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Ruiz v. Santa Maria: Defining “Minority-Preferred Candidate” Within Section 2 of the Voting Rights Act

I. INTRODUCTION

The Voting Rights Act was passed to address problems faced by ethnic minorities in gaining access to the electoral system, by protecting the minority’s ability to “participate in the political process and to elect representatives of their choice.” Section 2 of the Act was passed to prevent vote dilution, which occurs when the majority subsumes the minority’s vote in nearly all elections, giving the minority no opportunity to elect its chosen representatives. Following a United States Supreme Court decision in 1980, Congress amended Section 2 to give even greater protection to minorities.

In Mobile v. Bolden, the Supreme Court held that, in order to establish a Section 2 violation, plaintiffs must show that the officials who set up a voting process or procedure intended to dilute the minority’s vote. This substantially raised the bar for plaintiffs further than Congress wished, as evidenced by the fact that two years later Section 2 was amended. The new language of Section 2 specifically indicated that a violating election system was one which resulted in discrimination, regardless of any intent. Therefore, plaintiffs who wished to bring a Sec-

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At the time of passage few minorities had the money, resources, or opportunity to serve as candidates for elected office, and voting rules made it difficult for minorities to vote or elect their preferred candidate. Some states, counties, and cities, particularly in the South, created election rules and structured election districts to prevent minority citizens either from voting or from having a reasonable chance of electing a candidate of their choice.

Id.
4. See id.
10. See id.
tion 2 claim were no longer precluded by their inability to prove discriminatory intent on the part of the jurisdiction’s officials.

The Supreme Court’s only comment on the revised Section 2 of the Voting Rights Act has been *Thornburg v. Gingles* (“*Gingles*”).11 There the Court set out a three prong test for courts to use when evaluating vote dilution claims.12 Unfortunately, the Court split on the issue of the proper definition of “minority-preferred candidate,” leading to confusion among the lower courts.

Part II of this note examines the Supreme Court opinion in *Thornburg v. Gingles*, looks at the concurring opinions, and describes the split evident among the Circuit Courts of Appeals over the definition of “minority-preferred candidate.” Part III sets out the facts, holdings, and analysis of *Ruiz v. City of Santa Maria*13, the Ninth Circuit’s attempt to apply *Thornburg v. Gingles*. Part IV suggests why the approach accepted by the Ninth Circuit should be rejected in favor of the “totality of the circumstances” test outlined by the Third Circuit in *Jenkins v. Red Clay Consolidated School District Board of Education*.14

II. *GINGLES AND THE RESULTING CIRCUIT SPLIT*

A. The Supreme Court

In *Gingles*, the Court established a three prong test to determine whether there has been a violation of Section 2, such that minorities are denied the opportunity to elect their “representatives of choice.”15 However, the Court split on the role race should play when determining who is the “minority-preferred candidate,” a term the Court uses in its test, thus leaving the lower courts with no precise definition.16 The resulting confusion has led to a split among the circuit courts over the proper definition of “minority preferred candidate” to use in applying the *Gingles* test.

The plaintiffs in *Gingles* brought suit when North Carolina enacted a redistricting plan for its state legislature.17 The new plan included a number of multimember districts,18 which Plaintiffs claimed diluted black

12. See id. at 50-51.
13. 160 F.3d 543 (9th Cir. 1998).
14. 4 F.3d 1103 (3d Cir. 1993).
15. See *Gingles* 478 U.S. at 51.
17. See id. at 34-35.
18. See id. at 46-51. Multimember districts are electoral districts which combine the area of
votes by placing concentrations of black voters who would constitute a majority in a single-member district into multimember districts with a majority of white voters. Plaintiffs asserted that such a system violated Section 2 of the Voting Rights Act.

The Court noted that Congress’ amendment to Section 2 requires only a “results test” as the standard for proving a violation. Thus, under the amendment, a discriminatory effect alone is enough for a violation; there need be no intention on the part of officials to implement a discriminatory election system. The Court also recognized that the Senate listed several factors that it wanted to be considered when looking at a possible Section 2 violation. The factors were: 1) a history of official discrimination within the area that affected minorities’ voting rights; 2) the extent of racial polarization within the area; 3) a history of using devices such as unusually large electoral districts, majority vote requirements, anti-single shot voting, and other methods to encourage discrimination; 4) a candidate slating process to which members of minority groups have been denied access; 5) the effect of past discrimination of a minority group which affects education, employment, health, etc. which in turn affects ability to participate in the political process; 6) whether subtle or overt racial appeals are used in political campaigns; 7) the actual electoral success of members of a minority group; and 8) other factors, such as a significant unresponsiveness to minority community concerns by elected officials and a tenuous policy underlying any particular voting procedure or practice.

The District Court had considered many of these factors while looking at the alleged violation. The Supreme Court, while upholding generally the district court’s findings, synthesized the factors into a three prong test. The Court was careful to state that multimember districts are not per se violations of Section 2. Plaintiffs in a Section 2 action still

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19. See id.
20. See id. at 39.
21. See id. at 36. The statute reads, in relevant part, “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, . . . .” 42 U.S.C. § 1973 (emphasis added).
22. See Gingles, 478 U.S. at 36.
23. See id. at 36-37.
26. See id. at 48.
must prove that the multimember election system significantly affects their ability to elect their representatives of choice. In order to do so, plaintiffs have to satisfy three conditions.

First, plaintiffs must show that the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district." This requirement makes sense because if the minority could not elect a representative of its choice in a single-member district, then it is not the multimember election system that is diluting the minority vote, and thus there is no structural remedy. Second, the plaintiffs must show that the minority group "is politically cohesive." If the minority group is not politically cohesive, then there are no distinctive minority interests which are not being served by a multimember district. Third, the plaintiffs must show that the majority "votes sufficiently as a bloc to enable it... to defeat the minority's preferred candidate." This requirement allows the minority to show that being subsumed within a larger majority impedes its ability to elect its candidate of choice.

This test incorporates two of the Senate factors, which the Court characterized as the most important: the ability of members of the minority group to be elected within the jurisdiction, and the extent of racial polarization within the jurisdiction. The other factors, the Court said, support a vote dilution claim, but are not essential to it.

There were two concurring opinions in Gingles. The issue on which they differed from the minority was whether the race of the candidate should be considered when determining who can be considered the minority's preferred candidate. This lack of agreement on the part of the Supreme Court led to confusion among circuit courts over the proper definition of minority-preferred candidate. Furthermore, although the Court discussed whether the race of the candidate is relevant, it never explicitly adopted any test to determine the "minority-preferred candidate."

Justice Brennan, in the majority opinion, which was only a plurality for this part, stated that the candidate's race should not be a consideration.

27. See id.
28. See id. at 50-51.
29. Id.
30. Id.
31. See id.
32. See id.
33. Id.
34. See id. at 51.
35. See id. at 48 n.15.
36. See id.
37. See id. at 83, 101.
in a Section 2 claim; rather, it is the race of the voters which is important (since they will need to show political cohesion and a representative of choice).\textsuperscript{38} Therefore, the “minority-preferred candidate” can either be a member of a minority or the majority. He stated two reasons to support his opinion. First, if Congress had intended only minority members to be minority-preferred candidates, it would have specified that.\textsuperscript{39} As it is, Congress only mentioned “representatives of their choice,” which Justice Brennan interpreted on its face.\textsuperscript{40} Second, the goal of the Voting Rights Act is only to ensure that the majority does not impede the minority’s electoral opportunity, which goal can be achieved by looking only at the minority’s race and the votes cast by the minority.\textsuperscript{41}

Justice White took issue with Justice Brennan’s approach to “minority-preferred candidate” because Brennan’s approach seemed unable to separate race-based politics from interest-group politics.\textsuperscript{42} Justice White gave an example to illustrate his point.\textsuperscript{43} Suppose that there exists a multimember district with eight members.\textsuperscript{44} The district is 60\% white and 40\% black, and there could be two single-member districts drawn with a majority of black voters.\textsuperscript{45} There are six white and two black Republicans running against six white and two black Democrats.\textsuperscript{46} Suppose further that all of the Republicans, including the two black candidates, are elected, although 80\% of the black voters voted Democratic.\textsuperscript{47} Under Justice Brennan’s test, there would be a Section 2 violation: the minority could be a majority in at least one single-member district, the minority was politically cohesive (80\% voted Democratic), and the minority was unable to elect its representatives of choice because of the majority’s vote. However, Justice White pointed out that the real reason the minority’s representatives of choice were not elected were because of party, not race polarization.\textsuperscript{48}

Justice O’Connor agreed in part with Justice White, but she elaborated more on her position than did Justice White.\textsuperscript{49} She stated that the race of the candidate is not necessarily irrelevant to an inquiry into ra-

\begin{footnotesize}
\textsuperscript{38} See id. at 67-70.
\textsuperscript{39} See id.
\textsuperscript{40} See id.
\textsuperscript{41} See id.
\textsuperscript{42} See id. at 83.
\textsuperscript{43} See id.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See id.
\textsuperscript{47} See id.
\textsuperscript{48} See id.
\textsuperscript{49} See id. at 101.
\end{footnotesize}
cially-polarized voting. Evidence that majority voters voted against a minority-preferred candidate for reasons other than those which made that candidate minority-preferred could be evidence that another "minority-preferred candidate" may receive majority support. However, Justice O'Connor disagreed with Justice White's apparent position that a candidate's race was the only factor to be considered. She argued that both of the other approaches ignore several of the Senate Report factors, such as a lack of responsiveness by elected officials to minority concerns, and that the more bright-line tests fail to adequately explore whether racial politics play a large role in the district.

Not surprisingly, given the Supreme Court's disagreement, the circuit courts have disagreed over how to define "minority-preferred candidate." The various Circuits have fallen into two basic camps, although there are variations even among compatriot circuits. The Second, Fourth, and Sixth Circuits have applied an objective test similar to the approach advocated by Justice Brennan. These circuits looked solely at which candidates receive the most minority votes. The Third, Eighth, Tenth, and Eleventh Circuits used a totality of circumstances analysis which requires the court to delve into multiple factors in each case. This analysis is closer to that suggested by Justice O'Connor.

B. The Circuit Courts

NAACP v. City of Niagara Falls is a good example of the bright-line rule. In 1985, by referendum, the City of Niagara Falls changed its city government to include a seven-member city council whose members were elected at large. A majority of the voters specifically rejected a single-member district option. Four years later, plaintiffs filed an action claiming that the at-large election system impermissibly diluted the African-American vote in the district, violating Section 2 of the Voting

50. See id.
51. See id.
52. See id. at 99.
53. See id. at 101.
54. See NAACP v. City of Niagara Falls, 65 F.3d 1002, 1018 (2d Cir. 1995); Lewis v. Almance County, 99 F.3d 600, 614 (4th Cir. 1996); Clarke v. City of Cincinnati, 40 F.3d 807, 810 (6th Cir. 1994).
55. See Ruiz v. City of Santa Maria, 160 F.3d 543, 551 (9th Cir. 1998).
57. 65 F.3d 1902 (2d Cir. 1995).
58. See id. at 1004.
59. See id. at 1005.
Rights Act. They asked the court to order a move to single-member districts, one of which would be predominately African-American. The district court refused to do so, saying that the plaintiffs had failed to meet all the requirements of the Gingles test. The Second Circuit Court eventually affirmed the district court, and its definition of “minority-preferred candidate” was essential to its analysis.

The Second Circuit expressly rejected the Third Circuit’s multi-factor test in favor of a more straight-forward and objective approach. The Second Circuit’s holding is specifically geared toward cases where plaintiffs want to change multimember districts into single-member districts and can be broken down into three parts. First, a candidate cannot be the “minority-preferred candidate” if he or she has received less than 50% of the minority vote. Second, even if a candidate receives more than 50% of the minority vote in the multimember general election, that candidate is not necessarily the minority-preferred candidate if another candidate received more minority support in the primary but failed to reach the general election. And third, a candidate does not have to be considered minority-preferred even with more than 50% of the minority vote if another candidate receives significantly more minority support. Therefore, in each election, the court may designate more than one, or no, candidates as minority-preferred.

In Jenkins v. Red Clay Consolidated School District Board of Education, the Third Circuit took an entirely different approach to defining the term “minority-preferred candidate.” The plaintiffs, who were black voters, alleged that the at-large system for electing the Board of Education diluted the voting strength of black voters. Plaintiffs sought an injunction banning the at-large voting system and establishing a different, non-discriminatory system. The district court found that the plaintiffs had failed to satisfy the third prong of the Gingles test, that the majority votes as a bloc to usually defeat the minority’s representative of choice.

60. See id.
61. See id. at 1004.
62. See id.
63. See id. at 1018-19.
64. See id. at 1018.
65. See id. at 1018-19.
66. See id.
67. See id.
68. See id.
69. See id.
70. 4 F.3d 1103 (3d 1993).
71. See id. at 1111.
72. See id. at 1111-12.
73. See id. at 1112.
However, the Third Circuit found that the district court had erred in its analysis and reversed and remanded the case. Central to the Third Circuit’s ruling was the third *Gingles* prong, which is where the concept of “minority-preferred candidate” comes into play.

The Third Circuit rejected any approach which either gives all or no consideration to the race of the candidate. Underlying the flexible approach advocated by the Third Circuit are two considerations: 1) “not all minority candidates will be minority preferred,” and 2) even if a majority candidate receives a majority of the minority’s vote, an inquiry should be made into whether the majority candidate truly represents the interests of the minority. Despite its first consideration, the Third Circuit conceded that often a minority candidate will be the minority’s preferred candidate, creating an inference that, while not meeting plaintiff’s burden, it takes plaintiff partway to proving the minority-preferred candidate. The plaintiff then must introduce additional evidence to prove a particular candidate is minority-preferred, although the court stated that this burden is not substantial and may be satisfied by lay testimony or statistical analysis of voting patterns.

The Third Circuit then gives several factors for district courts to use when determining whether a candidate is minority-preferred. One consideration is “the extent to which the minority community can be said to have sponsored the candidate.” Relevant factors here include minority involvement in advancing the candidate and the level in which minorities participate in conducting or financing the candidate’s campaign. Another consideration is “the attention which the candidate gave to the particular needs and interests of the minority community.” Within this inquiry, the court can look at whether the candidate campaigned in minority areas and addressed minority crowds. A further consideration is “the rates at which [minority] voters turned out when a minority candidate sought office as compared to elections involving only [majority] candidates.” The final consideration the Third Circuit mentions is “the extent to which minority candidates have run for office and the ease or

74. *See id.*
75. *See id.* at 1125.
76. *Id.* at 1126.
77. *Id.*
78. *See id.*
79. *See id.* at 1129.
80. *Id.*
81. *See id.*
82. *Id.*
83. *See id.*
84. *Id.*
difficulty with which a minority candidate can qualify to run for office."

Most of the other circuits accept one of these two approaches, although they each have their variations. The Supreme Court has not accepted any of these cases for review, and so remains silent—except for Gingles—as to the proper definition of a "minority-preferred candidate." In 1998, the Ninth Circuit heard a case which demanded it choose an approach for determining the "minority-preferred candidate."

III. **RUIZ AND THE OBJECTIVE TEST**

The Ninth Circuit joined with the reasoning of the Second, Fourth, and Sixth Circuits concerning the definition of "minority-preferred candidate" by accepting an objective, bright-line test. In *Ruiz v. Santa Maria*, the plaintiffs, four Hispanic voters, claimed that the City's electoral system diluted the Hispanic vote in violation of the Voting Rights Act.

**A. The Factual Background of Ruiz**

The City of Santa Maria had always elected its mayor and city council members in an at-large election system. The mayor was elected to a two-year term, and each of the council members were elected to four-year terms, although their elections were staggered so two council members are elected every two years. Voters would permitted to vote for up to two candidates in the city council elections.

The Hispanic population had grown in Santa Maria. In 1970, Hispanics made up 27% of the city's population, and that percentage increased to 33% in 1980 and to 45.7% by 1990. Also in 1990, the population was 46.4% white, 1.9% black, and 5.9% Asian, Pacific Islander, or other. Even though they were nearly half the population, Hispanics comprised only 28.7% of the voting age population. Both political parties agreed that the Hispanic population would continue to grow.
The plaintiffs presented election results that showed that until 1994, no Hispanic had ever been elected as a city official.\textsuperscript{96} Their results showed that even though the Hispanic candidates were the first or second preference of Hispanic voters, the Hispanic candidates were the least preferred candidates of the other voters and came in last in every election.\textsuperscript{97} The only first or second preference of Hispanic voters who was elected was a white candidate, Urbanske, who ran in 1988 and 1992.\textsuperscript{98} The plaintiffs filed their first action in 1992, and the case first went to trial in 1994.\textsuperscript{99} In the 1994 city elections, two Hispanic candidates (who were the first and second preference of Hispanic voters) were elected to the city council.\textsuperscript{100} The district court dismissed the action in 1996, saying that the success of Hispanics to elect their preferred candidates rendered the case moot.\textsuperscript{101} Alternatively, the district court stated in granting defendant’s motion for summary judgment, the plaintiffs could not prove that the majority voted as a block to defeat minority-preferred candidates, a necessary factor under the Voting Rights Act.\textsuperscript{102} The Circuit Court disagreed with both grounds for summary judgment and agreed to hear the case.\textsuperscript{103}

\textbf{B. The Ninth Circuit's Reasoning in Ruiz}

The Ninth Circuit faced the issue of whether the majority usually vote as a bloc to defeat the minority-preferred candidate. Essential to

\textsuperscript{96} See id.
\textsuperscript{97} See id.
\textsuperscript{98} See id. at 546-47.
\textsuperscript{99} See id. at 547.
\textsuperscript{100} See id.
\textsuperscript{101} See id. at 547-48.
\textsuperscript{102} See id. at 548.
\textsuperscript{103} See id. at 548-49. Plaintiffs argued that the case was not moot because of "special circumstances" surrounding the 1994 election. Specifically, they pointed to 4 things: 1) unprecedented crossover voting by non-Hispanics. The percentage of non-Hispanics voting for Hispanic candidates was very low in previous elections, and actually falling (15.7% in 1988, 8.6% in 1990, and 4.7% in 1992), and Hispanic candidates had always been the least preferred candidates of non-Hispanics. However, the Hispanic candidates in 1994 received 35.2% and 26.1% of the non-Hispanic vote; 2) the Hispanic candidates in 1994 received endorsements from city organizations and leaders who had never before endorsed Hispanic candidates; 3) the Hispanic candidates in 1994 received much more money from non-Hispanic sources than Hispanic candidates in other years did. Also, one of the Hispanic candidates spent $32,000 of his own money, which was three times more than any other candidate had ever spent in a city council election; 4) the pending lawsuit filed by plaintiffs was well-known throughout the city, and a newspaper article quoted a candidate urging the voters to prove that Santa Maria was not racist. The circuit court concluded that the case was not moot because the Voting Rights Act looks at whether a majority-bloc usually defeats a minority-preferred candidate, not whether the minority has ever been able to elect its preferred candidate. Therefore, it was still appropriate for the court to address the question of whether Santa Maria’s election system violated Section 2. See id. at 548-49.
such an inquiry is the proper definition of "minority-preferred candidate." As mentioned previously, the Supreme Court did not clarify this issue in *Gingles*, and the circuit courts were split on it. Furthermore, this was the first time the Ninth Circuit was called upon to determine this issue.\(^{104}\) Therefore, the Ninth Circuit was free to decide what approach it deemed appropriate.

The court of appeals first agreed with most of the other circuits that a non-minority may be the minority's preferred candidate.\(^{105}\) This recognizes that a non-minority candidate may best reflect and address the minority's concerns, while a minority candidate may not. It also avoids "electoral apartheid" which would be "a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy."\(^{106}\)

The Ninth Circuit then turned to the question of which candidate within a given election was the minority's preferred candidate. The Court recognized the opposing positions: the Second, Fourth, and Sixth Circuits that looked at which candidate receives the most votes from minority voters, a bright-line, objective test, and the Third, Eighth, Tenth, and Eleventh Circuits that used a multi-factor test that looks at the totality of circumstances and anecdotal evidence to determine the minority preferred-candidate on a case-by-case basis.\(^{107}\) The Ninth Circuit explicitly agreed with the Second Circuit's decision in *Niagara Falls* that a bright-line test should be used.\(^{108}\)

The Ninth Circuit gave two reasons why it preferred the objective test to the multi-factor, totality of circumstances test. First, the Ninth Circuit borrowed the Second Circuit's reasoning that the totality of circumstances test requires delving into anecdotal evidence, which is a "dubious judicial task" that can deteriorate into racial stereotyping.\(^{109}\) Specifically, inquiring into factors such as whether a candidate has addressed the minority community's concerns "suggest[s] the existence of a racial political orthodoxy that courts should not legitimate."\(^{110}\) Second, the totality of circumstances approach "do[es] not necessarily bear a correlation with how all minority voters feel about a candidate, only how activist groups feel."\(^{111}\) One of the factors that such an analysis considers is whether the

104. See id. at 552.
105. See id.
106. Id. (quoting NAACP v. *Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995)).
107. See id. at 552.
108. See id.
109. Id. (quoting *Niagara Falls*, 65 F.3d at 1018).
110. *Niagara Falls*, 65 F.3d at 1018.
111. *Ruiz*, 160 F.3d at 552.
minority group mobilized to support a particular candidate. However, as the Ninth Circuit pointed out, “not all minorities may have the time or inclination to take such steps, even though they support that candidate.” Thus, the Ninth Circuit concluded that the ballot box was the best way to determine the minority-preferred candidate.

The Ninth Circuit also agreed with the Second Circuit’s view that a candidate who receives the most minority votes in the general election does not have to be considered the minority’s preferred candidate if the candidate receiving the most minority votes in a primary election is defeated in the primary and does not reach the general election. This is logical, since in order to exercise their voting rights in a general election, minority voters must vote for the candidates who were victorious in the primaries, even if one of them was not originally preferred by minorities. Furthermore, the inquiry in a Section 2 action is whether the majority votes as a bloc to defeat the minority-preferred candidate. The majority can do this just as effectively in a primary election as in a general election. If this occurs, the minority should not be penalized for supporting a default candidate because the candidate the minority originally preferred was defeated early in the electoral process.

The Ninth Circuit did break away from the Second Circuit’s analysis by holding that the candidate who receives enough minority votes to win if the election was held solely among the minority group is the minority candidate. The Second Circuit, on the other hand, held that a candidate cannot be minority-preferred if he or she fails to garner 50% of the minority vote. The Ninth Circuit points out that in election systems like the one in Santa Maria, in which there are several candidates and voters are permitted to vote for two candidates, few candidates ever receive more than 50% of the minority vote. A requirement of 50%, then, would make it difficult to determine the minority-preferred candidate in most elections.

IV. THE TOTALITY OF THE CIRCUMSTANCES TEST IS THE BEST APPROACH

While the Ninth Circuit in Ruiz adopted the objective test advocated by Justice Brennan and developed in Niagara Falls, the better approach

113. Ruiz, 160 F.3d at 552.
114. See id.
115. See id.
116. See id.
117. See Niagara Falls, 65 F.3d at 1018.
118. See Ruiz, 160 F.3d at 552.
would be the multi-factor, totality of circumstances test articulated by the Third Circuit in Jenkins. Even though such a test is more unwieldy and sacrifices some judicially economic advantages, it is more likely to give deserved attention to all evidence surrounding a Section 2 claim, leading to a more just result.

A. The Criticisms of an Objective Test

There are several criticisms of the objective approach. First, as the dissent pointed out in Ruiz, "the only virtue of the . . . bright-line rule is simplicity." While the objective approach may have some judicially economic advantages and makes it easier for an attorney to predict to a client who the court-determined "minority-preferred candidate" will be, it ignores the realities of Section 2 claims. Section 2 claims are necessarily complex and fact-intensive anyway. Thus, removing one of the multi-factor analyses conducted by the courts will not add to judicial economy but may significantly erode the justice of the outcome. Furthermore, although the adopting Circuits touted the "bright-line" nature of the objective test, they also recognized some of its limitations and volunteered to look into other factors. The Second Circuit, for instance, has stated that a court may ignore the fact that a candidate received more than 50% of the minority's vote and refuse to declare that candidate minority-preferred if another candidate received greater minority support in the primary but did not reach the general election. Thus, the Second Circuit allowed a court to discard its bright-line test in favor of a more subjective approach. The Ninth Circuit agreed with these limitations and also added one of its own: a candidate does not have to receive more than 50% of the minority vote in order to qualify as minority-preferred. Therefore, even the circuits who have adopted the bright-line test allow, and almost encourage, courts to make a more circumstances-based inquiry into which candidate is minority-preferred.

A second criticism of the objective test is that it "fall[s] prey to the myopic presumption there is a minority preferred candidate in any race in which the minority votes." A bright-line rule prohibits courts from looking at factors, such as the historical environment and the current choices, which may affect the minority's voting preference.

119. Id. at 561.
120. See id. at 552.
121. See Niagara Falls, 65 F.3d at 1018-19.
122. See Ruiz, 160 F.3d at 552.
123. See id. at 561.
125. See Ruiz, 160 F.3d at 561.
lead the court to declare a candidate minority-preferred when that candidate was really only the minority’s least disfavored candidate among a slate of disfavored candidates. The response is that circuit courts using the bright-line rule have taken this edge off of their objective rule by permitting courts to look at other evidence and at candidate choices; based on such a survey, the courts may choose to declare no candidates minority-preferred. However, this is simply a way of admitting that the circuits who use a multi-factor approach may be more likely to affect justice while not abandoning the bright-line rule. The more the courts turn to other factors to blunt the unyielding effect of the objective test, the more the advantages of a bright-line test are eroded and the advantages of the multi-factor test are accepted.

Finally, a bright-line rule is dangerous because of its “unyielding rigidity and insensitivity to the particular facts of a voting rights case.” The dissent in Ruiz is especially critical of the bright-line rule adopted in that case, since the rule did not even contain a percentage threshold to be met before a candidate can be declared minority-preferred as the Second Circuit did in Niagara Falls. The Fourth Circuit, another proponent of the objective test, has also declined to set a threshold, but it requires an “individual assessment” that each candidate is actually minority-preferred. Again, the circuits which adopted the objective test seem to recognize its limits, and engage in a fact-intensive, individual analysis of each case anyway. However, reliance on a bright-line test, with a quick comment that each case’s circumstances may change the test, may actually be less bright-line for lower courts than a detailed multi-factor test such as the one used in Jenkins.

B. Advantages of the Multi-Factor Test

There are several advantages to a totality of circumstances, multi-factor test like the one outlined in Jenkins. First, such a test allows for flexibility. The multi-factor test rejects any per se rules that flow from the objective test. A multi-factor test accepts all relevant evidence and allows the court to give the evidence the weight the circumstances deem

126. See id.
127. See Niagara Falls, 65 F.3d at 1019.
128. Ruiz, 160 F.3d at 561.
129. See id.
130. See Lewis v. Almance County, 99 F.3d 600, 614 (4th Cir. 1996).
131. See Jenkins, 4 F.3d at 1125.
132. See id. An example of such a rule is that elections involving only white candidates can never be relevant. See id.
appropriate. This rule addresses Justice O'Connor's concerns that the objective test dismisses out-of-hand any circumstance where the race of the candidate may be relevant, and it does not adequately assess racial polarization and the interests behind it.

Another advantage of a multi-factor test is that it is more likely to properly define the "minority-preferred candidate." The multi-factor test is consistent with Justice O'Connor's argument that majority candidates can be minority-preferred, but provides an intensive inquiry to protect the validity of such a finding. The objective test, especially where there is no minimum threshold of support or provision for individual assessment, can elevate least-disfavored candidates to preferred status. A test that requires the court to look into such factors as minority support for the campaign, the extent to which the candidate addressed minority concerns, the ability of minorities to mount viable campaigns and minority turnout in a particular race is more likely to identify a candidate who is truly minority-preferred. Such a test would be better suited to identify a candidate who actually encouraged minority support from one who was merely grudgingly given minority support as the lesser of two evils.

Advocates of the objective test can counter that the multi-factor test requires greater time and subjectivity from a court in order to delve into many fuzzy factors and a vast array of facts, only to often come out the same way as the much simpler objective test. Indeed, in straightforward cases, this may be true. However, more complex or marginal cases may be resolved very differently under the two separate tests. Consider the hypothetical of a district in which the majority controls the nomination process to such an extent that the minority can never even see a preferred candidate in a primary election. However, a bare minimum majority of the minority votes for the winning candidate in each election. Under an objective test, there would be no Section 2 violation, since the winning candidate would be considered to be the minority-preferred candidate. In fact, even the safeguards of the Second Circuit would fail to find a violation, since over 50% of the minority voted for the winning candidate and there was not a candidate in the primary who received more support. However, a multi-factor test could uncover the fact that minorities are
barred from affecting the nomination process, as well as consider whether the winning candidate ever addressed minority concerns, received minority support other than votes, or encouraged minority turnout. Under this scenario, the multi-factor test is much more likely to impart justice, which should be a paramount concern over possible judicial economy or simplicity.

A multi-factor test incorporates the idea of “civic inclusion” of minorities. It is this theme that recent scholarship insists Congress intended with its “opportunity . . . to participate in the political process” language. Civic inclusiveness engages minorities in all stages of the political process—from lobbying to talking to representatives to forming coalitions to nominating and slating candidates. Because of its presence in the Voting Rights Act, civic inclusion should be part of a Section 2 analysis. A totality of circumstances test incorporates several of the factors that define civic inclusiveness. Thus, a multi-factor test recognizes the importance Congress placed on the whole political process (not just a voting ballot) when determining whether minorities were being discriminated against electorally. Civic inclusion also has a real bearing on which candidates are minority-preferred, since the ability of minorities to affect the early stages of the political process (nomination, etc.) will affect their level of support for candidates who make the ballot. If minorities are shut out from the political process, it is likely that none of the resulting candidates will truly be minority-preferred.

Finally, the legislative intent of the amended Section 2 of the Voting Rights Act supports a multi-factor test. Congress amended Section 2 explicitly to reject an “intent” test and move to a “results” test. The Senate also included a report that outlined relevant factors in determining whether minorities have been denied the opportunity to elect their representatives of choice. As the majority opinion noted in Gingles, two of these factors were incorporated into the three prong test. However, the other Senate factors were not specifically included in the test; the only way to completely effectuate the legislative intent of the Senate is to incorporate these factors into the determination of the minority’s preferred candidate. This incorporation would still allow these factors to affect the

140. See id. at 1059-61.
141. See id. at 1059.
142. See id.
143. See id. at 1060.
144. See Gingles, 478 U.S. 35-37.
146. See Gingles, 478 U.S. 48 n 15.
3-prong test, since who the minority’s preferred candidate turns out to be can greatly affect whether or not there has been a Section 2 violation.

Several of the factors Jenkins looks to in its multi-factor test incorporate various Senate factors and ensure that those factors influence the evaluation of a vote-dilution claim. First, the Jenkins requirement that the court look to the attention a candidate has paid to the minority community and its interests\(^\text{147}\) relates to the Senate’s interest in whether elected officials are responsive to the minority community’s needs.\(^\text{148}\) This is also a factor that Justice O’Connor asserted was missing from Justice Brennan’s bright-line analysis.\(^\text{149}\) It is difficult to consider elected officials to have been minority-preferred if the officials ignore the concerns of the minority community. Also, the Jenkins test looks at the extent to which minority candidates have run for office and any barriers which may hinder a minority’s campaign.\(^\text{150}\) Several Senate factors are included within this analysis including any history of discrimination in the jurisdiction, whether minorities have been denied access to a candidate slating process, and whether minorities bear effects of past discrimination which affect their ability to be involved in the political process.\(^\text{151}\)

Furthermore, the language of the statute suggests that Congress intended courts to consider many more factors and circumstances than just the minority’s vote. Congress specifically stated that any determination of vote dilution should be “based on the totality of circumstances.”\(^\text{152}\) Congress even provided a list of factors which could be probative of such a determination, as mentioned above.\(^\text{153}\) Such language demonstrates Congress’ intent that the court’s inquiry in a Section 2 claim to be searching and fact-intensive. The multi-factor, totality of circumstances approach is better suited to this intention than the bright-line test.

V. CONCLUSION

Therefore, the multi-factor approach the Third Circuit adopted is a more appropriate inquiry into the “minority-preferred candidate” under Section 2 of the Voting Rights Act than an objective test. The most obvious advantage of the objective test, its simplicity, does not stand up to the advantages of the multi-factor test. The Jenkins test is more likely to effectuate justice through its flexibility and greater likelihood of cor-

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147. See Jenkins, 4 F.3d at 1128.
149. See Gingles, 478 U.S. at 101.
150. See Jenkins, 4 F.3d at 1129.
rectly determining the minority-preferred candidate, and it more closely fits the legislative intent of Congress. Furthermore, followers of the bright-line test, in order to prevent it from being too rigid and insensitive, have modified it to include the opportunity for courts to consider other factors. While such modification has solved the problem, it has eroded the objective test's bright-line advantage.

The objective test in *Ruiz* is especially harsh since it does not contain the softening elements of some of the other circuit court rules. The Ninth Circuit does not protect the minority from being assigned a least disfavored candidate by establishing a minimum vote threshold, nor does it allow courts to conduct a fact-based assessment into a determined minority-preferred candidate. For these reasons, the Ninth Circuit should have adopted the multi-factor test.

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