No. 07-689

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Contrary to Respondents' contentions in their brief in opposition, the certiorari petition demonstrates that the circuits and state courts of last resort are intractably split on an important issue of federal law – whether Section 2 of the Voting Rights Act protects a minority group from vote dilution if that group, as a result of limited but predictable crossover voting, has the ability to elect its candidate of choice in a proposed district but constitutes less than 50% of the district. This issue should be resolved by this Court before the next round of redistricting begins.

Following the decennial census in 2010, the boundary lines for thousands of Congressional, state and local election districts will need to be reformed. Unless this Court resolves the issue raised in this petition prior to 2010, many of those new boundary lines will be plagued by doubt (and inevitable litigation) as to whether the new districts comply with Section 2. The most efficient time to resolve such uncertainty is before redistricting occurs – not after thousands of new districts have been drawn.

It is unlikely that another case will present itself to this Court raising the issue set out in the petition prior to the next round of redistricting. For most States, redistricting occurs once every ten years – a process that commences shortly after the decennial census. Litigation concerning those districts is generally resolved within a few years of the creation of the districts. That cycle will commence again following the 2010 census. Here, the only reason that the issue is presented eight years after the last census is because North Carolina underwent mid-cycle redistricting as a result of decisions by the North Carolina Supreme Court.

The petition presents a unique opportunity for this Court to resolve an unsettled and important election law issue before districts are redrawn throughout the country. Respondents' arguments that this Court should deny review are unavailing.

I. RESPONDENTS' SUGGESTION THAT THE PETITION IS PREMATURE IS WITHOUT MERIT.

Respondents argue that because the decision of the North Carolina Supreme Court directs the North Carolina General Assembly to draw new district lines, the petition is premature. Respondents assert that because new district lines "have not yet been drawn" in accordance with the North Carolina Supreme Court's decision, any decision by this Court would be "an advisory opinion." (Br. in Opp. 4)

If this Court were to grant certiorari and reverse the North Carolina Supreme Court's interpretation of Section 2, the existing legislative districts would stand as valid and would therefore remain in place until the next census. The redistricting that has been ordered by the North Carolina Supreme Court prior to the next census is only needed because of the North Carolina Supreme Court's erroneous reading of Section 2 of the Voting Rights Act. The decision of the North Carolina Supreme Court has a real and direct impact upon Petitioners and the minority voters in House District 18.

Respondents' speculation, unsupported by the record, that perhaps a district could be drawn in this area of North Carolina with an African-American population of greater than 50% in no way diminishes the fact that the final judgment at issue directs the

North Carolina General Assembly to abandon current districts and begin redistricting anew. The new districts must be drawn according to the North Carolina Supreme Court's erroneous interpretation of the Voting Rights Act. House District 18, with its proven record of electing the candidate of choice of a minority group, will no longer exist.[1]

Congress has given this Court the authority to review final judgments "rendered by the highest Court of a State" which involve an issue of federal law. 28 U.S.C. § 1257(a) (2000). Here, the North Carolina Supreme Court's decision directs the North Carolina General Assembly to redraw legislative districts. That decision constitutes "the final word" by the highest state court. *Mkt. St. R.R. v. R.R. Comm'n,* 324 U.S. 548, 551 (1945). Accordingly, it is reviewable by this Court.

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[1] Other districts are also at risk. On Nov. 20, 2007, a separate action was filed in federal court to compel redistricting beyond Pender and New Hanover Counties. *Dean v. Leake,* No. 2:07-CV-51-FL (E.D.N.C.). In *Dean,* plaintiffs attack, on equal protection grounds, several other districts that have repeatedly elected African-American candidates to the North Carolina General Assembly. These districts also contain less than a mathematical majority of African-Americans. Relying on the decision below, plaintiffs argue that because these districts were designed to contain a specific minority percentage, but failed to meet the 50% threshold, race was impermissibly used in drawing these districts without a compelling state interest, such as compliance with the Voting Rights Act.

II. THE SOLE LEGAL ISSUE BEFORE THE NORTH CAROLINA SUPREME COURT WAS THE CONSTRUCTION AND APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

Respondent contends that certiorari should not be granted "because the primary and controlling issue is one of North Carolina law." (Br. in Opp. 3) The decision below, however, rested solely and exclusively on the interpretation of Section 2 of the Voting Rights Act.

Before the three-judge panel, the State asserted that the manner in which House District 18 was drawn (*i.e.*, dividing county lines) was compelled by federal law, specifically, Section 2 of the Voting Rights Act. (Pet. App. 53a) As Respondents themselves argued in their motion for summary judgment: "the only contested legal issue appears to be whether Section 2 of the Voting Rights Act (42 U.S.C. 1973) requires that Pender County be split." (Pet. App. 73a) Both the three-judge panel and the North Carolina Supreme Court recognized that the issue before it was the meaning and construction of Section 2 of the Voting Rights Act. (Pet. App. 2a, 72a)

The North Carolina Supreme Court clearly rested its decision on its construction of federal law. Thus, this Court has jurisdiction to take the petition. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2522 (2006); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006).

III. THE CIRCUIT COURTS AND STATE COURTS OF LAST RESORT ARE INTRACTABLY SPLIT ON THIS ISSUE.

Respondents contend that this Court should not grant certiorari because there is no circuit conflict. (Br. in Opp. 9-11) Respondents' argument that there is no circuit conflict is incorrect.

Respondents assert that the decision of the First Circuit in *Metts v. Murphy,* 363 F.3d 8 (1st Cir. 2004) (en banc) does not stand as a true conflict with the decisions of other circuits. (Br. in Opp. 10) In *Metts*, the district court granted a motion to dismiss plaintiffs' vote dilution claim under Section 2 because the plaintiffs could not show that the minority population would exceed 50% of the proposed district. The First Circuit in an en banc decision reversed the district court, concluding that plaintiffs' complaint stated a claim upon which relief could be granted. The First Circuit had to reject the 50% rule, as the language of its opinion indicates, in order to reverse the dismissal of the complaint under Rule 12(b)(6) of the Rules of Civil Procedure.

Respondents also attempt to minimize the split of authority by characterizing the decision of the New Jersey Supreme Court in *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840 (N.J. 2003), as dicta. (Br. in Opp. 10-11). In *McNeil*, the New Jersey Supreme Court expressly recognized that a vote dilution claim may be brought under Section 2 to create a coalition district in which the minority population is less than 50% of the proposed district. *Id.* at 851-54. The New Jersey Supreme Court recognized that its decision was also compelled by the one-person, one-vote doctrine. The fact that the New

Jersey Supreme Court set out alternative bases for its decision does not render either alternative holding as dicta. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948). The 50% rule was expressly considered and rejected by the New Jersey Supreme Court. Unquestionably, the *McNeil* decision is binding on the New Jersey General Assembly with respect to the drawing of district lines.[2]

This Court should reject Respondents' assertion that the circuit split can be ignored because a greater number of circuits have resolved this issue in favor of Respondents than in favor of Petitioners. Respondents overlook the numerous three-judge panels that have held that Section 2 protects coalition districts. *See, e.g., Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320-22 & n.56 (S.D. Fla. 2002) (three-judge court)*; Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court); *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (three-judge court); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court). The legislatures in these States cannot simply ignore such precedent in drawing districts. Accordingly, these decisions alone ensure that state legislatures will not

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[2] Additionally, Respondents cite to *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), and assert that this decision reflects that the Tenth Circuit has also adopted the 50% rule. (Br. in Opp. 9) The *Sanchez* decision, however, neither supports nor rejects the 50% rule. The plaintiffs in *Sanchez* successfully challenged a district that was less than half Hispanic by proposing an alternative district that was more than half Hispanic. The Tenth Circuit's holding is simply irrelevant to the question presented in the instant case.

be consistent in their application of the Voting Rights Act.

Respondents also ignore the position of the United States Department of Justice on this issue. The Department of Justice has repeatedly urged this Court to reject an interpretation of Section 2 that imposes a literal, numerical requirement of 50%. (*See* Amicus Br. of the League of Women Voters of the United States 8-11 (citing numerous amicus briefs filed by the United States))

More importantly, this Court has repeatedly assumed that a vote dilution claim may proceed even if the proposed district does not meet a 50% numerical threshold. *See, e.g., League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2624 (2006) (plurality opinion). Three justices of this Court have expressly rejected the 50% rule. *Id.* 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 in part). A clear split exists within federal and state courts with respect to this issue. This Court would not benefit by further percolation of the issue among the lower courts. In fact, failure to resolve this issue prior to the next round of redistricting will harm state and local governments, candidates for office, minority voters and our nation as a whole.

IV. THE NORTH CAROLINA SUPREME COURT ERRED IN ITS CONSTRUCTION OF SECTION 2 OF THE VOTING RIGHTS ACT.

The decision of the North Carolina Supreme Court is not consistent with the language of the Voting Rights Act or Congressional intent. Respondents' argument to the contrary is incorrect.

Respondents argue that Congress is undoubtedly aware that numerous circuit courts have adopted the 50% rule. (Br. in Opp. 11) Respondents assert that Congress' failure to override these circuit court decisions reflects Congressional intent to embrace such a rule. This Court, however, has repeatedly noted that Congressional inaction is a poor indication of Congressional intent. *See, e.g., Kimbrough v. United States,* 128 S. Ct. 558, 573 (2007); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983). Moreover, Respondents' theory of Congressional acquiesce is belied by this Court's repeated indications that a Section 2 claim may be brought even in the absence of a 50% numerical majority. *See, e.g., LULAC,* 126 S. Ct. at 2624 (plurality opinion). Given this Court's statements indicating that such a Section 2 claim may be brought, Congress simply has had no reason to adopt legislation reiterating that this Court's assumptions are correct.

Respondents further assert that the 50% rule provides a clear test that avoids "difficult hair splitting." (Br. in Opp. 12) In making this argument, Respondents rely on examples of plaintiffs bringing Section 2 claims to establish influence districts, *i.e.*, districts in which the minority population is not sufficiently large to elect a candidate of choice but is

large enough to influence the outcome of close elections. Respondents gloss over the fact that the present case does not concern an influence district. Rather, what is at stake is whether a Section 2 claim may be brought with respect to a district in which the minority group has a proven ability to elect a candidate of choice based on limited yet predictable crossover voting from another racial group (*i.e.*, a coalition district). This case is not about influence districts.

Respondents further emphasize that the 50% rule will facilitate "ease of application." (Br. in Opp. 13) The Voting Rights Act, however, has never been about ease of application. The purpose of the Act is to ensure that minority voters are treated fairly and equitably, regardless of whether the protections of the Act are inconvenient. "Ease of application" is simply not sufficient justification to ignore Congress' mandate that district lines are to be reviewed "based on the totality of circumstances" to ensure that a protected group is not afforded "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The intent of Section 2 of the Voting Rights Act is to address historic and continuing patterns of racial discrimination that have the effect of denying racial minorities an equal opportunity to elect their candidates of choice. Nothing in the Act itself or its history supports the view that Section 2's remedial effects should be narrowly limited to minorities only when they can be drawn into districts where they have a mathematical majority.

As three justices of this Court have correctly observed, the 50% rule is not supported by the

language of the Act or by Congressional intent. *LULAC*, 126 S. Ct. at 2645 n.16 (Stevens, J., concurring in part and dissenting in part); *id.* at 2647-48 (Souter, J., joined by Justice Ginsburg, concurring in part and dissenting in part). The decision of the North Carolina Supreme Court should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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