Eleventh Circuits.

46 999 F2d 831, 865 (5th Cir 1993).


48 114 S Ct 2647 (1994).
policy statements found in the Senate Report and in the Gingles decision. It also gives too much weight to one factor in the totality of the circumstances analysis.

The Court’s decision in Gingles focused on the Senate Report, which accompanied the 1982 Amendments to the floor of the Senate. Apart from establishing that the VRA would not require plaintiffs to prove discriminatory intent, the Senate Report outlined the basic policies and purposes underlying the amended VRA. The “Senate Report Factors” provided the Gingles Court with the framework for analyzing vote-dilution claims under Section 2; their prominence suggests the Court’s close reliance on the Senate Report and the principles it enunciates in determining the scope and application of the amended VRA.

The Gingles decision and the Senate Report emphasized that the purpose of the amended VRA was not confined to narrow, mechanical aspects of the electoral process. The Senate Report discussed the long, difficult history of voting discrimination in the United States, and it stated the committee’s conviction that the amendments were “necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendment rights” on which the VRA is based. The Gingles Court also recognized the broad sweep of the VRA.

The Fifth Circuit’s LULAC IV opinion directly contradicts the broad statements of policy found in the Senate Report and in Gingles. In justifying its decision, the Fifth Circuit weakly asserted, “[t]he Voting Rights Act responds to practices that impact voting; it is not a panacea addressing social deficiencies.” In light of Gingles, this assertion envisions too narrow a scope for the VRA. Furthermore, the legislative history of the VRA indicates broad concern for social inequities that have developed in American society. Voting discrimination plays only one part—albeit significant—in this picture. Throughout history,

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49 Gingles, 478 US at 43.
51 Gingles, 478 US at 43-51.
52 S Rep No 97-417 at 4 (cited in note 8).
53 Id at 27.
54 Gingles, 478 US at 44 n 9.
55 "[T]he purpose of the Voting Rights Act was not only to correct an active history of discrimination, the denying of Negroes of the right to register and vote, but also to deal with the accumulation of discrimination . . . ." Id at 8; Gingles, 478 US at 44 n 9.
“institutions” of widespread socioeconomic discrimination and voting-rights violations have acted to perpetuate each other. Indeed, both these institutions might have died out sooner had each not provided such strong reinforcement for the other.

Nonetheless, the LULAC IV court asserted confidently that “[t]he absence of eligible candidates goes a long way in explaining the absence of minority judges.” The court did not engage in an extended inquiry into the possible causes and ramifications of the absence of “eligible” candidates. The court criticized the plaintiff’s “generalized armchair speculation” as lacking “some indication that [the] effects of past discrimination actually hamper the ability of minorities to participate.” Yet it is precisely such a broad circumstantial inquiry that the Supreme Court mandated: “Lack of electoral success is evidence of vote-dilution, but courts must also examine other evidence in the totality of the circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes.”

In an article concerning the history of Section 2 and judicial elections, attorney Robert C. McDuff sharply challenged the use of the eligible-attorney standard on the grounds that it misconstrues the issues raised in these cases. “This argument misses the point that these are not lawsuits seeking equal employment for minority lawyers as judges. Instead, these are voting-rights lawsuits seeking for minority voters an equal opportunity to elect the candidates of their choice.” The evidence in voting-rights cases usually focuses on whether white bloc voting frustrates attempts by minority voters to elect the representatives they prefer. Thus, the eligible-attorney standard highlights evidence that is usually irrelevant to the issue in the case by focusing on candidates rather than voters.

Moreover, the eligible-attorney standard has little historical or empirical basis, he argues. In a large number of cases, the minority-preferred candidate lost because the white bloc voted

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57 LULAC IV, 999 F2d at 866.
58 Id at 866.
59 Id at 867.
60 Id at 866.
61 De Grandy, 114 S Ct 2647, 2657.
63 Id at 969.
64 Id.
65 Id at 970.
66 McDuff, 38 Loyola L Rev at 969 (cited in note 14).
heavily against that candidate—an outcome permitted by the absence of a strong remedial system.\textsuperscript{67} In other instances, the impossibility of winning an election in a particular district has deterred minority candidates from entering the electoral fray.\textsuperscript{68} Under each of these scenarios, focusing on the number of eligible attorneys would distract a court from examining more significant issues.

The decision in \textit{LULAC IV} has additional flaws. The court failed to offer any historical or social evidence to support its sharp distinction between “practices that impact voting” and other manifestations of discrimination—what the court terms “social deficiencies.”\textsuperscript{69} Instead, the court rested its argument on opinions in two other decisions, neither of which provides compelling support for its position. First, the court cited \textit{Southern Christian Leadership Conference v Evans}.\textsuperscript{70} Although that opinion provides a thorough analysis supporting the eligible-attorney standard, the Eleventh Circuit vacated the judgment and remanded it for reconsideration\textsuperscript{71} in light of \textit{Nipper v Smith} (“\textit{Nipper I}”).\textsuperscript{72} The \textit{Evans} opinion, therefore, carries little weight in an argument against an opinion issued by the Eleventh Circuit.

The \textit{LULAC IV} court also cited \textit{Presley v Etowah County Commission}\textsuperscript{73} in support of its assertion that Section 2 “is not a panacea addressing social deficiencies.”\textsuperscript{74} In that case, the Court stated that “[t]he Voting Rights Act is not an all-purpose antidiscrimination statute.”\textsuperscript{75} \textit{Presley} dealt, however, with a question unrelated to the issue in \textit{Nipper I}\textsuperscript{76} and \textit{LULAC IV}; it addressed whether changes in the authority of two elected Alabama county administrative commissions fell under the ambit of Section 5 of the VRA,\textsuperscript{77} dealing exclusively with government

\textsuperscript{67} Id at 970.

\textsuperscript{68} Id.

\textsuperscript{69} \textit{LULAC IV}, 999 F2d at 866.

\textsuperscript{70} 785 F Supp 1469, 1476-77 (M D Ala 1992)(finding no Section 2 violation in Alabama's at-large system of electing trial judges).

\textsuperscript{71} \textit{Southern Christian Leadership Conference v Evans}, 18 F3d 897 (11th Cir 1994)(vacating and remanding lower court decision finding no Section 2 violation in Alabama's at-large system of electing trial judges).

\textsuperscript{72} 1 F3d 1171 (11th Cir 1993)(“\textit{Nipper I}”), rev'd on other grounds, \textit{Nipper v Smith}, 39 F3d 1494 (11th Cir 1994)(“\textit{Nipper II}”).

\textsuperscript{73} 112 S Ct 820 (1992).

\textsuperscript{74} \textit{LULAC IV}, 999 F2d at 866.

\textsuperscript{75} \textit{Presley}, 112 S Ct at 832.

\textsuperscript{76} 1 F3d at 1171.

\textsuperscript{77} 42 USC § 1973c (1988).
preclearance of changes in voting practices.\textsuperscript{78} In particular, the \textit{Presley} opinion dealt with the proper interpretation of the phrase “with respect to voting” contained in Section 5.\textsuperscript{79} The inquiry focused on interpretation of statutory language in a provision of the VRA distinct from Section 2. In contrast, the decisions in \textit{Nipper I} and \textit{LULAC IV} concern the application of a legal test developed by the Supreme Court to govern courts’ application of Section 2.\textsuperscript{80} \textit{Presley} concerned a different interpretive question about a different section of the VRA than either \textit{Nipper I} or \textit{LULAC IV}. Thus, it offers little support for an argument favoring the eligible-attorney standard.

Perhaps the greatest flaw in the Fifth Circuit’s position is that it encourages courts to give excessive weight to one circumstantial factor. In \textit{De Grandy}, the Supreme Court stated that “the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.”\textsuperscript{81} The general question for courts to ask, the Court said, is “whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect . . . .”\textsuperscript{82} To the contrary, the \textit{LULAC IV} court treated the eligible-attorney standard as virtually dispositive of the question in its case; the court devoted most of its conclusion to the issue.\textsuperscript{83} While this conclusion may be characterized as dicta, it offers evidence of the court’s prioritization of factors under the totality of the circumstances. Indeed, a reasonable reading of the court’s language suggests that once the percentage of eligible attorneys who are minority-group members is shown to be low, defendants could have a nearly complete defense to liability.\textsuperscript{84}

Furthermore, the \textit{LULAC IV} court averred that it would not inquire into broader questions and factors, such as why relatively

\begin{footnotesize}
\textsuperscript{78} \textit{Presley}, 112 S Ct at 824.
\textsuperscript{79} Id at 824.
\textsuperscript{80} \textit{Nipper I}, 1 F3d at 1171; \textit{LULAC IV}, 999 F2d 831.
\textsuperscript{81} \textit{De Grandy}, 114 S Ct at 2657.
\textsuperscript{82} Id at 2658.
\textsuperscript{83} \textit{LULAC IV}, 999 F2d at 893.
\textsuperscript{84} Attorney Robert B. McDuff has noted that rare cases may arise in which no qualified candidates exist, and that such an absence of candidates necessarily can become a factor in the court’s analysis. McDuff, 38 Loyola L Rev at 970 (cited in note 14). However, he argues that even in those cases, the court should look skeptically upon such evidence. Id. Because eligible candidates could emerge in the future, only to suffer defeat in a discriminatory electoral system, the court should scrutinize the system to determine its legality whether or not candidates are presently available. Id.
\end{footnotesize}
few minorities have become qualified for judicial offices. However, the Supreme Court's decisions demonstrate that courts should make a broad, multifaceted inquiry into Section 2 claims to determine liability. The Senate Report itself emphasized that the question of political opportunity, which is the crux of Section 2 cases, "depends upon a searching practical evaluation of the 'past and present reality.'" Indeed, the Fifth Circuit itself has noted the importance of avoiding preclusive tests, stating that "to preclude vote-dilution claims where few or no [African-American] candidates have sought offices in the challenged electoral system . . . would allow voting rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove." The extent of minority electoral success is but one of the factors that the Gingles Court suggested should be considered. The eligible-attorney standard, which is only one approach to evaluating this success, should not receive the potentially preclusive power that the Fifth Circuit accorded it.

Under the Fifth Circuit's formulation, the eligible-attorney standard becomes a trump card that defendants can throw to preclude liability. A plaintiff may have a compelling case that would satisfy all three of the Gingles threshold factors and provide evidence of many other circumstantial factors pointing to liability. Nonetheless, the claim could fail due to a low percentage of minority-group candidates in the recent past. Thus, the Fifth Circuit's approach may cripple an otherwise compelling claim that a judicial election practice dilutes minority votes. Furthermore, given the complexity of proof required under Gingles, plaintiffs must expend considerable effort and resources to wage and win their Section 2 claims. Plaintiffs with valid vote-dilution claims may resist bringing suit because this one piece of evidence could completely undermine their case. In these situations, the VRA would remain unenforced and essentially useless in the fight to improve minority electoral participation.

55 LULAC IV, 999 F2d at 893, 894.
56 Gingles, 478 US at 45; De Grandy, 114 S Ct at 2657.
58 Westwego Citizens for Better Gov't v City of Westwego, 872 F2d 1201, 1208-09 n 9 (5th Cir 1989)(vacating and remanding lower court decision dismissing claim that system for electing aldermen in Westwego, Louisiana violated Section 2).
59 Gingles, 478 US at 45.
The Fifth Circuit's position also creates a disincentive to change discriminatory electoral regimes. Discriminatory electoral regimes deprive minorities of the opportunities to participate in political processes that would enhance their political influence. It hardly seems speculative to suggest that such participation could lead to increased economic and social opportunities for members of minority groups. In this context, the defenders of discriminatory regimes could use the eligible-attorney standard to their advantage. Rather than deal with the problems of discrimination in voting and other areas, those in power could use the lack of minority opportunity to defend the discriminatory regime as it stands. Thus, discrimination would be its own best defense. Fewer exclusionary electoral regimes would fall, and minority political efforts would be frustrated.

It is an underlying tenet of the American democratic system that popular participation in choosing leaders and governing will improve society. Given this assumption, it follows that broader, more effective political participation by minorities would help ameliorate fundamental problems that afflict some groups. It also follows that efforts to minimize participation by those groups would have a deleterious effect. Overall, under the Fifth Circuit's eligible-attorney approach, the absence of minority attorneys could actually serve to reinforce the discrimination and lack of opportunity that are its source. Congress surely did not intend the VRA to have this effect.

IV. COURTS SHOULD FOLLOW THE ELEVENTH CIRCUIT'S FLEXIBLE APPROACH TO THE STATISTICAL POOL QUESTION

The Eleventh Circuit's decision in *Nipper v Smith* ("Nipper I") represents a better approach to analyzing the totality of the circumstances in judicial-election suits. The court's rejection of the eligible-attorney standard shows greater fidelity to the Supreme Court's decisions in *Thornburg v Gingles* and *Johnson v De Grandy*. Its flexible approach, which incorporates either the total-population standard or the voting-age-population standard, also conforms to the Supreme Court's decisions in this area.

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90 S Rep No 97-417 at 28 (cited in note 8).
91 Id at 4.
92 1 F3d 1171 (11th Cir 1993).
94 114 S Ct 2647 (1994).
The Senate Report recognized this nation's long history of electoral discrimination. In light of this history, the Senate was convinced that the amended VRA would need to "ensure full protection of the Fourteenth and Fifteenth Amendments rights." The Gingles Court also stated that the VRA had broad remedial purposes. In addition, the De Grandy Court emphasized that determinations of liability under the totality of the circumstances rests on a "comprehensive, not limited, canvassing of relevant facts." The Eleventh Circuit's approach in Nipper I adheres to these principles.

Admittedly, the court's treatment of the statistical pool question in Nipper I is quite brief. Nonetheless, it clearly incorporates the basic considerations of the Senate Report, Gingles, and De Grandy. While the LULAC IV court dismissed broader inquiries as outside the purview of Section 2 claims, the Nipper I court stated that a proper circumstantial inquiry in a Section 2 suit must examine historical evidence of discrimination in areas beyond the electoral arena, including education. This approach echoes the concern of Congress and the Supreme Court that applying the amended VRA should involve consideration of a broad array of factors that look to the underlying issues in voting-rights claims.

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quiry to which it applies—minority electoral success.\textsuperscript{106} This approach preserves the intent of Congress and the Supreme Court that numerous factors should influence the outcome of a Section 2 case.\textsuperscript{107}

The Eleventh Circuit’s opinion suggests that either the total-population standard or the voting-age-population standard would be acceptable in assessing minority electoral success.\textsuperscript{108} This noncommittal position, while somewhat ambiguous, maintains fidelity with the Supreme Court’s interpretation of Section 2. Indeed, this solution represents the best course the court could choose in outlining the parameters of Section 2 circumstantial analysis.

According to the Supreme Court, Congress intended for courts to take account of “all relevant evidence.... A court should not exclude certain types of relevant evidence... from its examination if doing so would leave an incomplete view of the circumstantial evidence picture.”\textsuperscript{109} The \textit{LULAC IV} approach would hinder this effort by allowing a particular factor to preclude further consideration of other relevant factors. In contrast, the \textit{Nipper I} approach allows consideration of either factor, or both factors, depending on the particular case.\textsuperscript{110} As the Eleventh Circuit has noted, the case will determine the exact nature of the circumstantial inquiry.\textsuperscript{111} Thus, depending on the case, a court might want to use either the total-population standard or the voting-age-population standard. Each approach gives a particular view of the circumstances. The total-population standard provides a sense of whether the entire group has had reasonable success in achieving representation in elective office. In contrast, the voting-age-population standard allows a court to examine whether the voting members of the minority group have enjoyed the type and degree of success reasonably expected of a particular group of voters, absent white bloc voting or other discriminatory factors. Each approach shows courts a different facet of the issue of minority electoral success under the totality of the circumstances. As Robert C. McDuff has argued, the real question in Section 2 judicial suits is not the success of minority judg-

\begin{thebibliography}{11}
\bibitem{Nipper I} \textit{Nipper I}, 1 F3d at 1183. \bibitem{S Rep No 97-417} See S Rep No 97-417 at 928-30 (cited at note 8); \textit{Gingles}, 478 US at 44-45; \textit{De Grandy}, 114 S Ct at 2657. \bibitem{Nipper I} \textit{Nipper I}, 1 F3d at 1183. \bibitem{Nipper v Smith} \textit{Nipper v Smith}, 39 F3d 1494, 1527 (11th Cir 1994)(“\textit{Nipper II}”). \bibitem{Nipper I} \textit{Nipper I}, 1 F3d at 1183. \bibitem{Nipper II} \textit{Nipper II}, 39 F3d at 1536, 1537.
\end{thebibliography}
es in getting elected per se, but it is the success of voters in electing their chosen representatives.\textsuperscript{112} The \textit{Nipper I} approach allows for the best examination of this important question.

Finally, the Eleventh Circuit's approach removes the bad incentives created by the Fifth Circuit's decision in \textit{LULAC IV}. Where discrimination exists, it is very likely that the eligible-attorney standard will weigh against the plaintiffs and in favor of the status quo. Thus, under the \textit{Nipper I} approach, plaintiffs would receive stronger assurance that their claim would succeed or fail on its overall force and not on one statistical factor that is unlikely to support their case. With that threat removed, plaintiffs who might otherwise not proceed with a costly case would be more likely to seek relief under Section 2.

The Eleventh Circuit's flexible approach would also provide incumbents and other defenders of exclusionary regimes with less incentive to maintain a discriminatory electoral regime and more incentive to address the participatory needs of minority groups. Unable to seek shelter behind a lack of minority candidates, those who design judicial election schemes would need to make them less vulnerable to Section 2 challenges—in other words, less exclusionary. Under the \textit{Nipper I} approach, an entire group's political success would factor into a court's calculation. As a result, it also would factor into the calculations of those trying to avoid Section 2 liability.

\textbf{CONCLUSION}

The application of Section 2 of the VRA to judicial elections represents a relatively new area of voting-rights law. Many factors will lead to increasing use of this Section to challenge judicial-election schemes around the country. Each of these cases will follow the two-tiered test for Section 2 liability established by the Supreme Court in \textit{Thornburg v Gingles}.\textsuperscript{113} Courts thus must examine a multiplicity of factors in considering the totality of the circumstances in each suit.

The split between the Fifth and Eleventh Circuits concerning the proper statistical approach to one of these factors—the extent of minority electoral success—is significant. The Supreme Court should resolve the issue. The potential parties to Section 2 litiga-


\textsuperscript{113} 478 US 30 (1986).
tion, both plaintiffs and defendants, should know the criteria by which courts will assess such claims. This Comment has argued that courts should follow more expansive tests to achieve the goals of the VRA. Courts should discard the approach endorsed by the Fifth Circuit in *League of United Latin American Citizens, Council No. 4434 v Clements* ("LULAC IV"),\(^{114}\) and instead adopt the more flexible approach outlined in *Nipper v Smith* ("Nipper I").\(^{115}\) Use of either the voting-age-population standard or the total-population standard is more faithful to the approach and policies outlined by the Supreme Court in interpreting Section 2 of the VRA.

\(^{114}\) 999 F2d 831 (5th Cir 1993).

\(^{115}\) 1 F3d 1171 (11th Cir 1993), rev'd on other grounds, *Nipper v Smith*, 39 F3d 1494 (11th Cir 1994)("Nipper II").