

No. 07-689

FEB 14 2008

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
Supreme Court of North Carolina**

BRIEF IN OPPOSITION

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STATEMENT

Respondents will not restate the history and factual summary presented in the Petition. Several points do need clarification, however. It also is important to understand the background which resulted in the current litigation. Pender County is a fast growing coastal county, which experienced growth of 42.4% between 1990 and 2000 according to the United States decennial census. This was the sixth fastest rate of growth in the State of North Carolina. Until 2003, no Pender County resident had served in the North Carolina General Assembly since the provision permitting each county a representative was abolished in the 1960's. In the redistricting plan

proposed by the General Assembly in 2001, Pender County was to be split among 5 House and 3 Senate districts. This splintering of the County resulted in Pender County submitting an amicus brief in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*). The majority opinion in *Stephenson I* recognized the plight in which Pender County was placed by the “balkanization” of its citizens. As a result of the decision in *Stephenson I*, Pender County was kept whole in one House district and a Pender County resident was elected. The North Carolina Supreme Court subsequently clarified the redistricting standards to be used in a second decision involving the same parties. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2002) (*Stephenson II*). After the adoption of another redistricting plan in November 2003, additional litigation was pursued by the original *Stephenson* plaintiffs which resulted in a ruling that a new action had to be filed to challenge the 2003 plan and that the challenge must be heard before a three judge panel pursuant to a newly enacted statute. *Morgan v. Stephenson and Stephenson v. Bartlett*, 595 S.E.2d 112 (2004). Three weeks after that opinion, Respondents filed the present action.

The proceedings below were handled largely by stipulations entered into between the parties. The decision to proceed by way of stipulation was made by Respondents both to conserve costs and in the vain hope for a quick resolution (this action was commenced in 2004, but relief will not be achieved until 2010). Section 2 of the Voting Rights Act (42 U.S.C. Sec. 1973) formed no part of Respondents’ case and was raised essentially as an affirmative defense by the petitioners. As the three Judge panel noted below, in the absence of the VRA claim, the contested

districts were “toast” under the Whole County provision of the North Carolina Constitution. Appendix, 92A. Among the many issues not addressed below was the distinction between the ability of the proposed influence district to elect a minority candidate of choice and the ability of the district to elect an incumbent minority candidate of choice.¹ Because relief was sought pursuant to the North Carolina Constitution for residents of a single County, there was no attempt to evaluate other North Carolina legislative districts, much less the VRA issue as argued by Petitioners and amici curiae.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Certiorari should not be granted in this case because the primary and controlling issue is one of North Carolina law, namely the application of the “whole county provision” of the North Carolina Constitution to legislative redistricting. Respondents in their complaint sought relief under the whole county provision. The VRA is involved in the litigation only because the Petitioners asserted that the mere possibility of an unasserted VRA claim justified their partially ignoring the whole county provision when drawing the districts at issue. At this stage, there can be no serious contention that a violation of Section 2 of the Voting Rights Act exists or needs to be remedied because the legislative districts, to be used

¹This distinction may become germane because the incumbent presently is under six felony indictments and the North Carolina General Assembly is considering expelling him from the General Assembly. Robertson, Gary D., *Panel Upholds Wright Charges*, Raleigh News & Observer, February 12, 2008, B1 (<http://www.newsobserver.com/1565/story/937224.html>)

for the 2010 elections, have not yet been drawn. The districts ultimately drawn by the North Carolina General Assembly may create a true majority minority district in order to comply with the VRA. While the issues raised by the appeal may well be ones of interest, answering them at this point would consist of giving an advisory opinion.

The central issue raised by Petitioners is whether under *Thornburg v. Gingles*, 470 U.S. 30 (1986) and the VRA a majority minority district requires that the minority group comprise an actual majority of the population within the district. There is no support for the contention that a split on the 50% issue exists because all the Circuit Courts and highest State Courts which have dispositively ruled on the issue have adopted the 50% rule. The reason the rule has received universal acceptance by the Circuit Courts is that it complies with both the literal language of this Court in *Gingles* and the statutory language of Section 2 of the VRA. Finally, the 50% rule is workable and easily applied which will greatly limit the number of cases in which the judicial branch will be involved in the inherently political act of drawing electoral districts.

1. The Decision Below Is Controlled By The North Carolina Supreme Court's Interpretation Of The North Carolina Constitution Not Federal Law.

In seeking certiorari from this Court, the Petitioners ignore the central and controlling nature of the North Carolina Constitution in the decision below. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007). The North Carolina Constitution provides that County lines are to be respected in draw-

ing legislative districts. N.C. Const. Art II, Sections 3 & 5. In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)(*Stephenson I*) the North Carolina Supreme Court first announced the criteria to be used in reconciling the WCP with the Voting Rights Act and one person one vote requirements.

The Court subsequently clarified its holding by reiterating its first decision and setting out nine redistricting factors to be used:

After a lengthy analysis of these constitutional provisions and applicable federal law, we outlined in *Stephenson I* the following requirements that must be present in any constitutionally valid redistricting plan:

[1.] . . . [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. *To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established*

. . . .

[2.] In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

[3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . . , the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

[4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. *Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.*

[5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . “one-person, one-vote” standard, the requirements of the WCP are met by combining or grouping the *minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent “one-person, one-vote” standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the “exterior” line of the multi-county grouping;* provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the

at or within plus or minus five percent “one-person, one-vote” standard.

[6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, *only the smallest number of counties necessary to comply with the at or within plus or minus five percent “one-person, one-vote” standard shall be combined*[.]

[7.] . . . [C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.

[8.] . . . [M]ulti-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

[9.] Finally, we direct that any new redistricting plans, including any proposed on remand in this case, *shall depart from strict compliance with the legal requirements set forth herein only* to the extent necessary to comply with federal law. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (emphasis added).

Stephenson II, at 305-307, 582 S.E.2d 247, 250-51. In applying the *Stephenson* factors for non-VRA counties, the key is to cluster counties in order to have appropriate population while dividing as few counties as possible. The North Carolina General Assembly here placed Pender County and New Hanover County into a two County cluster which had sufficient population to form three House districts. The North Carolina Supreme Court opinions recognize the supremacy of the VRA by directing that VRA districts are to be drawn first. Here, if the State were actually

attempting to create a required VRA district, then it should have drawn a majority minority district as the first priority, then looked to the lower priority issue of respecting County lines. The reason the VRA became involved in the case is that unless a Section 2 remedial district was required, the district at issue clearly violated the North Carolina Constitution. Under the North Carolina Supreme Court's decision in the current case, the General Assembly will have the opportunity to redraw districts which must first comply with the VRA. Given that the decision below hinged on an interpretation of the power of the North Carolina General Assembly to redistrict under the North Carolina Constitution, granting certiorari would be inappropriate.

2. There Is No Violation Of The VRA Because The Districts Have Not Yet Been Redrawn.

Certiorari is especially inappropriate in this case because there is no possible violation of the VRA at this point. The North Carolina Supreme Court has directed that new districts be drawn for use in the 2010 elections based upon the standards set forth in the *Stephenson* cases and the instant decision. Given that those lines have not been drawn, it is impossible to say whether any of the districts drawn will violate the VRA. The Court expressly left "to the General Assembly the decision whether House District 18 should be redrawn as a non-VRA district, or whether it should be redrawn to meet the numerical majority requirement to satisfy the first *Gingles* prong." *Pender County v. Bartlett*, 361 N.C. at 510. Accordingly, it is possible that a district would be drawn which produced an actual majority minority district. Drawing a minority majority district cannot constitute a viola-

tion of the VRA. *Johnson v. De Grandy* 512 U.S. 997, 1000 (1994). To grant certiorari at this stage would be to provide little more than an advisory opinion about a situation which does not yet, and may never, exist. The decision of the North Carolina Supreme Court simply does not provide a clean or clear case for addressing the proposed issue. The multiple amicus briefs make clear that they hope this Court will use this case to provide a roadmap for redistricting after the 2010 census. There are many issues on which many people would like this Court to clarify the law, but that is not the role of the Court. 28 U.S.C. Sec. 1257 (1998). To grant certiorari now would prevent North Carolina from having the opportunity to draw districts which comply with both Section 2 and the North Carolina Constitution.

3 No Actual Split In Authority Exists With Regard To The 50% Rule.

Despite Petitioners' best efforts to create an alleged conflict among Circuit Court opinions, none exists. Petitioners acknowledge that the Fourth, Fifth, Sixth and Seventh Circuits have adopted the 50% rule. Petition p. 13. Respondents would submit that the Tenth² and Eleventh³ Circuits likewise have adopted the 50% rule. Regardless of quibbles with regard to the other Circuits, including the Ninth, it is clear that every Circuit Court which has adopted a clear position has adopted the 50% rule.

² *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir.1996) (noting that "satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible"), *cert. denied sub nom. Colorado v. Sanchez*, 520 U.S. 1229 (1997).

³ *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997).

Against the weight of this authority Petitioners submit an inconclusive opinion from the First Circuit and a decision of the New Jersey Supreme Court where the discussion of the VRA was mere dicta. In *Metts v. Murphy*, 363 F.3d 8 (2004)(en banc) the First Circuit refused to grant a motion to dismiss. “We are thus unwilling at the complaint stage to foreclose the *possibility* that a section 2 claim can ever be made out where the African-American population of a single member district is reduced in redistricting legislation from 26 to 21 percent.” *Id.* at 11. That the Court was not deciding the issue on the merits is clear from its direction as to further proceedings “Whether a full-scale trial is needed is an entirely different matter; perhaps summary judgment will suffice depending on how the evidence develops and the ultimate theory or theories offered by both sides—theories that hopefully will go beyond dueling claims as to what *Gingles* means.” *Id.* at 12. Given that a 26% minority population could at best hope to be an influence district, the value of this opinion to the actual question presented seems remote.

Petitioners also attempt to rely on an opinion from the New Jersey Supreme Court as the basis for a split in authority. *McNeil v. Legislative Apportionment Comm’n*, 828 A.2d 840 (N.J. 2003), *cert. denied*, 540 U.S. 1107(2004) held in dicta that the bright line test was not to be followed. *McNeil* involved a challenge to the creation of three state senate districts in the Newark and Jersey City areas, instead of the two required by the New Jersey Constitution. The Court first determined that the one person one vote standard required a redistricting plan which disregarded the municipal boundary provision of the New Jersey constitution. The Court found three alternative and independent grounds upon which to invalidate the

provisions of the New Jersey Constitution (two of which were based in State law) before reaching Section 2. It also bears mentioning that unlike the North Carolina Supreme Court, the New Jersey Supreme Court determined to simply invalidate the county and city line restrictions imposed by the New Jersey constitution. There was no attempt to reconcile the provisions of the state constitution with federal requirements as was done in the *Stephenson* cases. Thus, the New Jersey Supreme Court reached the VRA issue only after resolving the actual dispute on two independent state grounds and a one person one vote analysis. In the petition for certiorari, the focus is on alleged differences between three judge panels in other jurisdictions having to nothing to do with this case or a split among the circuits. Pet. 18-21. There simply is no dispute among the Circuits about the 50% rule which this Court needs to resolve and until an actual split exists this Court should not take up the issue.

4. The Decision Below Complies Fully With The Decisions Of This Court And The VRA.

The decision by the North Carolina Supreme Court complies fully with the holdings of this Court and the VRA while also furthering the interest of limiting judicial involvement in redistricting. The VRA does not speak to a standard for drawing district lines, and despite the number of circuits which have adopted and currently follow the 50% rule, Congress has not amended Section 2 to indicate a contrary intent. The intent of the VRA also is supported because a contrary holding would not simply protect the right of minority group voters to participate in the political process, but rather would protect the right of minor-

ity group voters to form a coalition with some members of the majority group to elect a mutually acceptable candidate. This Court has established that Section 2 does not exempt a minority group from having to “pull, haul and trade” in the normal political process. *Degrandy*, 512 U.S. at 1020. To raise a coalition formed by a minority group to a special status does not ensure equal access, it grants a special status not provided for by the VRA. The purpose of the VRA is not to ensure that a minority group can elect its candidate, but rather to provide the minority group with an equal opportunity to that of other voters to elect a candidate of choice. *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993).

In addition to giving the Court’s holding in *Gingles* appropriate respect by interpreting the word “majority” consistent with its ordinary meaning, following the 50% rule will reduce the opportunities for redistricting issues to require judicial resolution. Determining whether the 50% threshold is met is a straightforward determination not requiring speculation as to the motivation of voters. Absent a clear test, the judicial system will be drawn into increasingly difficult hair splitting involving sufficient populations to elect and conflicting claims between minority groups such as in *Metts* where the African American community complained that the increase in Latino population and a 5% decrease to 21% resulted in the election of a Latino instead of an African American candidate. *See also Hall v. Virginia*, 385 F.3d 421 (4th Cir., 2004), *pet. disc. rev. denied*, 125 S.Ct. 1725 (2005)(plaintiffs sought to increase African American population from 32% to 40% by redrawing the lines to take population from a 53% African American district). Competing interest groups will endlessly seek advantage and bring actions involving

increasingly thin margins if the Court abandons *Gingles*.

This case demonstrates the ease of application of the 50% rule. The remaining Plaintiffs in this case are individuals acting without the involvement or financial backing of political parties or interest groups. While petitioners and amici curiae decry the “mechanical” application of the first *Gingles*’ factor, such an application provides the certainty they claim is needed prior to next round of redistricting. More importantly, it reduces the chance that the Courts will be drawn into the fights over the drawing of electoral districts. This Court recognizes, as does the North Carolina Supreme Court, that redistricting decisions are best left to the legislative branch. “The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies.” *Abrams v. Johnson*, 521 U.S. 74, 101 (1997). The North Carolina Supreme Court likewise believes that redistricting should be left to the legislative branch and recognizes that the absence of a bright line rule will expose many more districts to challenge under the VRA.

“Redistricting should be a legislative function for the General Assembly, not a legal process for the Courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that district must be configured in order to give it control over the election of candidates.”

Bartlett at 505. As recognized unanimously by the Circuit Courts and the North Carolina Supreme Court, the 50% rule provides a bright line which can easily be applied by legislators and avoids continual litigation over district lines.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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