

Supreme Court, U.S.
FILED

07-689 NOV 21 2007

No. — OFFICE OF THE CLERK

**In the
Supreme Court of the United States**

GARY BARTLETT, ET AL.,

Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
North Carolina Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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November 2007

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QUESTION PRESENTED

Whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

**LIST OF PARTIES TO THE
PROCEEDINGS BELOW**

The petitioners are Gary Bartlett in his official capacity as Executive Director of the North Carolina State Board of Elections; Larry Leake, Robert Cordle, Genevieve C. Sims, Lorraine G. Shinn and Charles Winfree, in their official capacities as members of the State Board of Elections; Joe Hackney in his official capacity as Speaker of the North Carolina House of Representatives; Marc Basnight, in his official capacity as President Pro Tempore of the North Carolina Senate; Michael Easley, in his official capacity as Governor of the State of North Carolina; and Roy Cooper, in his official capacity as Attorney General of the State of North Carolina.

The respondents are Dwight Strickland, David Williams and Stephen Holland.

Pender County, F.D. Rivenbark and Eugene Meadows were among the plaintiffs in the action below. Pender County, F.D. Rivenbark and Eugene Meadows originally appealed to the North Carolina Supreme Court from the entry of summary judgment against them but later withdrew their Notice of Appeal.

Joe Hackney, as the current Speaker of the North Carolina House of Representatives, is the successor in office to James B. Black and Richard T. Morgan who were sued in their official capacities in the action below.

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The opinion of the North Carolina Supreme Court (Pet. App. 1a-50a) is reported at *Pender County v. Bartlett*, 649 S.E.2d 364 (N.C. 2007). The partial summary judgment order (Pet. App. 51a-105a) and final judgment (Pet App. 106a-120a) of the three-judge panel of the Superior Court are unreported.

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on August 24, 2007. (Pet. App. 1a) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Section 2 of the Voting Rights Act is set out in Petitioners' Appendix at 121a-122a.

STATEMENT

This case presents a question of law that the Court has expressly left open on five occasions in the last quarter century and that now divides at least five United States Courts of Appeals and two state supreme courts: whether a racial minority group that constitutes less than 50% of a proposed district's population can state a vote dilution claim under Section 2 of the Voting Rights Act. That legal question

is entirely dispositive of this case, which was decided below on cross-motions for summary judgment, because there is no serious dispute as to any of the following facts:

- North Carolina House of Representatives District 18, which includes parts of New Hanover and Pender Counties, is geographically compact.

- The African-American minority group in District 18 is politically cohesive.

- The white majority in New Hanover and Pender Counties votes sufficiently as a bloc to enable it usually to defeat the African-American minority's preferred candidates.

- The African-American population in District 18 is sufficiently large to nominate and elect a Representative of its choice, even though it constitutes less than half of the district's population.

- In fact, with limited but predictable crossover support from white voters, District 18's African-American voters (who constitute an outright majority of the district's Democratic registered voters) have now repeatedly nominated and elected their preferred Representative, who also is African-American.

- Without a district such as District 18 that contains part of New Hanover County and part of Pender County, African-Americans in this region of the State likely could not nominate and elect a Representative of their choice.

The outcome of this case therefore rests entirely on the legal conclusion that the inability to draw a district that is at least 50.01% African-American is fatal to any vote dilution claim under Section 2 of the Voting Rights Act. Petitioners respectfully request that the Court grant this petition and resolve this important federal question before redistricting begins again in the wake of the 2010 federal decennial census.

1. Since 1992, voters in House District 18 (previously House District 98) have elected an African-American to the North Carolina General Assembly. Although African-Americans comprise less than 50% of the total population of current District 18, African-Americans comprise 54% of the registered Democratic voters of the district. The winner of the Democratic primary in this district has consistently won in the general election. Registered Democrats comprise 59% of the total voters in District 18.

When House and Senate districts were redrawn by the General Assembly in 2003,¹ the General Assembly

¹ The 2003 redistricting plan was the third statewide redistricting plan adopted by the General Assembly following the 2000 decennial census. The first two

concluded that it was necessary to cross county lines in forming House District 18 so as not to dilute the voting rights of African-Americans in violation of Section 2. As the North Carolina Supreme Court recognized below, House District 18 was drawn with an African-American voting age population of 39% because past election results in North Carolina demonstrate that such a legislative voting district would present African-Americans with an opportunity to elect their candidates of choice. (Pet. App. 5a) To draw such a district, the North Carolina General Assembly joined the population of Pender County and an adjoining

redistricting plans were struck by the North Carolina Supreme Court on the ground that they violated provisions of the North Carolina Constitution that prohibit dividing counties to form state House and Senate districts (the “whole county” provisions). *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). Construing these state constitutional provisions, the North Carolina Supreme Court has concluded that counties may be divided and county lines crossed in order to comply with the Voting Rights Act and one-man, one-vote requirements, but the crossing of county lines must be minimized for districts that are not required by the Voting Rights Act. The North Carolina General Assembly drew District 18 to comply with the *Stephenson* criteria to the maximum extent practicable and at the same time maintain District 18 as an effective African-American coalition district so as to avoid a legal challenge under Section 2. (Pet. App. 137a-139a)

county (New Hanover County) and then formed three districts within this two county grouping.² If the General Assembly were required to minimize the crossing of county lines (*i.e.*, keep Pender County whole and add only so much of New Hanover County as would be necessary to comply with the one-person, one-vote requirement), the maximum African-American population that could be obtained within House District 18 would not be sufficient to provide African-Americans an opportunity to elect a candidate of choice in this district.

2. In May 2004, Pender County and its county commissioners brought an action against the Governor and other state officials (“the State”) in the Superior Court of Wake County, North Carolina, to challenge the General Assembly’s 2003 redistricting plan. Specifically, plaintiffs asserted that House District 18 violated the “whole county” provision of the North Carolina Constitution. N.C. Const. art. II, § 5(3) (no county shall be divided in forming a state house district) (Pet. App. 127a); *see also* N.C. Const. art. II, § 3(3) (senate districts) (Pet. App. 126a). In its answer, the State asserted that it was necessary to cross

² A map showing the boundaries of these three districts (District 16, 18 and 19) is set out in Petitioners’ Appendix at 132a.

county lines in order to comply with Section 2 of the Voting Rights Act.³

Plaintiffs' claim was heard by a three-judge panel of the Superior Court. See N.C. Gen. Stat. § 1-267.1 (2007) (challenges to State legislative districts to be heard by a three-judge panel of the Superior Court). The parties filed cross-motions for summary judgment on the issue of whether the "configuration of House District 18 [is] required by Section 2 of the Voting Rights Act." (Pet. App. 72a) Specifically, plaintiffs argued that because African-Americans do not constitute a numerical majority in this district, the district was not required to be formed in order to comply with Section 2. The three-judge panel unanimously rejected this argument.

³ Consistently throughout this litigation, the State has contended that District 18 constitutes a "coalition" district (also referred to as a "crossover" district or "ability to elect" district) in which the minority group may elect its candidate of choice as a result of being joined by predictably supportive voters from outside the minority group. In contrast to a "coalition" district, an "influence" district arises when "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). The State has not and does not assert that District 18 is protected under Section 2 of the Voting Rights Act as an "influence" district.

The three-judge panel turned to the three preconditions for bringing a Section 2 claim as set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Under *Gingles*, a plaintiff must show that: 1) the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district,” 2) the minority group is “politically cohesive,” and 3) “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Id.* at 50-51. The three-judge panel recognized that the Fourth Circuit had previously held in *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005), that a vote dilution claim may only be brought under Section 2 if a minority group exceeds 50% of the population of a proposed election district. The three-judge panel rejected the Fourth Circuit’s conclusion that the first *Gingles* prong establishes a literal numerical threshold of 50%. Rather, the panel concluded that the first *Gingles* prong “depends on the political realities extant in the particular district in question, not just the raw numbers of black voters present in the general population of the district.” (Pet. App. 93a) The panel opined that the proper analysis is whether the political realities of the district “make the black voters a *de facto* majority that can elect candidates of their own choosing.” (Pet. App. 93a) The panel observed that the “inquiry must focus on the potential of black voters to elect representatives of their own choosing not merely on sheer numbers alone.” (Pet. App. 93a)

Based upon the undisputed evidence that African-Americans could successfully elect (and had in fact done so) candidates of their choosing in House District 18, the three-judge panel entered partial summary judgment with respect to the first and second prongs of the *Gingles* test.⁴ Specifically, the panel held that African-Americans were a sufficiently large and geographically compact group to form an effective majority in House District 18 and that African-Americans were politically cohesive in this district. (Pet. App. 102a-103a) Following the entry of partial summary judgment in favor of the State, plaintiffs stipulated that the white majority in Pender and New Hanover Counties voted sufficiently as a bloc to enable it usually to defeat the candidates of choice of African-Americans in the district.⁵ (Pet. App. 128a-131a) With this stipulation, the three-judge panel issued

⁴ The three-judge panel also issued summary judgment against Pender County (and its commissioners to the extent they were suing in their official capacity) on the ground that the County lacked standing to sue the State. Pender County originally appealed that determination to the North Carolina Supreme Court but later withdrew its appeal. Thus, the only appellants before the North Carolina Supreme Court were three individual plaintiffs.

⁵ This stipulation was supported by the expert opinion of Dr. Richard L. Engstrom who concluded that pronounced and persistent patterns of racially polarized voting exist in Pender and New Hanover Counties.

summary judgment in favor of the State. (Pet. App. 106a-120a) The panel concluded that House District 18 met all three of the *Gingles* prongs and that, based on the totality of the circumstances, House District 18 had to be drawn across county lines in order to comply with Section 2 of the Voting Rights Act. (Pet. App. 117a-118a)

3. The North Carolina Supreme Court, in a divided opinion, reversed the three-judge panel. (Pet. App. 1a-50a) The North Carolina Supreme Court noted that the only issue before it was whether the first *Gingles* precondition requires that the minority group be greater than 50% to be protected by Section 2. (Pet. App. 14a) The North Carolina Supreme Court concluded that *Gingles* imposes such a requirement. In so holding, the North Carolina Supreme Court recognized that African-Americans had the effective ability to elect candidates of their choice in House District 18. (Pet. App. 5a) Nevertheless, the North Carolina Supreme Court concluded that this Court in *Gingles* “meant [to establish] a quantitative majority” and set a threshold requirement of 50%. (Pet. App. 14a) The North Carolina Supreme Court held that because Section 2 of the Voting Rights Act did not require that House District 18 be drawn so as not to dilute the vote of African-Americans in these counties, the district violated the “whole county” provision of the North Carolina Constitution by dividing county lines. The North Carolina Supreme Court ordered the State to proceed with a further round of redistricting for the

2010 election, thereby eliminating the possibility of maintaining a district with proven ability to elect an African-American candidate of choice.

Chief Justice Parker, in a dissent in which Justice Timmons-Goodson joined, opined that the majority had misconstrued both Section 2 of the Voting Rights Act and this Court's decision in *Gingles*. Chief Justice Parker noted that "the United States Supreme Court has not endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute a numerical majority." (Pet. App. 41a (Parker, C.J., dissenting)) Chief Justice Parker concluded that such a "rigid numerical majority requirement" is inconsistent with both this Court's precedent and the intent of the Voting Rights Act. (Pet. App. 42a)

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve an issue that has been before the Court, but left unresolved, in five previous opinions. *Thornburg v. Gingles*, 478 U.S. 30, 46-47 n.12 (1986); *Grove v. Emison*, 507 U.S. 25, 41 n.5 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994); *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2624 (2006). Because this Court has not yet decided this issue, the circuit courts and state courts of last resort remain intractably split.

More importantly, the present petition likely stands as the last opportunity for the Court to resolve this split before redistricting occurs as a result of the 2010 census.

If the Court does not resolve this important issue before the next census is conducted, election districts will be drawn throughout the country with different standards used in different circuits. Should this Court wait to resolve the circuit split until after the 2010 census, a substantial number of jurisdictions could be forced to undergo the arduous process of redistricting twice – once to account for new census data and a second time to draw the district lines correctly when a uniform rule is eventually established by this Court.

The answer to this question will affect the voting rights of minorities throughout the country. Potential districts that could elect minority candidates may not be drawn if redistricting authorities feel constrained by a numerical majority requirement, while other minority districts may be unnecessarily packed, often at great costs to geographic compactness, solely to assure a numerical majority.

The States and their local government subdivisions need to know the answer to this important question now. As Justice Souter observed in *LULAC*, “[a]lthough both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, the day has come to answer it.” 126

S. Ct. at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part) (citations omitted). Justices Stevens, Souter and Ginsburg have noted that they would answer this question differently than did the North Carolina Supreme Court. *LULAC*, 126 S. Ct. at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part); *id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting).

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUITS AND STATE COURTS OF LAST RESORT.

The circuit courts and state courts of last resort are split on the issue of whether a vote dilution claim may be brought under Section 2 of the Voting Rights Act when the population of minority voters constitutes less than 50% of a geographically compact area but is sufficiently numerous to elect representatives of their choice as a result of consistent crossover voting from other racial groups. On the one hand, the Fourth, Fifth, Sixth and Seventh Circuits have relied on *Gingles* to impose a numerical threshold of 50% for bringing a Section 2 claim. On the other hand, the First Circuit, the New Jersey Supreme Court and the United States Department of Justice have concluded that the language and purpose of Section 2 set no such

unyielding numerical threshold. The decision of the North Carolina Supreme Court deepens this conflict.

The Fourth, Fifth, Sixth and Seventh Circuits have held that a vote dilution claim may only be brought if a minority group constitutes greater than 50% of a proposed election district. In *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004), the Fourth Circuit held that Section 2 of the Voting Rights Act establishes “a numerical majority requirement” for vote dilution claims. The Fourth Circuit relied upon this Court’s decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The *Gingles* decision establishes three preconditions that must be shown in a Section 2 claim: 1) the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district,” 2) the minority group is “politically cohesive,” and 3) “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Id.* at 50-51. In *Hall*, the Fourth Circuit rejected the plaintiffs’ argument that the first *Gingles* prong is satisfied when minorities are sufficiently numerous to form an effective or functional majority as a result of consistent and reliable crossover voting from other racial groups. The Fourth Circuit reasoned that a “redistricting plan that does not adversely affect a minority group’s potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution ‘on account of race’ in violation of Section 2.” *Hall*, 385 F.3d at 431.

The Fifth Circuit has similarly held that the first *Gingles* prong constitutes a bright line test. *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000). The Fifth Circuit concluded that *Gingles* requires “vote dilution claimants to prove that their minority group exceeds 50% of the relevant population.” *Id.* The Fifth Circuit held that the plaintiff could not establish a Section 2 violation given that the plaintiff’s evidence showed that the minority group would have constituted no more than 48% of the population of the proposed district. *Id.* at 851.

The Sixth Circuit, in a sharply divided en banc decision, has held that the first *Gingles* prong cannot be satisfied unless a *single* minority would constitute more than 50% of the proposed district. *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). In *Nixon*, the Sixth Circuit concluded that Section 2 requires that the minority group be sufficiently numerous and geographically compact to constitute a majority without consideration of crossover or coalition voting. *Id.* at 1391. Thus, the Sixth Circuit has made clear that a minority group that falls short of the 50% mark in a district cannot demonstrate that it has the ability to elect a candidate of its choice.

Like the Fourth, Fifth and Sixth Circuits, the Seventh Circuit has adopted a 50% rule with respect to the first *Gingles* prong. *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988). In *McNeil*, the Seventh Circuit concluded that the first *Gingles* prong

constitutes a “bright-line requirement” and held that “no aggregation of less than 50% of an area’s voting age population can possibly constitute an effective voting majority.” *Id.* at 945 (quotations omitted); *see also id.* at 943 n.9 (“Cross-over voting is to be considered only after the *Gingles* prerequisites are met.”).

The North Carolina Supreme Court adopted the reasoning of these circuits. Relying upon the Seventh Circuit’s decision, the North Carolina Supreme Court concluded that a “bright line rule for the first *Gingles* precondition ‘promotes ease of application without distorting the statute or the intent underlying it.’” (Pet. App. 23a (quoting *McNeil*, 851 F.2d at 942)) Citing the Fourth Circuit’s decision, the North Carolina Supreme Court stated that “[w]hen a minority group lacks a numerical majority in a district, ‘the ability to elect candidates of their own choice was never within the [minority group’s] grasp.’” (Pet. App. 22a (quoting *Hall*, 385 F.3d at 430)) Despite acknowledging the ability of African-Americans in District 18 to elect their candidate of choice, the North Carolina Supreme Court held that the first *Gingles* prong constitutes a quantitative threshold that cannot be met unless a minority exceeds 50% in the proposed district.

In contrast to the North Carolina Supreme Court and these four circuit courts, the First Circuit, as well as the New Jersey Supreme Court and the United States Department of Justice, have concluded that the

“majority” requirement of the first *Gingles* prong should not be read as a literal, mathematical requirement of 50%. In *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc), the First Circuit, in an en banc decision, specifically noted that “several Supreme Court opinions after *Gingles* have offered the prospect, or at least clearly reserved the possibility, that *Gingles*’ first precondition – that a racial minority must be able to constitute a ‘majority’ in a single-member district – could extend to a group that was a numerical minority but had predictable cross-over support from other groups.” *Id.* at 11. In *Metts*, the district court dismissed plaintiffs’ complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because plaintiffs failed to show that a district could be created in which African-Americans would constitute more than 50% of the district. *Metts v. Almond*, 217 F. Supp. 2d 252 (D.R.I. 2002), *rev’d sub nom. Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc). The First Circuit reversed the district court and expressly held that a minority group that comprises less than 50% of a district may satisfy the first *Gingles* prong if the minority group has the ability to elect its candidate of choice. 363 F.3d at 12.

Like the First Circuit, the New Jersey Supreme Court has held that Section 2 protects minorities from vote dilution even if the minority group falls short of a majority in a specific district. In *McNeil v. Legislative Apportionment Comm’n*, 828 A.2d 840 (N.J. 2003), New Jersey adopted a legislative redistricting plan

that divided Newark and Jersey City into three districts each. Plaintiffs, who wanted each city divided into just two districts, sued under a state constitutional provision that required keeping municipalities intact to the greatest extent possible. In defense, the State argued that these six districts were all mandated by Section 2 of the Voting Rights Act, even though four of them were coalition districts that were less than 50% black and less than 50% Latino. The Supreme Court of New Jersey agreed with the State, held that packing minority voters into a smaller number of majority-black or majority-Latino districts would violate the Voting Rights Act, and concluded that Congress never “intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters.” 828 A.2d at 853 (citation and internal quotation marks omitted).

In the past, the United States Department of Justice has urged the Court to grant certiorari and resolve this issue of “recurring significance in the administration and enforcement of Section 2.” Brief of the United States as Amicus Curiae at 6, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, No. 98-1987 (U.S. Dec. 1999). The Department has argued that this Court should reject an interpretation of Section 2 that imposes a literal, numerical requirement of 50%. *Id.* The United States has consistently advocated that “Section 2 and *Gingles* do not impose an absolute requirement that a minority be shown to constitute a majority in a single-member district.” *Id.* The United

States has recently reiterated that it has steadfastly argued that “a ‘flat 50% rule’ [is] inappropriate when the minority group was ‘compact, politically cohesive, and substantial in size yet just short of a majority.’” Brief of the United States as Amicus Curiae, *League of United Latin American Citizens v. Perry*, No. 05-204, 2006 U.S. S. Ct. Briefs LEXIS 192, **34 (U.S. Feb. 1, 2006) (quoting Brief of the United States as Amicus Curiae at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.*).

The conflict among the circuits is particularly problematic given that decisions of three-judge courts frequently diverge within a circuit. In Ohio, for example, the Ohio legislature must choose whether it will follow Sixth Circuit precedent or follow a directive by a three-judge court. Compare *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (50% threshold must be met by a single minority to trigger Section 2), with *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (three judge court) (“We cannot agree with the defendants that a government may with impunity divide a politically cohesive, geographically compact minority population between two single member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed a single district’s population divided by two.”).

In New York, the New York legislature must choose whether to follow a three-judge court from the Southern District of New York or a three-judge court

from the Eastern District of New York. *Compare Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 384 (S.D.N.Y. 2004) (three-judge court) (concluding that a “bright-line rule effectuates” goals of Voting Rights Act), *aff’d*, 453 U.S. 997 (2004), *with Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (“there is no bright-line rule for discerning an appropriate VAP level within a district that passes Voting Rights Act muster”).

The doubt and uncertainty that has plagued redistricting is perhaps best reflected by the conflicting decisions arising within the Eleventh Circuit. In *Negron v. City of Miami Beach*, 113 F.3d 1563 (11th Cir. 1997), the Eleventh Circuit affirmed the district court’s determination that the plaintiffs had failed to “meet the first *Gingles* precondition.” *Id.* at 1568. In *Negron*, the plaintiffs’ proposed plan created three districts with Hispanics constituting 48.45%, 47.58% and 41.17% of the citizen voting age population for those districts. *Id.* at 1567. The Eleventh Circuit noted that the plaintiffs’ plan “fails to create any districts where Hispanics constitute a majority of potential voters.” *Id.* at 1571. The Eleventh Circuit held that the plaintiffs had therefore failed to satisfy the first *Gingles* prong.⁶

⁶ In *Negron*, the record established that only 50% of the Hispanic residents of Miami Beach were citizens, thus making citizenship a relevant factor in the *Gingles* analysis

The *Negron* decision has engendered significant confusion within the Eleventh Circuit. Although the holding of *Negron* appears to stand for the proposition that a minority group must exceed 50% to satisfy the first *Gingles* prong, the language of the decision emphasizes that the legal standard is whether the minority group is “sufficiently large” or “numerous.” *Id.* at 1566-67, 1569. As a result, it is understandable that a subsequent panel of the Eleventh Circuit has stated that the circuit has not yet resolved whether the first *Gingles* prong stands as a 50% numerical threshold. *Dillard v. Baldwin County Comm’rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004). More recently, a panel of the Eleventh Circuit, in contrast to the *Negron* decision, has held that crossover voting must be considered in determining whether a minority group meets the first *Gingles* prong. *Thompson v. Glades County Bd. of County Comm’rs*, 493 F.3d 1253, 1264 (11th Cir. 2007) (in holding that proposed district

in determining the ability of the Hispanic community to elect a candidate of choice in that only citizens can vote. 113 F.3d at 1569. Citing *Negron*, the North Carolina Supreme Court concluded that the proper statistic for determining the first *Gingles* prong is voting age as refined by citizenship. (Pet. App. 17a) Because the overwhelming majority of African-Americans residing in eastern North Carolina are citizens, whether voting age population or citizen voting age population is used in analyzing House District 18 is essentially immaterial.

consisting of a bare majority of African-Americans – 50.23% – satisfies the first *Gingles* prong, court recognized that even a minority too small to constitute a majority in a single-member district is protected by Section 2 if there is sufficient crossover voting that would allow the minority group to elect its candidate of choice). Moreover, the rationale of *Negron* has been rejected by a three-judge court sitting in the Southern District of Florida. In *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1321-22 & n.56 (S.D. Fla. 2002) (three-judge court), the court noted: “we doubt [the use of the word ‘majority’ in the first *Gingles* prong] was intended as a literal, mathematical requirement.” The court further concluded that the *Gingles* prongs must not be read as establishing a “bright-line test.” *Id.* at 1322.

The issue set out in the petition has percolated in the lower courts for two decades and has not been definitively resolved. The present split of authority has resulted in inconsistent outcomes and has hindered the efforts of state and local governments to comply with the Voting Rights Act. The Court should grant certiorari to resolve this split of authority.

II. THE DECISION OF THE NORTH CAROLINA SUPREME COURT RAISES AN IMPORTANT ISSUE OF FEDERAL LAW.

Both Congress and the President have repeatedly recognized that the Voting Rights Act is “one of the

most important pieces of legislation in our Nation's history." 152 Cong. Rec. S8781 (daily ed. Aug. 3, 2006) (statement of President George W. Bush to Congress); see 152 Cong. Rec. S8372 (daily ed. July 27, 2006) (remarks of Sen. Leahy) ("The Voting Rights Act is one of the most important laws Congress has ever passed."). This Court has also emphasized that the right to vote is one of the most important liberties held by the citizens of a democracy. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) (the right to vote stands as "the most basic of political rights"); see also *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (right to vote "is a fundamental matter in a free and democratic society"). The Voting Rights Act was intended by Congress to protect this right and to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Accordingly, the proper and consistent application of this Act is vital to our Nation and to the individual rights of its citizens.

The question presented by this petition is an important issue which must be resolved if the Voting Rights Act is to be applied consistently throughout the country and in a manner that effectuates its stated purpose. Over the last two decades, the present issue has been before the Court on five separate occasions. In *Gingles*, this Court left open the issue of whether "a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district" could still satisfy the

requirements of a Section 2 vote dilution claim. *Gingles*, 478 U.S. at 46 n.12. Seven years later in *Grove*, this Court noted that although the issue had not been resolved in *Gingles*, the appeal did not present a good vehicle for resolving the issue in that it had not been argued before the district court. *Grove*, 507 U.S. at 41 n.5. That same term, this Court in *Voinovich* stated that it “need not decide how *Gingles*’ first factor might apply” when a minority group constitutes less than 50% of a proposed district, because the plaintiffs had failed to satisfy the third *Gingles* prong. *Voinovich*, 507 U.S. at 154, 158. In *De Grandy*, this Court assumed, without deciding, that “even if [a minority group is] not an absolute majority . . . in the [proposed] districts, the first *Gingles* condition has been satisfied.” *De Grandy*, 512 U.S. at 1009. Finally, last year in *LULAC*, this Court again addressed, but failed to resolve, this issue: “As the Court has done several times before, we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population.” *LULAC*, 126 S. Ct. at 2624.

Unlike *LULAC*, *De Grandy*, *Voinovich* and *Grove*, the present petition presents a good vehicle for resolving this important issue. The only issue in this action is the meaning of the first prong of *Gingles*. The remaining two prongs of *Gingles* are not in dispute. Based on the plenary, uncontested evidence presented by the State, the three-judge panel found that the African-American voters in Pender and New Hanover

Counties are politically cohesive. In addition, the panel found and the plaintiffs stipulated that racially polarized voting exists in the two counties so that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

As the North Carolina Supreme Court recognized, “[o]nly the first *Gingles* precondition is at issue in this appeal.” (Pet. App. 14a) The North Carolina Supreme Court articulated the issue before it as follows:

We must determine whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (*i.e.*, greater than 50 percent), or whether it meant instead a minority group sufficiently large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups.

(Pet. App. 14a)

The district at issue has, since its creation, elected an African-American to the North Carolina General Assembly. The decision below puts in jeopardy the ability of African-Americans within this district to elect a candidate of their choice. Moreover, the current split of authority leaves unresolved the rights of minority voters throughout the country and leaves States floundering in their efforts to comply with Section 2 of the Voting Rights Act.

**III. THE PRESENT APPEAL IS LIKELY
THE LAST OPPORTUNITY FOR THIS
COURT TO RESOLVE THIS
IMPORTANT ISSUE BEFORE
REDISTRICTING OCCURS AS A
RESULT OF THE 2010 CENSUS.**

In 2010, the United States Census Bureau will conduct its next decennial census of the country. *See* 2 U.S.C. § 2a (2000). That data will result in election districts for local, state and federal offices being redrawn. The present petition likely presents the last opportunity for this Court to resolve this issue before the next round of redistricting.

Should this important issue not be resolved prior to 2010, the criteria used by States to draw district lines will be different in the Fourth, Fifth, Sixth and Seventh Circuits from those used in the First Circuit. States and localities in the remaining circuits stand in the unenviable position of simply guessing which side of the split their circuit will ultimately adopt. States in these circuits face protracted litigation regardless of which side of the split they choose to follow. Moreover, if this Court were to delay resolving this issue until after redistricting is complete, the Court's decision, regardless of how the split is resolved, will result in district lines being redrawn in a substantial number of States. More importantly, if this Court were to hold that minority groups need not reach a numerical threshold of 50% to be protected against vote dilution

under Section 2, any delay in resolving this issue will result in district lines being drawn that do not fully and adequately protect minority voting rights.

The issue before the Court has a substantial impact upon state and local governments, minority voters and political candidates. This Court should directly address this issue before jurisdictions throughout the country embark upon the next round of redistricting.

IV. THE NORTH CAROLINA SUPREME COURT ERRED IN CONCLUDING THAT A MINORITY POPULATION MUST EXCEED 50% TO BE PROTECTED AGAINST VOTE DILUTION UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

This Court should also grant certiorari because the North Carolina Supreme Court erred in holding that Section 2 only protects minorities against vote dilution if the minority population in a geographically compact area exceeds 50%. The North Carolina Supreme Court's construction of the Voting Rights Act is contrary to the language of the Act and ignores this Court's prior decisions.

In *LULAC*, Justice Kennedy, writing for a plurality of the Court, assumed that a minority group that comprises less than 50% of a district's population could establish a vote dilution claim under Section 2.

LULAC, 126 S. Ct. at 2624. That assumption is well founded.

The text of Section 2 does not itself require that minorities constitute 50% of a district in order to be protected against vote dilution. Moreover, the three prongs of *Gingles* must be read and construed in light of their function – to determine whether racial minorities have an equal opportunity “to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b) (2000). As this Court noted in *Voinovich*, “the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.” 507 U.S. at 158. The “bright line” 50% rule adopted by the North Carolina Supreme Court constitutes such a mechanical application. The Voting Rights Act compels courts to take a “functional view of the political process.” *Gingles*, 478 U.S. at 48 n.15. “The danger of a ‘one-size-fits-all’ bright-line rule is its unyielding rigidity and insensitivity to the particular facts of a voting rights case.” *Ruiz v. City of Santa Maria*, 160 F.3d 543, 561 (9th Cir. 1998) (Hawkins, J., concurring in part and dissenting in part); see also Note, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. Rev. 312, 326 (2005) (“the aim of *Gingles*’s first prong can be vindicated without slavishly adhering to the numerical rule”).

The decision of the North Carolina Supreme Court focuses upon the literal language used by this Court in *Gingles* to describe the first precondition for bringing

a vote dilution claim. (Pet. App. 7a (stating that *Gingles* requires that the minority group “constitute a majority in a single-member district”)) In *De Grandy*, however, the Court rephrased the first *Gingles* prong as requiring the existence of “a sufficiently large minority population to elect candidates of its choice.” *De Grandy*, 512 U.S. at 1008; *see also id.* at 1020 (recognizing that “there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice”). As one commentator has observed, “the ‘majority’ requirement in the first prong is properly viewed as requiring an effective voting majority capable of electing a minority-preferred candidate, rather than a literal mathematical majority of the population.” Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2606 (2004).

This Court’s decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), further underscores that the decision of the North Carolina Supreme Court is wrong. In *Georgia v. Ashcroft*, the Georgia legislature reduced the number of “safe” minority districts in order to increase the number of coalition and influence districts. This Court held that such an approach was not necessarily a retrogressive violation of Section 5 of the Voting Rights Act, 42 U.S.C.S. § 1973c (LexisNexis Supp. 2007) (Pet. App. 123a-125a). Although Section

2 and Section 5 “combat different evils,” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 476 (1997), this Court’s unanimous recognition that coalition voting is important to assessing minority voting power is highly instructive. In *Georgia v. Ashcroft*, all nine justices agreed that it is not necessarily retrogressive to reduce the number of districts in which minorities exceed 50% of the voting age population in order to increase the number of coalition districts. 539 U.S. at 490; *id.* at 492 (Souter, J., dissenting). As one commentator has observed, “the Court’s decision moves the Voting Rights Act away from a talismanic fifty-percent mark” and should be “extend[ed] to section 2 vote dilution cases.” *The Supreme Court, 2002 Term: Leading Cases*, 117 Harv. L. Rev. 469, 474 (2003). “[I]t would make little sense for courts to preclear a redistricting plan that divides one majority-minority district into two coalitional districts in a state covered by section 5, but then, in a noncovered state, reject a redistricting plan that creates two coalitional districts rather than one majority-minority district.” Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. at 2601-02.

Georgia v. Ashcroft is a practical recognition that “the ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine.” 539 U.S. at 480. This Court’s recognition of the significance of coalition districts in determining minority voting strength in the context of Section 5’s stricter retrogression standard undermines

the conclusion of the North Carolina Supreme Court that a vote dilution claim may only be brought under Section 2 if a numerical threshold of 50% is met.

This Court should hold that “a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage.” *LULAC*, 126 S. Ct. at 2648 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part). “[T]he ‘50% rule,’ which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry.” *Id.* at 2645 n.16 (Stevens, J., concurring in part and dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

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November 2007

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