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 Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
1730 M Street, N.W., # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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
Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE A BRIEF FOR THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), the League of Women Voters of the United States respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. Counsel of record for all parties received notice of the League's intention to file this brief more than ten days before the brief's December 26, 2007 due date.

Petitioners' counsel granted consent, but respondents' counsel withheld consent on the ground that he had been unable to speak with one of his clients.

The League's interest in this case arises from its long-standing involvement in reapportionment and redistricting, dating back more than half a century. The League, its members, and its affiliates in all 50 States and more than 850 local communities have been directly involved both in the debates over new districting maps after each decennial census and in the ongoing effort to reform the redistricting process itself.

The brief the League seeks to file will bring to the Court's attention relevant matter not already contained in the petition for a writ of certiorari, including (1) a thorough, historical description of the genesis of the current confusion surrounding coalition-district claims under Section 2 of the Voting Rights Act; (2) a detailed recounting of eight lower-court cases (six of which were not even cited by the court below) that declined to adopt the absolute "50% Rule" that the majority below adopted; (3) a concise description of why this case is a far better vehicle for resolving the question presented than were any of this Court's prior Voting Rights Act cases; and (4) a discussion, based on the League's extensive experience in the field, of five reasons why the Court should settle this question before the next decennial census kicks off another round of congressional, state-legislative, and local redistricting.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, NW, # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

DECEMBER 21, 2007

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES - continued

TABLE OF AUTHORITIES - continued

CONSTITUTIONS, STATUTES, AND RULES

TABLE OF AUTHORITIES - continued

MISCELLANEOUS

TABLE OF AUTHORITIES - continued

INTEREST OF THE *AMICUS CURIAE*

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively in government and the electoral process.[1] The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women through the Nineteenth Amendment to the United States Constitution. Today, the League has more than 150,000 members and supporters, and is organized in more than 850 communities and in every State.

The League has long been a leader in seeking to ensure that redistricting at every level of government promotes full and fair political participation by all Americans. In jurisdiction after jurisdiction, the League and its members participate in the redistricting process following each decennial census. And even before the "reapportionment revolution" commenced with this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the League worked to reform and modernize the redistricting process itself. *See, e.g.*, *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958) (three-judge court).

---

[1] Petitioners, but not respondents, have consented to the filing of this brief. Counsel of record for all parties received timely notice of the League's intention to file this brief. No party, counsel for a party, or person other than the League, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

Recognizing that the Constitution's promise of fair and effective representation can never be realized so long as any American citizen's right to vote is denied or abridged, the League supports federal legislation to make the Fifteenth Amendment every bit as effective for minorities as the Nineteenth Amendment has been for women. The League and its members have long supported the Voting Rights Act of 1965, having worked for the reauthorization of Section 5 and the 1982 amendments to Section 2, which guarantee minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The demands of amended Section 2, like all laws constraining redistricting, need to be clear. Otherwise, political mapmakers will treat ambiguities and conflicts in the law as an invitation to gerrymander. The League therefore respectfully asks this Court to grant the petition and clarify whether a vote-dilution claim under Section 2 requires that a minority community's size meet a rigid numerical quota.

SUMMARY OF ARGUMENT

The 2010 census and another round of redistricting are on the horizon. But courts, legislatures, and voters are deeply divided as to one of the critical requirements under Section 2 of the Voting Rights Act: whether a cognizable vote-dilution claim requires that a minority group constitute a literal, mathematical majority of a proposed district's population (the "50% Rule"), or whether instead it suffices if the group constitutes an

effective voting majority in a proposed "coalition district," where minority-preferred candidates can prevail with limited but reliable crossover support from other voters.

Five times, this Court has expressly reserved that question, usually assuming — but never actually deciding — that the Act requires an effective voting majority, not a formalistic and rigid 50.001% majority. Predictably, lower courts have been confused. There is a clear split not only among the circuits, but also among the state courts and three-judge federal district courts that handle much of the Nation's redistricting litigation and whose judgments can be appealed only to this Court, not to the circuit courts. One side in this split takes the position, adopted by the North Carolina Supreme Court below, that the minority group must constitute more than 50% of a district's population, and that coalition-district claims are not cognizable under Section 2 of the Voting Rights Act. That position is in considerable tension with the plain text of the statute, is contrary to the long-standing position of the Justice Department, and is hard to reconcile with this Court's recent, unanimous rejection of the 50% Rule under Section 5 of the Act. The court below ignored or misread these authorities, leaving the false impression that its decision endorsing the 50% Rule fully comported with precedent. *See* Pet. App. 11a-27a.

With the 2010 census just two years away, the confusion exacerbated by the decision below is sure to result in uneven enforcement of minority voting rights during the next round of redistricting,

heightened race-consciousness in district line-drawing, and partisan manipulation of one of our Nation's greatest civil-rights statutes. Voters, whose districts may be redrawn several times following numerous rounds of litigation, can only be harmed by this chaos.

The petition here cleanly presents the issue on a record built largely by stipulation. And this case has none of the flaws that have previously prevented the Court from reaching the issue. The petition for a writ of certiorari should be granted.

ARGUMENT

I. THIS COURT HAS NOT PROVIDED CLEAR GUIDANCE ON WHETHER COALITION-DISTRICT CLAIMS ARE COGNIZABLE UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act prohibits redistricting plans that, "based on the totality of circumstances," are shown to offer members of a protected racial or language minority group "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 plain text of Section 2 thus focuses on minority groups' ability "to elect representatives of their choice." *Id.* Neither Section 2 nor any other part of the Voting Rights Act says anything about "majority-black" or "majority-Latino" or "majority-minority" districts.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court explained that the "essence" of a Section 2 vote-dilution claim is that the challenged districting

plan "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. Section 2 plaintiffs therefore must present some alternative plan that would provide greater opportunity for minority voters to elect candidates of their choice. *See id.* at 46-51.

The *Gingles* Court established three "necessary preconditions" for proving vote dilution under Section 2: The plaintiffs' minority group must show that (1) it is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) it is "politically cohesive"; and (3) its preferred candidates "usually" are defeated by white bloc voting. *Id.* at 50-51. The first *Gingles* prong is needed because "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* at 50 n.17. In assessing whether African-American concentrations were sufficiently large "to constitute effective voting majorities in [new] single-member districts" — that is, whether blacks had the "potential" to elect their preferred candidates — the *Gingles* Court eschewed "mechanical" rules and instead applied a "flexible, fact-intensive," and "functional" approach to the political process. *Id.* at 38, 45-46, 58; *see id.* at 48 n.15, 75-80. Specifically, the Court considered — among other "'intensely local,'" district-specific facts — the "size of the district," the "percentage of registered voters in the district who are members of

the minority group," the "number of minority group members [who] usually vote for the same candidates," and the number of "white 'crossover' votes" that those same minority-preferred candidates could reliably expect to attract. *Id.* at 56, 79 (citation omitted).

Nevertheless, the express wording of the first *Gingles* prong has generated two conflicting interpretations. Some have read the term "majority" to mean a literal, mathematical majority. Others have understood the term as referring to an effective voting majority capable of "elect[ing] representatives of [the minority voters'] choice." 42 U.S.C. § 1973(b).

This Court's precedents do not resolve that conflict. In *Gingles* itself, as was typical for voting-rights litigation in the 1980s, the plaintiffs did not propose any new districts where blacks would have constituted less than 50% of the population. The Court therefore had no occasion to consider whether Section 2 permits "a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district." 478 U.S. at 46-47 n.12. In her concurrence, however, Justice O'Connor noted that voters belonging to such a minority group could nonetheless demonstrate their ability "to elect representatives of their choice" by showing that sufficient "white support would probably be forthcoming in some such district." *Id.* at 90 n.1 (O'Connor, J., concurring in judgment).

This Court's post-*Gingles* cases have continued to leave the issue unresolved. In *Growe v. Emison*, 507 U.S. 25 (1993), the district court had concluded that Section 2 required an "oddly shaped" multiracial

district with a total population that was 43% black and 40% white. *Id.* at 38 & n.4. This Court unanimously reversed because the record contained no statistical evidence of minority political cohesion, the second *Gingles* factor. *Id.* at 41-42. As for the first *Gingles* factor, the Court again expressly declined to decide whether "a minority group not sufficiently large to constitute a majority will suffice." *Id.* at 41 n.5 (citing *Gingles*, 478 U.S. at 46-47 n.12).

Later in the same Term, in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court again unanimously reversed a district court's finding of Section 2 liability, this time because the plaintiffs had failed to demonstrate significant white bloc voting, the third *Gingles* factor. *Id.* at 158. As for the first factor, the plaintiffs had claimed that the State violated Section 2 by failing to draw districts where black voters, though short of a mathematical majority, were sufficiently numerous to elect their candidates of choice "with the assistance of cross-over votes from the white majority." *Id.*; *see id.* at 154. The Court observed: "Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 158. It therefore assumed, without deciding, that the plaintiffs had stated a cognizable Section 2 claim under *Gingles*. *Id.* at 154, 158.

The next Term, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court again reversed a district court's finding of Section 2 liability, this time because the challenged plan already contained enough districts where Hispanic voters could form

"effective voting majorities" capable of electing their chosen representatives. *Id.* at 1000. As before, the Court assumed without deciding that plaintiffs could satisfy the first *Gingles* prong and state a cognizable Section 2 claim even if their minority group fell short of "an absolute majority." *Id.* at 1009. As the Court explained, "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." *Id.* at 1020. The *De Grandy* Court focused on electoral opportunity, rather than on an absolute numerical majority: "[T]he first *Gingles* condition requires the possibility of creating . . . [additional] districts with a sufficiently large minority population *to elect candidates of its choice*." *Id.* at 1008 (emphasis added).

The Court's next opportunity to address the issue came when Latino plaintiffs filed petitions for writs of certiorari in *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), and *Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999). In both cases, the Fifth Circuit had required Section 2 vote-dilution claimants to show that their minority group could constitute an absolute numerical majority of a district's citizen voting-age population. *Valdespino*, 168 F.3d at 852-53; *Perez*, 165 F.3d at 372-73. The Court called for the views of the Solicitor General, 528 U.S. 804 (1999), who argued that the Fifth Circuit's "absolute 50% rule" was contrary to this

Court's precedents and warranted review.[2] In the Solicitor General's view, a minority community must show merely that it could "elect representatives of its choice," not that it would "constitute an absolute majority of the population (by any particular measure) in a single-member district."[3] The Justice Department had taken this same position — rejecting any "magical numerical threshold" — in earlier Section 2 cases, dating back at least to 1990.[4] Both Fifth Circuit cases, however, raised thorny factual issues about demographic shifts and naturalization trends since the last census. *See, e.g.*, *Valdespino*, 168 F.3d at 853-55. The Court denied both petitions. 528 U.S. 1114 (2000).

Three years later, in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) — a case that the North Carolina Supreme Court barely mentioned below, *see* Pet. App. 19a — this Court expressly rejected the 50% Rule in the context of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *See Ashcroft*, 539 U.S. at 480-85. Although Sections 2 and 5 "'differ in structure, purpose, and application,'" they both protect the right to vote from being abridged on

---

[2] Br. for U.S. as *Amicus Curiae* at 6-7, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (No. 98-1987); *see also id.* at 8-15.

[3] *Id.* at 6.

[4] Br. for U.S. at 33-38, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *see also* Br. for U.S. as *Amicus Curiae* at 11, 17-18, *Campos v. City of Houston*, 113 F.3d 544 (5th Cir. 1997). *But see* Br. for U.S. as *Amicus Curiae* at 10, 16, *Voinovich v. Quilter*, 507 U.S. 146 (No. 91-1618).

account of race. *Id.* at 478 (citation omitted). And while the *Ashcroft* Court, interpreting Section 5, was divided about the significance of "influence districts" — which are in no way implicated here[5] — all nine Justices recognized the validity of "coalition districts," where a minority group constituting less than half a district's population nonetheless can elect its candidates of choice when joined by predictably supportive nonminority voters. *See id.* at 480-85; *id.* at 492-93 (Souter, J., dissenting).

Although Congress has since overruled *Ashcroft*'s validation of "influence districts," overwhelming and bipartisan majorities reaffirmed the Court's unanimous recognition of coalition districts. *See* Pub. L. No. 109-246, § 5, 120 Stat. 577, 580-81 (2006) (protecting minority citizens' "ability . . . to elect their preferred candidates of choice"), *codified at* 42 U.S.C. § 1973c(b), (d), Pet. App. 125a; *see also* Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 216-51 (2007) (interpreting the 2006 statute).

---

[5] Although courts (including this one, *see, e.g.*, *Voinovich*, 507 U.S. at 154, 158) sometimes have used the term inconsistently, the *Ashcroft* majority and dissenting opinions correctly defined an "influence district" — in sharp contrast to a coalition district — as one where minority voters can play a substantial, influential role in elections but cannot reliably form winning coalitions with other voters and thus lack any realistic opportunity to elect representatives of their choice. *Ashcroft*, 539 U.S. at 482; *id.* at 493-97 (Souter, J., dissenting). This case does not involve influence-district claims.

Just last year, the Court yet again addressed, but did not resolve, the issue of coalition districts and the 50% Rule. In *LULAC v. Perry*, 126 S. Ct. 2594 (2006), the plaintiffs claimed that Section 2 required Texas to reinstate a district whose adult citizen population was 26% black. *Id.* at 2624. Again, the United States as *amicus curiae* argued against the "flat 50% rule" when the minority group is "compact, politically cohesive, and substantial in size *yet just short of a majority*." Br. of U.S. as *Amicus Curiae* at 19, *LULAC v. Perry*, 126 S. Ct. 2594 (No. 05-276) (citation and internal quotation marks omitted). But the United States asked the Court to reject plaintiffs' claim on the facts because they had failed to prove below that African-Americans could effectively control the 26% black district. *Id.* at 11-17. The United States urged the Court to avoid a definitive ruling on the "strict 50% rule" until "it is faced with a case in which resolution of the question would likely be dispositive. . . . Such a case would offer the Court the benefit of a concrete factual setting in which to resolve that issue." *Id.* at 20, 24.

Again, the Court declined to settle the issue. Writing for the plurality, Justice Kennedy stated: "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." *Perry*, 126 S. Ct. at 2624 (citing *De Grandy*, 512 U.S. at 1009; *Voinovich*, 507 U.S. at 154; *Gingles*, 478 U.S. at 46-47 n.12). The plurality saw no clear error in the trial court's finding that whites, rather than African-Americans, controlled the district's

Democratic primaries, in which a white incumbent repeatedly had gone unchallenged. *Id.* at 2624-25. Therefore, the plaintiffs had not demonstrated that their district truly provided black voters an equal "opportunity 'to elect representatives of their choice.'" *Id.* at 2625 (quoting 42 U.S.C. § 1973(b)).

The Chief Justice, in an opinion joined by Justice Alito, also focused on effective opportunities to elect candidates of choice. He explained that Section 2 plaintiffs must "show that an alternative [redistricting plan] would present better prospects for minority-preferred candidates" by creating either additional "majority-minority" districts or additional coalition districts where a minority group could elect candidates of its choice with "'cross-over votes from other ethnic groups.'" *Id.* at 2654-55 (Roberts, C.J., dissenting in part) (quoting *De Grandy*, 512 U.S. at 1008, and citing *Voinovich*, 507 U.S. at 154) (emphasis omitted).

In his partial dissent, Justice Souter, joined by Justice Ginsburg, suggested that the Court should stop "sidestepp[ing] the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%." *Id.* at 2648. Justice Souter explained that he would "hold that a minority of 50% or less of the voting population might suffice at the *Gingles* gatekeeping stage." *Id.* "To have a clear-edged rule," Justice Souter would allow Section 2 plaintiffs to show that minority voters in a proposed district "constitute a majority of those voting in the primary of the

dominant party, that is, the party tending to win in the general election." *Id.*[6]

Justice Stevens "agree[d] with Justice Souter that the '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., dissenting in part) (citation omitted).

II. THE LOWER COURTS ARE DEEPLY DIVIDED ON THIS IMPORTANT FEDERAL QUESTION.

The Court's Voting Rights Act opinions have left lower courts, both federal and state, in an unenviable spot. On the one hand, the plain text of the statute, supported by numerous passages from this Court's opinions, focuses on whether districts can elect minority-preferred representatives. *See* 42 U.S.C. § 1973(b). On the other hand, some lower courts, such as the North Carolina Supreme Court here, have read the first *Gingles* factor to demand proof that a minority group can constitute a literal, mathematical "majority" of a district's population. *Gingles*, 478 U.S. at 50.

Of course, the *Gingles* Court that coined the "majority" requirement was construing Congress's

---

[6] Justice Souter also recognized that "a minority group might satisfy the § 2 'ability to elect' requirement in other ways" and did not "rule out other circumstances in which a coalition district might be required by § 2. A minority group slightly less than 50% of the electorate in nonpartisan elections for a local school board might, for example, show that it can elect its preferred candidates owing to consistent crossover support from members of other groups." *Id.* at 2648 n.3.

text, not overruling it. The word "majority" in *Gingles* and its progeny should therefore be understood to effectuate the statutory text guaranteeing minority voters an equal "opportunity . . . to elect representatives of their choice." 42 U.S.C. § 1973(b). After all, the language of a judicial opinion must be "read in context" and not "parsed" like a statute. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979).

The lower courts, however, remain deeply confused and divided, and many of them have reached a conclusion opposite to that of the North Carolina Supreme Court. For example, in *McNeil v. Legislative Apportionment Commission*, 828 A.2d 840 (N.J. 2003), a case with facts remarkably similar to this one, voters residing in Newark and Jersey City complained that their cities were each divided among three, rather than two, legislative districts, in violation of the state constitution's whole-municipality provision. *See id.* at 844-45. The State argued that Section 2 required trisecting each city to create more opportunities for African-American and Latino citizens to elect their preferred candidates in coalition districts. *See id.* The New Jersey Supreme Court agreed, holding that strict adherence to the state constitution's whole-municipality provision would pack minority voters into too few districts and thus "dilute minorities' ability to elect representatives of their choice," in violation of Section 2. *Id.* at 857. The court explained: "'[N]othing suggests that Congress intended to limit Section 2 claims to ones involving districts where minorities were a majority of voters.'" *Id.* at 853

(citation omitted). The North Carolina court did not cite the New Jersey case.

The First Circuit's en banc decision in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004), also rejected the flat 50% Rule. Inexplicably, the majority below misread *Metts* as leaving this issue "unresolved." Pet. App. 22a. In *Metts*, African-American voters challenged Rhode Island's state senate plan and proposed a coalition district in Providence, but the trial court dismissed their case under Rule 12(b)(6) for failure to state a claim. That judgment was reversed by a divided panel of the First Circuit, with Judge Lynch writing a lengthy majority opinion canvassing the arguments for and against the 50% Rule. *Metts v. Murphy*, 347 F.3d 346, 2003 WL 22434637 (1st Cir. 2003) (withdrawn).

On rehearing en banc, the First Circuit addressed "how to apply *Gingles* when no racial group makes up more than 50 percent of the district" and "whether the 'majority' requirement in *Gingles* is a numerical majority or an effective majority that could be constructed [with] cross-over votes." *Metts*, 363 F.3d at 11. If Section 2 mandated a "numerical majority," the district court's dismissal would have been affirmed; but instead, the en banc court vacated the dismissal and remanded the case to allow the African-American plaintiffs to develop evidence showing that their preferred candidate could predictably garner enough "cross-over support from other groups" to render a proposed coalition district viable under Section 2. *Id.* at 11-12. On remand, the case settled after the State agreed to create a coalition district where Providence's African-

American community could, and in fact did, elect its preferred candidate, who now serves as the Rhode Island Senate's sole African-American member and Deputy Majority Leader.

The positions staked out by the First Circuit en banc and the New Jersey Supreme Court resonate with opinions from at least half a dozen three-judge federal district courts, each of which included at least one circuit judge. *See* 28 U.S.C. § 2284(b)(1). Even before this Court decided *Gingles*, the Northern District of Mississippi, in a decision this Court summarily affirmed, recognized that Section 2 could protect a 42% black district.[7] And after *Gingles*, three-judge courts in the Northern District of Ohio,[8] the Western District of Arkansas,[9] the Eastern and Southern Districts of New York,[10] and the Southern

---

[7] *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court), *summarily aff'd sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984).

[8] *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991) (three-judge court) (approving a district where blacks would "constitute nearly one-third of the voting age population and about half of the usual Democratic vote").

[9] *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (Richard S. Arnold, C.J.) (stating that plaintiffs could present a viable coalition-district claim if "minority voters could join with enough non-minority voters to form a majority").

[10] *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694-95 (E.D.N.Y. 1992) (three-judge court) ("[T]here is no bright-line rule for discerning an appropriate VAP [voting-age population] level within a district that passes Voting Rights Act muster. . . . This case-by-case approach is

District of Florida[11] all declined to adopt the absolute 50% Rule. The majority below failed to cite five of these six cases. *See* Pet. App. 17a-27a.

On the other side of the split, the Fourth, Fifth, Sixth, and Seventh Circuits all have upheld the 50% Rule and rejected coalition-district claims.[12] And now they have been joined by the Supreme Court of North Carolina. Pet. App. 27a.

---

underscored by the realities that every redistricting case is unique, that the line between 'packing' minorities and 'fragmenting' them is frequently a thin one, and that each redistricting effort requires an extremely fact-intensive evaluation."); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 373-77, 381-404 (S.D.N.Y.) (three-judge court) (rejecting a Section 2 claim because plaintiffs failed to show that their proposed 37% black district could actually elect minority-preferred candidates), *summarily aff'd*, 543 U.S. 997 (2004).

[11] *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1320 n.56 (S.D. Fla. 2002) (three-judge court) (doubting that *Gingles*'s first factor "was intended as a literal, mathematical requirement"); *id.* at 1322 (criticizing "the approach of focusing mechanically on the percentage of minority population (or voting-age population or registered voters) in a particular district, without assessing the actual voting strength of the minority in combination with other voters").

[12] *Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004); *Valdespino*, 168 F.3d at 852-53; *Perez*, 165 F.3d at 372-73; *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998); *Nixon v. Kent County*, 76 F.3d 1381, 1391-92 (6th Cir. 1996) (en banc); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942-48 (7th Cir. 1988); *see also Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court), *summarily aff'd*, 540 U.S. 1013 (2003). The majority below failed to cite four of these seven cases.

But even these courts diverge on a key related question: Do minority plaintiffs need to show a 50% majority of voting-age population ("VAP") or of citizen voting-age population ("CVAP")? The Seventh Circuit's position is unclear; the Fourth and Sixth Circuits require a VAP majority; and the Fifth Circuit and the North Carolina Supreme Court require a CVAP majority, which generally is easier for African-Americans and American Indians to satisfy, but much harder for Latinos and Asian-Americans. *See supra* note 12 (citing cases); Pet. App. 17a.

The lower courts that have taken some position on the coalition-district issue — rejecting the 50% Rule, adopting the 50% VAP Rule, or adopting the 50% CVAP Rule — collectively have jurisdiction over more than 56% of the Nation's minority population.[13] Allowing this issue to percolate longer will only exacerbate, not cure, the split among the lower courts.

III. THIS CASE IS THE PERFECT VEHICLE FOR RESOLVING THE ISSUE.

This case presents a clean opportunity to resolve the Section 2 issue that this Court repeatedly has left open and that now divides the lower courts. The case was decided on cross-motions for summary judgment, and the key facts were stipulated. Pet. App. 6a-9a. Moreover, the validity or invalidity of

---

[13] *See* U.S. Bureau of the Census, Population by Race and Hispanic or Latino Origin, *available at* http://www.census.gov/population/cen2000/phc-t6/tab01.xls.

North Carolina House District 18 turns on one and only one issue: whether the 50% Rule is correct. The case therefore avoids the various obstacles that prevented the Court from deciding this issue earlier.

Unlike *Gingles*, this case presents a concrete example of a coalition district, where African-Americans, constituting only 43% of the district's total population, can coalesce with enough white voters to nominate and elect their preferred candidates. Pet. App. 46a.

Unlike *Growe*, this case involves a district that is geographically compact (see color map, *id.* at 132a), and the parties stipulated that the African-American community in and around Wilmington is politically cohesive. *Id.* at 98-103a, 129a-130a.

Unlike *Voinovich*, this case includes the parties' stipulation that the white majority in New Hanover and Pender Counties votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. *Id.* at 9a, 114a, 129a-130a.

Unlike *De Grandy*, this case presents undisputed evidence that African-American citizens cannot elect candidates of their choice in a number of districts roughly proportional to their share in the statewide population, even with District 18 performing solidly as a coalition district. *Id.* at 60a.

Unlike *Valdespino* and *Perez*, this case presents no thorny factual issues about demographic or naturalization trends since the last census. *Id.* at 5a.

Unlike *Ashcroft*, this case presents a pure Section 2 issue, as neither New Hanover nor Pender County

is covered by Section 5 of the Voting Rights Act. *Id.* at 64a.

And unlike *Perry*, this case deals with a district that has now twice nominated and elected an African-American representative who, by garnering overwhelming support from the black community and limited but reliable crossover support from some white voters, has staved off an array of challengers, black and white, Democratic and Republican. *Id.* at 46a.

One could hardly design a better vehicle than this case for resolving the "important question of federal law" presented in the petition. S. CT. R. 10(c).

IV. FAILING TO SETTLE THIS ISSUE BEFORE THE 2010 CENSUS WILL GENERATE NEEDLESS TURMOIL IN THE NEXT DECENNIAL ROUND OF REDISTRICTING.

Leaving the proper interpretation of Section 2 unresolved could wreak havoc on the congressional, state-legislative, and local redistricting that will follow the 2010 census.

1. As this case amply demonstrates, even when circuit precedent is clear, intra-circuit confusion will abound in the state courts, where redistricting litigation typically begins. *See Growe*, 507 U.S. at 32-37. Here, for example, the Fourth Circuit's unequivocal adoption of the 50% Rule in *Hall v. Virginia*, 385 F.3d 421, 427-32 (4th Cir. 2004), did not prevent a unanimous three-judge state trial court, as well as the dissenting justices on the North Carolina Supreme Court, from rejecting that rule and holding coalition-district claims cognizable. Pet.

App. 44a-45a, 90a-92a. After all, no state-court judgment is appealable to the Fourth Circuit.

2. If the Court resolves this issue *after* the 2010 census, States that redrew their districts in 2011 or 2012 based on what turns out to be the "wrong" interpretation of Section 2 will be sued and forced to engage in mid-decade "re-redistricting" to cure their Section 2 violations. The best time to resolve the question presented here is shortly before the census.

3. Absent timely resolution by this Court, ambiguity in Section 2 will leave too much unchanneled discretion in the hands of political line-drawers. The latitude to draw district lines based on either of two contrary interpretations of Section 2 will add one more weapon to politicians' arsenals in the gerrymandering wars. Legislators from a State's dominant political party will adopt whichever interpretation suits their partisan interests. And legislators from the "out" party will couch their partisan grievances in race-based terms, injecting racialized arguments into the legislative record to lay the groundwork for an eventual Section 2 challenge in court. It would be a bitter irony indeed if this Court's inaction transformed the Voting Rights Act into a tool for burdening representational rights.

4. Absent clear guidance from this Court, States that draw coalition districts, such as the 43% black district at issue here, may be dragged into court for failing to draw 50.001% black (or Latino) districts instead. *See Growe*, 507 U.S. at 38 n.4 (suggesting that the measure of whether a Section 2 violation has occurred is also the measure of whether a Section 2 violation has been remedied); Pet. App.

33a. Indeed, on the very day North Carolina's election officials filed their petition in this Court, they were sued on precisely this basis in federal district court. *See* Complaint at 36-38, *Dean v. Leake*, No. 2:07-CV-00051-FL-AD-RC (E.D.N.C. 2007). Plaintiffs in that case claim that Section 2 now requires the State to extend House District 18 beyond the Wilmington metropolitan area and media market, deep into the Mid-Carolina region, just to push the district's citizen voting-age population above 50%. That sort of lawsuit should be nipped in the bud. No State should be held liable for creating a reasonable number of geographically compact districts where minority voters can coalesce with other voters "to elect representatives of their choice." 42 U.S.C. § 1973(b).

Indeed, the mere threat of such lawsuits inevitably will encourage racial gerrymandering of the type this Court condemned in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995). In many areas, rejiggering an indisputably compact coalition district to push its minority percentage up over an artificial 50% black or 50% Latino threshold will require shooting narrow tentacles out from the district's central core to grab distant pockets of minority population. *See Bush v. Vera*, 517 U.S. 952, 965-73 (1996) (plurality opinion). States will find themselves in the same quandary they faced during the 1991-1992 redistricting, feeling pressure to violate the Equal Protection Clause in order to comply with the Voting Rights Act. *See Miller*, 515 U.S. at 927-28.

5. The issue presented here will only grow in importance in the coming years, because the opportunities to elect minority candidates from coalition districts are increasing over time.

In the early years of Voting Rights Act enforcement, it was widely believed that minority districts could overcome white bloc voting and elect minority-preferred candidates only if the minority group constituted at least 65% of the total population. *See, e.g.*, *Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984). Later, the effectiveness threshold was thought to have dropped to about 50%. Today, as this Court recognized in *Ashcroft*, political scientists agree that in many places that figure has declined by another 10 or 15 percentage points.[14]

In 1982, when Congress last amended Section 2, only four African-American Members of Congress hailed from districts whose voting-age populations were less than half black.[15] By contrast, today, most of the 41 African-American Members of Congress represent such constituencies, and there remains only one congressional district in the entire Nation

---

[14] *See Ashcroft*, 539 U.S. at 480, 483 (citing Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002)).

[15] *See* POLITICS IN AMERICA 1982, at 103, 150, 156, 1190 (1981).

that is at least 65% black.[16] This progress in overcoming racial isolation should be celebrated, not stymied.

At the same time, no one should ignore the empirical reality that the threshold at which minority voters have a better-than-even chance of electing their preferred candidates varies significantly depending on the State, the particular area within a given State, and the particular minority group or groups at issue. *Compare, e.g.*, *Page v. Bartels*, 144 F. Supp. 2d 346, 362-66 (D.N.J. 2001) (three-judge court) (holding that a 27.5% black district satisfied Section 2), *with Cottier v. City of Martin*, 475 F. Supp. 2d 932, 938 (D.S.D. 2007) (holding that a 54.5% Indian district did not satisfy Section 2).

All of this suggests that rejecting rigid numerical quotas and interpreting Section 2 flexibly will allow the Voting Rights Act's strictures to ratchet down as politics and housing patterns become increasingly integrated and as minority leaders build their capacity to "pull, haul, and trade" with their white counterparts. *De Grandy*, 512 U.S. at 1020. Over time, majority-black and majority-Latino districts will continue to be replaced by coalition districts, many of which will come to resemble microcosms of our increasingly diverse Nation. And the Voting Rights Act will naturally unwind itself, as it helps

---

[16] *See* CQ'S POLITICS IN AMERICA 2008: THE 110TH CONGRESS 1143, 1160 (2007).

pave our "transition to a society where race no longer matters." *Ashcroft*, 539 U.S. at 490.

For these reasons, the Court should grant the petition and settle the question whether Section 2 of the Voting Rights Act recognizes the viability of coalition districts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LLOYD LEONARD
LEAGUE OF WOMEN VOTERS
OF THE UNITED STATES
1730 M Street, NW, # 1000
Washington, DC 20036
(202) 429-1965

SAM HIRSCH
Counsel of Record
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

DECEMBER 21, 2007