No. 07-689

IN THE

Supreme Court of the United States

GARY BARTLETT, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND ET AL.,
Respondents.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DĒMOS: A NETWORK FOR IDEAS AND ACTION, AND THE NORTH AMERICAN SOUTH ASIAN BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the effort to assure civil rights for all Americans.[1] Protection of the voting rights of racial

[1] The parties have consented to the filing of this brief in letters or e-mails on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party

and language minorities is an important part of the Committee's work. The Committee has represented litigants in numerous voting rights cases throughout the nation over the past 45 years, including several cases before this Court.[2] The Committee has also participated as *amicus curiae* in many other significant voting rights cases.[3]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. LDF has an extensive history of involvement in efforts to eradicate barriers to the full participation of African Americans in the political process, and has represented parties or participated as *amicus curiae* in numerous voting rights cases be-

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made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g.*, *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young* v. *Fordice*, 520 U.S. 273 (1997); *Clark* v. *Roemer*, 500 U.S. 646 (1991); *Clinton* v. *Smith*, 488 U.S. 988 (1988); *Connor* v. *Finch*, 431 U.S. 407 (1977).

[3] *See, e.g.*, *Riley* v. *Kennedy*, No. 07-77, 2008 U.S. LEXIS 4517 (May 27, 2008); *Crawford* v. *Marion County Election Bd.,* 128 S. Ct. 1610 (2008)*; Miller* v. *Johnson*, 515 U.S. 900 (1995); *Johnson* v. *De Grandy*, 512 U.S. 997 (1994); *Holder* v. *Hall*, 512 U.S. 874 (1994); *Shaw* v. *Reno*, 509 U.S. 630 (1993); *Chisom* v. *Roemer*, 501 U.S. 380 (1991); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986); *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

fore this Court.[4] Of particular relevance to this case, LDF was counsel of record for the respondents in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court's leading case interpreting § 2 of the Voting Rights Act of 1965, as amended, the scope of which is at issue in this case.

Dēmos: A Network for Ideas and Action is a nonprofit, nonpartisan organization committed to building an America that achieves its highest ideals. That requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, an economy where prosperity and opportunity are broadly shared and disparity is reduced, and a revitalized public sector that works for the common good. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are key to these goals.

The North American South Asian Bar Association ("NASABA") is the umbrella organization for 25 regional bar associations in North America representing the interests of over 5,000 attorneys of South Asian descent. Within the United States, NASABA takes an active interest in the legal rights of South Asian and other minority communities, including voting rights.

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[4] *See, e.g.*, *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594 (2006); *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003); *Easley* v. *Cromartie*, 532 U.S. 234 (2001); *Bush* v. *Vera*, 517 U.S. 952 (1996); *Shaw* v. *Hunt*, 517 U.S. 899 (1996); *United States* v. *Hays*, 515 U.S. 737 (1995); *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 501 U.S. 419 (1991); *Chisom* v. *Roemer*, 501 U.S. 380 (1991); *Beer* v. *United States*, 425 U.S. 130 (1976); *White* v. *Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

SUMMARY OF ARGUMENT

In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court identified three "preconditions" to a vote dilution claim under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. § 1973. The first *Gingles* precondition is that the relevant minority group be "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. It is well settled that § 2 plaintiffs can satisfy this precondition by demonstrating that it is possible to draw a reasonably compact single-member district in which minority voters are a simple numerical majority of the population of eligible voters. The issue in this case is whether plaintiffs can satisfy the first *Gingles* precondition where they cannot meet this numerical majority test.

Amici believe the answer to this question is yes. Plaintiffs should also be able to satisfy the first *Gingles* precondition by showing that it is possible to draw a reasonably compact single-member district in which minority voters—although not a numerical majority—nonetheless have a realistic potential to elect candidates of their choice. To prove their potential to elect candidates in such a district, § 2 plaintiffs should be required to demonstrate a predictable level of white crossover voting sufficient to enable minority-preferred candidates to win elections. In these circumstances, minority voters should be deemed a *functional* majority of the proposed district's population. At the same time, however, the Court should also reaffirm that § 2 plaintiffs satisfy the first precondition where it is possible to draw a single-member district that meets the traditional numerical majority test.

In Part I, we show that a functional majority test is consistent with the text of § 2 and the logic of *Gingles*. The statute guarantees minority voters an equal "opportunity . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), but does not impose a numerical majority requirement as a precondition to relief. The purpose of the first *Gingles* precondition is to limit § 2 relief to situations in which minority voters have the potential to elect candidates of their choice. Minority voters always have that potential where a numerical majority-minority district can be drawn. But real-world election data show that notwithstanding the existence of racially polarized voting, minority voters can also have the potential to elect candidates in some districts where they are not a numerical majority. Relief under § 2 should not be foreclosed in such cases.

The North Carolina Supreme Court's concern that failure to adhere strictly to a bright line numerical majority test would create administrative difficulties and open a Pandora's box of new litigation is unwarranted. Proving a vote dilution claim under § 2 is already a demanding task. Proving the first *Gingles* factor under a functional majority test will be even more demanding, because it will require additional analysis and development of additional evidence that is not part of the existing § 2 calculus. Moreover, § 2 imposes numerous rigorous standards that cabin the scope of vote dilution claims—including most notably the requirement that plaintiffs prove the existence of racially polarized voting—and these standards will continue to apply to claims under a functional approach. Allowing plaintiffs to proceed on a functional majority theory therefore is not likely to significantly expand the scope of existing § 2 litigation.

Nor was the North Carolina Supreme Court correct in asserting that a "bright line" rule should be applied for reasons of administrative convenience. This Court has previously rejected such rigid approaches as inconsistent with the flexible nature of the § 2 inquiry. *See Johnson* v. *De Grandy*, 512 U.S. 997, 1017-21 (1994). And in any case, contrary to the North Carolina Supreme Court's assertion, a numerical majority test is not always simple or straightforward to administer. The so-called "bright line" of the numerical majority rule is, at times in actual practice, not as clear as the expression suggests. Moreover, it can encourage the parties to engage in numerical and map-drawing disputes that distract attention from what should be the key focus under § 2: whether minority voters have an equal opportunity to elect candidates of their choice.

We show in Part II that while § 2 plaintiffs should be permitted to proceed on a functional majority theory, they should not be required to do so. In other words, the Court should not simply replace the traditional numerical majority test—which courts have applied for more than two decades—with a new functional test. As *Gingles* and numerous lower court decisions make clear, satisfying a numerical majority test plainly suffices to establish potential to elect as a threshold matter because minority voters necessarily have the potential to elect candidates of their choice when they are an absolute majority of a district's population (even though in practice they may not do so in every case).

Moreover, requiring plaintiffs to prove their ability to elect candidates under a functional test in every case—even where it is clear that they could satisfy the simple numerical majority test—could pose a

substantial obstacle to § 2 plaintiffs who would otherwise have viable claims. A significant amount of § 2 litigation involves local elections for the governing bodies of small counties and municipalities. Many of these jurisdictions use at-large methods of voting or other electoral devices that this Court has recognized as being especially likely to have a discriminatory effect on minority voting strength. But in these jurisdictions, there is generally less voting data available for analysis, because there are fewer voting precincts, lower turnouts, fewer ballots cast, and often no primary elections. In such cases, even where the relevant data show a clear pattern of racially polarized voting, it may be difficult to make predictions about how a district with a particular racial composition will perform in actual practice. Yet experience shows that numerical majority-minority districts typically are an effective remedy for vote dilution in such cases. The Court should not undercut the effectiveness of this traditional remedy.

ARGUMENT

I. Minority Voters Should Be Able To Satisfy the First *Gingles* Precondition Under a Functional Majority Test.

The Supreme Court of North Carolina erred in holding that § 2 plaintiffs can never satisfy the first *Gingles* precondition unless it is possible to draw a single-member district in which minority voters are more than 50% of the eligible voting population. This Court should hold that § 2 plaintiffs can also satisfy the first *Gingles* precondition by proving—through reliable analysis of voting patterns and other relevant data—the existence of a predictable level of white crossover voting sufficient to give minority

voters a realistic potential to elect candidates of their choice in a proposed single member-district.[5] In these circumstances, minority voters constitute a *functional* majority of the proposed district's voting population, even though they are not, strictly speaking, a numerical majority.

A. The Functional Majority Test Is Consistent with the Text and Purpose of § 2 and the Logic of *Gingles*.

Nothing in the text of § 2 limits relief to cases in which it is possible to draw a majority-minority district. Nor is there anything in the legislative history that requires a numerical majority. *See* S. Rep. No. 97-417 (1982). The statute provides that a § 2 violation is established whenever the totality of the circumstances demonstrates that minority voters have "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). Thus, § 2 focuses on whether minority voters have an equal opportunity to elect their candidates of choice—not whether they constitute an absolute numerical majority of the electorate in any given district.

Moreover, Congress did not intend for the statute to be applied in a rigid, inflexible way. As *Gingles* observed, § 2 mandates that courts take a "'functional' view of the political process." 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 30 n.120 (1982)). In keeping

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[5] Members of a minority group can often also elect candidates of their choice through "coalition" voting with members of another minority group, *see, e.g., Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), but those circumstances are not presented in this case.

with that approach, this Court has stressed that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Johnson* v. *De Grandy*, 512 U.S. 997, 1007 (1994); *Voinovich* v. *Quilter*, 507 U.S. 146, 158 (1993). And it has noted that the first *Gingles* precondition might need to be "modified or eliminated" to address a claim brought by minority voters who could not constitute a majority in a single-member district. *Id.*

The functional majority test outlined above is a reasonable and appropriate modification of the *Gingles* framework. The purpose of the first precondition is to limit § 2 relief to cases in which minority voters have a realistic potential to elect candidates of their choice. As the Court explained, "[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." 478 U.S. at 50 n.17. Likewise, in *De Grandy*, the Court explained that "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S. at 1008. This formulation of the first precondition focuses on whether minority voters have the ability to elect candidates in a given district—not whether they are an absolute numerical majority.

Of course, where minority voters are a numerical majority of a district's eligible voting population, they do have the potential to elect candidates of their choice. Hence, the simple numerical majority rule applied in *Gingles* makes sense, and should continue to be applied. But it does not follow that minority voters must be a numerical majority in order to have

the potential to elect candidates. *Gingles* recognizes that even where voting is polarized along racial lines, some crossover support for the minority's preferred candidates is likely. *See* 478 U.S. at 56 ("[I]n general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover' votes* rises to the level of legally significant white bloc voting.") (emphasis added). Where there is a sufficient level of predictable crossover support, minority voters will have the potential to elect candidates of their choice even where they are not a numerical majority.[6]

Real world data confirm this conclusion. For example, 20 of the current African-American members of the House of Representatives are elected from districts that do not have a majority African-American voting age population.[7] Additionally, a detailed analysis of congressional elections involving African-American candidates in the South in the 1990s by Professors Grofman, Handley and Lublin shows that minority candidates were elected in districts that were not majority-minority notwithstanding the ex-

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[6] Justice O'Connor expressly recognized this possibility in her concurring opinion in *Gingles*:

> "[I]f a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice." 478 U.S. at 90 n.1 (O'Connor, J., concurring in judgment).

[7] *See* Brief of *Amici Curiae* Sanford D. Bishop Jr. et al. in Support of Petitioners at 10 and App. F.

istence of racially polarized voting.[8] Minority candidates were able to win election in these districts because the African-American voters were highly cohesive and because, notwithstanding the continued presence of racially polarized voting, there was a small but consistent level of white crossover support for minority-preferred candidates.

In sum, the first *Gingles* factor focuses not on whether minority voters are a numerical majority, but on whether they have a realistic potential to elect their preferred candidates. Logic and experience both demonstrate that minority voters can have a realistic potential to elect their preferred candidates even where they are not a numerical majority of the electorate in a given district, and in those circumstances, minority voters should not be foreclosed from relief under § 2.

B. The North Carolina Supreme Court's Rationale for Requiring a Numerical Majority Is Unpersuasive.

The North Carolina Supreme Court's ruling in this case is not grounded in either the text of § 2 or the logic of this Court's decisions in *Gingles* and subsequent cases. Instead, it is based on a series of policy considerations intended to show that a "bright line" numerical majority rule is the only interpretation of the first *Gingles* precondition that courts and legislatures can reasonably administer. *See Pender County* v. *Bartlett*, 649 S.E.2d 364, 373–74 (N.C. 2007) (Pet.

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[8] Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1400–03 (2001).

App. 22a-25a). None of the rationales articulated by the North Carolina Supreme Court is persuasive.

1. *Allowing Functional Majority Claims Will Not Lead to a Flood of New § 2 Litigation*. The North Carolina Supreme Court expressed concern that without a "bright line" numerical majority rule as a threshold standard for evaluating § 2 claims, there would be a "Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," 649 S.E.2d at 373 (Pet. App. 24a) (citations and internal quotation marks omitted). The court did not explain how it came to this conclusion, but in any event this concern is unwarranted. Proving a vote dilution claim under § 2 is already a demanding task, typically requiring extensive analysis by one or more experts. This, by itself, discourages "marginal" claims. For a variety of reasons, permitting plaintiffs to satisfy the first *Gingles* precondition under a functional test will not significantly ease plaintiffs' burdens under the statute and therefore is not likely to cause a significant increase in § 2 litigation.

First, the functional test is likely to be more demanding than the simple numerical majority test because it will require plaintiffs to undertake additional analysis and explore new lines of evidence that are generally not part of existing § 2 presentations. Under the numerical majority test, proof of the first precondition is straightforward. To make a *prima facie* showing, a plaintiff need only proffer a proposed district, show that it is reasonably compact, and demonstrate through the use of census data that minority voters are a majority of the eligible voting population.

By contrast, proof of the first *Gingles* factor under a functional majority test is likely to require a more complicated analysis. While the Court need not identify in this case all of the factors that might be relevant to satisfying a functional test, we note that Professors Grofman, Handley and Lublin have proposed a model that involves analysis of relative participation rates between white and minority voters, the degree of cohesion and crossover voting, the dynamics of party primaries or other multi-stage electoral processes, and the effect of incumbency.[9] Such an analysis would go beyond what is currently required to satisfy the cohesion and racial bloc voting prongs of *Gingles*. Depending on the availability of data, it might be difficult for plaintiffs to make the necessary showing in many cases. *See* discussion *infra* at 24–28. Accordingly, even if a functional test is available, many § 2 plaintiffs will likely continue to rely on the simple numerical majority test to prove the first precondition.

Second, functional majority claims are inherently self-limiting. As many courts have recognized, there is some tension between the presence of a consistent level of crossover voting, as required to satisfy the first *Gingles* precondition under a functional test, and the third *Gingles* precondition, which requires proof that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidates. As noted above, *Gingles* recognizes that a finding of legally significant racially polarized voting is not inconsistent with some degree of white crossover voting. *See* 478 U.S. at 56. But the greater the extent of crossover voting, the less likely it is

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[9] *See* Grofman et al., *supra* note 8, 79 N.C. L. REV. at 1423.

that a court will find a legally sufficient level of racially polarized voting. *See, e.g.*, *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 943 n.9 (7th Cir. 1988) ("The existence of a cross-over, of course, weakens *pro tanto* the assumption of racial bloc voting."). Where a § 2 claim is premised on a very high level of white crossover voting, it will run a correspondingly high risk of being dismissed under the third prong of *Gingles*.

Third, minority voters cannot plausibly claim to be a functional majority in a proposed district unless they are a least a substantial minority of the district's population. How substantial that minority must be, of course, depends on the extent of crossover voting. But the fact that the threshold necessary to enable the election of minority-preferred candidates may be less than 50% does not mean that there is no threshold at all. As petitioners suggest, the minority group must, at a minimum, be "significantly larger in size than the crossover group that would be necessary for a coalition between the two to constitute a majority in the district." Pet. Br. 41.

Fourth, there are other limiting principles generally applicable in § 2 litigation that will further cabin the extent of claims under a functional majority test. The most significant of these is the principle of rough proportionality discussed in *De Grandy*. In that case, the Court rejected the notion that § 2 requires creation of the maximum possible number of majority-controlled districts, 512 U.S. at 1016–17, and recognized that proportionality, while not dispositive, provides a guide as to the number of effective majority-

minority districts that must be created.[10] Accordingly, the Court found no § 2 violation where "minority voters form[ed] effective voting majorities in a number of districts roughly proportional to minority voters' respective shares in the voting-age population." *Id.* at 1000. This reasoning indicates that a relaxation of the numerical majority rule should not require jurisdictions to create a number of new "functional" majority districts. Under *De Grandy*, if a jurisdiction has created a number of districts in which minority voters have an opportunity to elect candidates of their choice that is roughly proportional to minority voters' share of the population—regardless of whether those districts are traditional majority-minority districts or functional majority-minority districts—it should not face § 2 liability.[11]

Section 2 imposes other limitations as well. For example, this Court has made clear that any proposed district must be reasonably compact, which means it must "take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *League of United Latin*

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[10] Of course, as *De Grandy* makes clear, proportionality is not by itself a safe harbor. 512 U.S. at 1017–21; *see also id.* at 1025 (O'Connor, J., concurring) ("[P]roportionality . . . is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive."); 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[11] Legislatures and other redistricting bodies undoubtedly have some discretion in how they comply with their obligations under § 2, including whether to comply by creating functional majority-minority districts or traditional numerical majority-minority districts. *Cf. Georgia* v. *Ashcroft*, 539 U.S. 461, 480, 483 (2003).

Am. Citizens v. *Perry*, 126 S. Ct. 2594, 2618 (2006) (citations and internal quotation marks omitted). This rule would continue to apply to any proposed functional majority district, just as it would for any proposed numerical majority district.

Finally, it is important to bear in mind that the *Gingles* factors are only intended as gatekeeping conditions. Plaintiffs must still establish in every case that based upon the totality of the circumstances, minority voters have "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); *see De Grandy*, 512 U.S. at 1011–12. Thus, the fact that § 2 plaintiffs can demonstrate the possibility of drawing a district in which they are a functional majority does not mean they will ultimately prevail in a vote dilution claim.

For all of these reasons, recognition of the functional majority test is unlikely to cause a flood of new litigation. Of course, some cases could be brought under a functional majority test that cannot be brought under a numerical majority test. But in practice, the functional approach is likely to be viable in just a few relatively discrete categories of cases. First, there are cases in which minority voters either fall just short of being a numerical majority or where there is a dispute over whether those voters constitute such a majority. Second, there are cases like this one which involve minority voters who have historically been able to elect candidates of their choice, but who do not constitute a numerical majority. Finally, there may also be a few cases in which a geographically compact and politically cohesive minority community has been divided among several districts, even though it could have constituted a functional

majority (and hence elected candidates of its choice) if the community had been left intact in one single-member district. If the other prerequisites for a vote dilution claim can be established, § 2 ought to provide a remedy in each of these circumstances.

2. *A Rigid and Inflexible "Bright Line" Test Is Inconsistent With the Statute.* The North Carolina Supreme Court also stated that a "bright line" numerical majority test "promotes ease of application" and "provides [state legislatures] with a safe harbor for the redistricting process." 649 S.E.2d at 373 (Pet. App. 23a-24a). This concern is misplaced here; the North Carolina legislature had no difficulty drawing a functional majority district and the state is not arguing for strict adherence to a numerical majority rule.

But in any case, ease of application for legislatures or other redistricting bodies is not a factor that is entitled to any significant weight in the interpretation of § 2. The Voting Rights Act is designed to protect the rights of *citizens*—not state legislatures. Adoption of rigid and inflexible bright-line rules for reasons of administrative convenience is inconsistent with Congress's purpose. That is why the Court has not adopted bright-line rules with respect to the second and third *Gingles* preconditions, and why, in *De Grandy*, it specifically rejected an interpretation of the first precondition that would have created a "safe harbor" for legislatures. *See* 512 U.S. at 1018 (holding that "[a]n inflexible rule would run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of the circumstances'") (quoting 42 U.S.C. § 1973(b)).

3. *The "Bright Line" Test Is Not Always So Clear*. The North Carolina Supreme Court's statement that a numerical majority rule is "straightforward and easily administered" and can be applied "fairly, equally, and consistently," 649 S.E.2d at 373 (Pet. App. 23a), also overstates the case. More than two decades of experience with the numerical majority test have demonstrated that the so-called "bright line" is not always so clear in actual practice. Further, the rule can have the undesirable effect of encouraging disputes over numerical issues and map drawing, which distract attention from what should be the proper focus under § 2: creating districts in which minority voters have a realistic opportunity elect candidates of their choice.

The Fifth Circuit's decision in *Valdespino* v. *Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), is a case in point. In that case, Hispanic voters challenged the use of at-large elections for positions on a seven-member board of trustees for a local school district. Using 1990 census data, they demonstrated that it was possible to divide the school districts into seven single-member districts, including one in which minority voters would constitute a majority of the citizen voting-age population. Thus, based on census data, there should have been no question that plaintiffs satisfied a "bright line" numerical majority test.

Nonetheless, the district court held that plaintiffs had not cleared the hurdle of the first *Gingles* precondition. It permitted the school district to introduce evidence that, since the time of the census, one large apartment complex in the proposed majority-Hispanic district had been renovated and had lost population, while another large apartment complex

had been built outside the district, increasing population there. Taking these changes into account, the school district's expert concluded that it was not possible to draw a district in which Hispanic voters were more than 48.3% of the citizen voting-age population ("CVAP"). The district court credited this analysis and denied relief, and the Fifth Circuit affirmed, holding that *Gingles* mandates a strict, bright-line numerical majority rule.

The Fifth Circuit's decision reflects an unduly rigid and formalistic interpretation of § 2. This Court has long recognized the discriminatory potential of at-large election schemes like the one at issue in *Valdespino*. *See, e.g.*, *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) ("We have . . . stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . .").[12] Where voting is sharply polarized along racial lines in such a jurisdiction, minority voters have as a practical matter no realistic opportunity to elect candidates of their choice in any election. In such circumstances, minority voters' ability to participate in the political process is curtailed just as effectively as if they had been denied access to the ballot altogether. Under the

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[12] *See also Gingles,* 478 U.S. at 47 ("This Court has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.") (citations and internal quotation marks omitted); *Rogers* v. *Lodge*, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.").

facts of *Valdespino*, however, it seems likely that minority voters could have had a realistic opportunity to elect a candidate of their choice if at-large voting had been replaced by a single-member district system, regardless of whether they were a strict 51% majority of CVAP—as the census data showed—or merely a substantial 48.3% minority in a proposed district. If plaintiffs had been given the option of proceeding under a functional test, they would have had an opportunity to prove their ability to elect candidates in their proposed district; instead, they were denied relief altogether.

Thompson v. *Glades County Board of County Commissioners*, 493 F.3d 1253 (11th Cir. 2007), similarly illustrates that the so-called "bright line" rule is not so clear. That case involved a challenge to an at-large voting scheme in a small county, with a voting-age population ("VAP") of 8,329. Plaintiffs demonstrated that it was possible to draw a single-member district in which African Americans were 50.23% of VAP—a very small majority, but a majority nonetheless. Nonetheless, the district court held that the first *Gingles* precondition was not satisfied because the record did not contain evidence of "voter registrations, voting rates, or voter practices which would give real world meaning to the statistically sufficient district." *Id.* at 1262. A divided panel of the Eleventh Circuit reversed, holding—over a dissent from Judge Tjoflat—that (1) "[a] majority is a majority, by however how small a margin," *id.*, (2) there was no evidence to suggest that the white minority, at 33% of VAP, would turn out in sufficient force to outvote the African-American majority, and (3) in any event, there was sufficient white crossover voting to enable minority voters to elect candidates of choice in the

proposed district. But the Eleventh Circuit subsequently vacated the panel decision and granted *en banc* review. *See Thompson* v. *Glades County Bd. of County Comm'rs*, 508 F.3d 975 (11th Cir. 2007) (en banc). Thus, it is still unclear in the Eleventh Circuit whether even a literal majority is necessarily sufficient to satisfy the first precondition.

Thompson again illustrates the difficulties in attaching talismanic significance to a numerical majority as the *only* measure of a minority group's ability to elect candidates. This rigid approach encourages manipulation of numbers and indeed, the very concept of a "numerical majority." By contrast, recognition of a functional approach would discourage legislatures and courts from drawing fine distinctions between a 49.5% minority district and a 50.5% minority district—a difference that is unlikely to have much impact in the real world—and instead focus their attention on whether the plan, as a whole, has the effect of diluting minority voting strength.

4. *Potentially Meritorious Claims Should Not Be Dismissed at the Gatekeeping Stage.* The North Carolina Supreme Court also candidly acknowledged that "a bright line rule 'might conceivably foreclose a meritorious claim . . . .'" 649 S.E.2d at 373 (Pet. App. 24a) (quoting *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 943 (7th Cir. 1988)). This statement highlights the problem with a rigid bright-line rule. We are not aware of any principle of law that permits a federal court to close its doors to plaintiffs with a potentially meritorious § 2 claim merely for reasons of administrative convenience or because it doubts that the claim will ultimately be successful. As we have shown, there are some circumstances in which minority voters who do not have an equal opportunity

to elect candidates of their choice under an existing electoral system could elect candidates of their choice under an alternative system—notwithstanding their inability to satisfy the numerical majority test. That is why the numerical majority test should not be the only way of satisfying the first precondition.

II. The Court Should Reaffirm That a Minority Group Satisfies the First *Gingles* Precondition Where It Meets the Numerical Majority Test.

While § 2 plaintiffs should be permitted to rely on the functional test to satisfy the first precondition, they should not be *required* to do so. This Court and the lower courts have long permitted plaintiffs to satisfy the first *Gingles* precondition by showing that they are a simple numerical majority in a single-member district, and there is no reason to abandon that test in this case. Rather, plaintiffs should be permitted to satisfy the first precondition under either the functional test or the traditional numerical majority test.

A. Where Minority Voters Are a Numerical Majority They Necessarily Have the Potential To Elect Their Candidates of Choice.

The numerical majority test is consistent with the text of § 2 because minority voters necessarily have a realistic opportunity to elect representatives of their choice when they are a numerical majority of a district's population. The majority opinion in *Gingles* properly recognized that a numerical majority is sufficient to demonstrate that minority voters have the "*potential* to elect representatives." 478 U.S. at 50 n.17. Justice O'Connor's concurring opinion makes

the same point: "It is true that a minority group that could constitute a majority in a single-member district ordinarily has the potential ability to elect representatives without white support . . . ." 478 U.S. at 90 n.1 (O'Connor, J., concurring in judgment).[13]

The courts of appeals have likewise consistently recognized that minority voters can elect candidates of their choice where they meet a numerical majority test. For example, the Fourth Circuit has stated that "minority voters have the potential to elect a candidate *on the strength of their own ballots* when they can form a majority of the voters in some single-member district." *Hall* v. *Commonwealth of Virginia*, 385 F.3d 421, 429 (4th Cir. 2004).[14] In short, the numerical majority threshold is an appropriate proxy for identifying viable § 2 claims because it represents the point at which minority voters can elect candidates of their choice without *any* crossover support.

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[13] This is not to say that creation of a district in which minority voters are a bare numerical majority will ensure that they can always elect candidates of their choice. But Congress did not intend to guarantee minority voters a 100% chance of success in any election. Instead, the statute guarantees minority voters an equal "*opportunity* . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added).

[14] *See also Thompson*, 493 F.3d at 1262 ("50% numerical majority [is] sufficient" to satisfy the first precondition); *Cottier* v. *City of Martin*, 445 F.3d 1113, 1117 (8th Cir. 2006) (Native-American majorities have "potential to elect"); *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988) (numerical majority standard allows courts to "estimate approximately the ability of minorities in a single-member district to elect candidates of their choice.").

B. Requiring Proof of a Functional Majority in Every Case Could Pose a Significant Obstacle for Many § 2 Plaintiffs and Undercut the Statute's Effectiveness As a Remedy for Vote Dilution.

There are also intensely practical reasons why the Court should not abandon the traditional numerical majority standard. As discussed *supra* at 12–13, a functional majority test is likely to be more demanding than the simple numerical majority test because of the need for additional data and analysis. The functional approach is likely to be especially problematic in cases involving local elections for governing bodies (*e.g.*, city councils, county commissions, and local school boards) in small counties and municipalities.

A substantial amount of § 2 litigation involves local election practices in these kinds of small jurisdictions—many of which employ at-large voting, multimember districts, or other devices that are likely to dilute minority voting strength.[15] For example, in *Thompson*, African American plaintiffs challenged the use of at-large elections for the county commission and school board in a county with a voting age population of only 8,329 people. 493 F.3d at 1256. And in *Cottier* v. *City of Martin*, 445 F.3d 1113 (8th Cir. 2006), Native American plaintiffs challenged the use of multimember districts in city council elections

[15] By contrast, many of this Court's § 2 cases (including *Gingles, Growe*, *Voinovich*, *De Grandy*, and *Perry*) have involved challenges to Congressional or state legislative districting schemes.

in a city of only 1,078 people.[16] In these kinds of cases, plaintiffs who currently have a remedy under § 2 might not have a remedy if they were not permitted to rely on a numerical test. Requiring the use of a functional test would therefore undercut the statute's effectiveness as a remedy for vote dilution.

Proving vote dilution in local elections in small jurisdictions is materially different from proving vote dilution in the context of Congressional or state legislative redistricting cases because there are typically fewer voting precincts, fewer voters and lower voter turnout for purely local elections, and in many cases no primaries. Minority voters in these jurisdictions may be able to satisfy the cohesion and racial bloc voting prongs of *Gingles* through a combination of statistical analysis and anecdotal evidence, including the lack of success of minority-preferred candidates.[17] But proving that minority voters have the potential to elect candidates of their choice will require § 2 plaintiffs to make predictions about future voting behavior based on an analysis of past voting behavior and the racial composition of the proposed district. As noted above, this will likely require a statistical analysis of relative voter participation rates and the degree of minority and white voter cohesion and crossover voting, and potentially many other fac-

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[16] *See also United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004) (challenge to at-large elections for county commission in county of 7,009 residents).

[17] For example, in *Cottier*, the Eighth Circuit had no difficulty concluding that the second and third preconditions had been proven where plaintiffs presented statistical evidence and lay testimony of voter cohesion and the evidence showed a consistent pattern of minority-preferred candidates being defeated in elections in the multimember districts. 445 F.3d at 1119-21.

tors.[18] In small jurisdictions, the data may be insufficient to enable either side to conduct this analysis with sufficient statistical significance to make reliable predictions about the threshold population level necessary to give minority voters an equal opportunity to elect their candidates of choice. In other words, even when the data are clear in their general pattern—unambiguously showing racially polarized voting—they may be ambiguous in their specifics, hindering reliable predictions about future voting behavior. Minority voters should not be foreclosed from relief under § 2 just because they hail from a small county or town with fewer data points for analysis in circumstances where other available information sheds the necessary light.

Moreover, even where it is possible to conduct a functional analysis in these jurisdictions, that analysis is likely to underestimate minority voting strength. A functional analysis is necessarily based on trends observed in *past* elections, and use of a dilutive voting system tends to discourage minorities from participating in the electoral process. The Ninth Circuit acknowledged this depressive effect in *Gomez* v. *City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988). In reversing a district court's finding that a low turnout rate among Hispanic voters evidenced a lack of cohesiveness, the court noted that "[l]ow voter registration and turnout have often been considered evidence of minority voters' lack of *ability* to participate effectively in the political process" and that "de-

[18] *See* Grofman et al., *supra* note 8, 79 N.C. L. REV. at 1423.

pressed registration rates may often be traceable in part to historical discrimination." *Id.* at 1416 n.4.[19]

The aftermath of *Gomez* demonstrates the limitations of an approach that relies on historical patterns to predict future voting behavior. Following the Ninth Circuit's decision, the at-large voting system in Watsonville was replaced with a system of single-member districts. A study of voter behavior in Watsonville concluded that the district system "effectively broke a racial barrier that kept Latino and other minority candidates from winning city council offices," paving the way for the election of a Latino mayor two years later.[20] Notably, it also led to a significant increase in Hispanic voter turnout.[21] Other studies have documented a similar effect.[22] Thus when dilution is remedied by creation of a majority-minority district, it is reasonable to expect that minority participation will increase, and minorities will have a greater opportunity to elect candidates of their choice than the backward-looking functional

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[19] *See also Uno* v. *City of Holyoke*, 72 F.3d 973, 986 (1st Cir. 1995) ("low voter turnout in the minority community sometimes may result from the interaction of the electoral system with the effects of past discrimination, which together operate to discourage meaningful electoral participation").

[20] Paule C. Takash, *Remedying Racial and Ethnic Inequality in California Politics: Watsonville Before and After District Elections,* 1 Chicano/Latino Policy Project Report 37 (1999), *available at* http://repositories.cdlib.org/issc/clpr/pr/Takash1999/.

[21] *Id.* at 38-39, 49.

[22] *See* Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004) ("Majority-minority districting boosts Latino turnout . . . .").

analysis would suggest. This effect is difficult to quantify through statistical analysis, but that does not make it any less real.

The Court is not writing on a blank slate in this case. More than 25 years of experience in the application of amended § 2 has demonstrated that the creation of single member districts in which minority voters are a simple numerical majority has given those voters a meaningful opportunity to participate in the political process and to elect representatives of their choice for the first time in history. While *amici* believe the Court should reverse the judgment of the North Carolina Supreme Court and recognize the functional test, it should not do so in a manner that undercuts the effectiveness of § 2 as a remedy for the often severe vote dilution that persists in many jurisdictions across the country. To that end, the Court should also reaffirm the continued validity of the simple numerical majority test.

CONCLUSION

The judgment of the North Carolina Supreme Court should be reversed, and the matter remanded for consideration of whether minority voters in House District 18 are a functional majority and, if so, whether the totality of the circumstances requires the creation of a functional majority district in Pender and New Hanover Counties.

Respectfully submitted,

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