No. 07-689

In the Supreme Court of the United States

GARY BARTLETT, ET AL.,
*Petitioners,*

v.

DWIGHT STRICKLAND, ET AL.,

*Respondents.*

**On Writ of Certiorari to the North Carolina Supreme Court**

# BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES, AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

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

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## STATEMENT OF AMICUS INTEREST[1]

The Florida House of Representatives ("Florida House") has a direct interest in this case because of its need for a clear redistricting standard under the Voting Rights Act that can be implemented in light of Florida's unique and ever-changing demographics. Without a clear "majority-minority" standard for potential VRA dilution claims, the Florida House cannot effectively draw districts that comply with federal law. Florida's population trends change frequently, and as such any standard below the majority-minority threshold would be unworkable for Florida to implement with any certainty, thereby vastly increasing the potential for claims under Section 2 of the VRA. Courts would then have to create standards to decide whether competing minority populations below a numerical majority could nonetheless have the potential to elect their candidates of choice, thereby effectively taking redistricting decisions out of the hands of the Florida Legislature.

## SUMMARY OF ARGUMENT

This Court should affirm the decision of the North Carolina Supreme Court in *Pender County v. Bartlett,* 649 S.E.2d 364 (N.C. 2007). In holding that a minority group must show that it makes up a numerical majority of the population in a proposed district to state a Section 2 claim under the Voting

[1] All parties to this case have consented to the filing of this amicus brief, and consent letters are on file with the Clerk of Court.

Rights Act, the North Carolina court complied with both the literal language of the VRA as well as this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In adopting the "50% (plus one) rule"[2] as a threshold for Section 2 claims, the court below followed the holdings of all federal circuit courts that have decided the issue, reasoning that a numerical majority requirement is the most objective and workable rule that will allow legislatures to do their jobs with less judicial interference in the political process of drawing electoral districts.

In passing the VRA, Congress intended to remedy past discrimination and provide equal electoral opportunities to all voters regardless of race. Congress intended to protect minority groups from discrimination, not to give them a preferred right to elect their candidate of choice. As such, the VRA does not create a preferred status for any particular group; it only ensures that all groups can vote on equal footing. A clear numerical "majority-minority" rule comports with the intent of the VRA by recognizing the need for an equal opportunity to elect a candidate, without creating a *right* to elect a preferred candidate for groups that comprise less than a majority of a proposed district's population.

The "50% rule" also adheres to this Court's holding in *Gingles* by giving the threshold requirement of a "majority" in any proposed district its natural and ordinary meaning. Although this

[2] This bright-line threshold will be hereinafter referred to as "the 50% rule" or the "majority-minority" rule.

Court has never specifically adopted the threshold rule, the Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuit courts of appeal have interpreted the VRA and *Gingles* to suggest a "majority-minority" rule; no circuit has clearly adopted a contrary standard or interpretation of the first *Gingles* threshold. Furthermore, in amending Section 5 of the VRA (dealing with re-districting, pre-clearance and retrogression) in 2006, Congress made clear that so-called "coalition districts" (proposed districts with less than a numerical majority of minority voters, but with crossover votes from other groups) are *not* protected in the redistricting process. As such, adoption of the "50% rule" for purposes of Section 2 comports with the retrogression analysis of Section 5. This Court should therefore adopt the "50% rule" as the standard under the first *Gingles* prong.

The North Carolina court was also correct in reasoning that the accepted "50% rule" is easy for legislatures to administer and will reduce the number of cases in which the judiciary must intrude into redistricting decisions. Without a clear "majority-minority" standard, courts will increasingly engage in complicated decisions regarding sufficient minority populations to potentially elect preferred candidates. The judiciary will also have to resolve conflicting claims involving competing minority groups. In other words, by requiring legislatures to protect "coalition districts" without a clear, objective standard or population percentage that must be met by groups claiming dilution, a veritable "Pandora's Box" of litigation will

be opened that will obstruct redistricting for years to come.

It is important for this Court to recognize that the VRA does not protect the opportunities of *political parties* to potentially elect their candidates of choice, but instead protects opportunities for *minority groups* to vote free from discrimination. By adopting the Petitioners' requirement that legislatures take heed of "coalition districts" in the redistricting process or face dilution claims, however, this Court would be protecting the rights of less-than-majority minority groups to band with other groups to elect candidates from their shared political party. This result is not the purpose of the VRA.

Lastly, adopting the "50% rule" threshold would comport with principles of equal protection. Should this Court require legislatures to protect "coalition districts," it would be sanctioning the dispersion and dilution of minority voting power. It is axiomatic that Section 2 deals only with vote dilution, and adhering to a "50% rule" as a threshold to state a dilution claim would not discourage the formation of coalitions between groups or sanction the intentional "packing" of minority groups into districts where they are not naturally located. Instead, a "majority-minority" threshold simply requires legislatures to pay attention to naturally occurring, compact minority districts or face dilution claims. This standard aligns with the limited intent of the VRA as well as equal protection principles because it prevents dilution of minority voting power by protecting against the "unpacking" of natural majority-minority districts. Accordingly, this Court

should affirm the North Carolina Supreme Court and hold that when a minority group constitutes less than 50% of a proposed district's population, there can be no vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

## ARGUMENT

### I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT COMPLIES WITH THE VOTING RIGHTS ACT, *GINGLES*, AND DECISIONS FROM ALL FEDERAL CIRCUITS THAT HAVE CONSIDERED THE "MAJORITY-MINORITY" REQUIREMENT.

The decision of the North Carolina Supreme Court in *Bartlett* complies with the literal language of Section 2 of the Voting Rights Act as well as this Court's holding in *Thornburg v. Gingles*, 478 U.S. 30 (1986). It follows the holdings of all federal circuit courts that have decided the issue by reasoning that a minority group must show that it makes up a numerical majority of the population in a proposed district, and thereby could potentially elect the candidate of its choice. This "50% rule" has been held to be the most workable rule that will allow legislatures to do their jobs with less judicial interference in the inherently political process of drawing electoral districts.

### A. The VRA and *Gingles* dictate that a clear "majority-minority" threshold should be the standard.

Congress intended to remedy past discrimination and provide equal electoral opportunities to everyone through the passage of the Voting Rights Act. Section 2(a) of the VRA prohibits any electoral practice or procedure that "results in the denial or abridgement of the right . . . to vote on account of race or color," while Section 2(b) states that Section 2(a) is violated if, "based on the totality of the circumstances, it is shown that the political processes leading to the nomination or election" of candidates are not "equally open to participation by" minority voters, such 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(a); 42 U.S.C. § 1973(b) (emphasis added).

Importantly, the VRA does not set standards for legislative drawing of district lines, and Congress has never stated in Section 2 that it had any intent to interfere with state legislative duties to construct electoral districts. The intent of the VRA is simply to protect minority groups from discrimination and vote dilution, not to give them a preferred right to elect their candidates of choice. In short, the Act is about equal and nondiscriminatory electoral *opportunities*, not about creating an affirmative preferred status of any particular group. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 152 (1993). The VRA does not protect any specific group; instead, all groups are guaranteed equal footing in every election, and they

have to work equally at building coalitions if they do not make up a numerical majority on their own. A clear numerical "majority-minority" threshold rule comports with the purpose and intent of the VRA by recognizing the need for an equal and clear opportunity to elect a candidate without creating a right to elect a preferred candidate for groups that comprise less than a majority of a proposed district's population.

Moreover, the "50% rule" comports with this Court's holding in *Gingles* by giving the threshold requirement of a "majority" in any proposed district its natural and ordinary meaning. The three preconditions for proving vote dilution this Court set forth in *Gingles* are: (1) that the minority group demonstrate "that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district"; (2) "that it is politically cohesive;" and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50 (emphasis added). The North Carolina Supreme Court correctly gave the word "majority" in the first precondition its most clear and natural reading, and the one supported by overwhelming federal courts precedent: the first precondition requires a numerical majority. *Bartlett*, 649 S.E.2d at 372-73.

As the North Carolina Supreme Court noted, *Gingles* used the word "majority" in the first precondition to establish the impossibility of violating Section 2 unless a majority-minority district can be created. In other words, minority voters "cannot claim to have been injured by [a

challenged] practice or structure if their preferred candidate cannot prevail even in its absence." *Gingles,* 478 U.S. at 50 n.17. The North Carolina court therefore correctly pointed out that the first threshold requirement is essential to determine whether "minority voters possess the potential to elect representatives in the absence of the challenged practice or structure." *Bartlett,* 649 S.E.2d at 373 (quoting *Gingles*, 478 U.S. at 50 n.17). Without a clear majority-minority rule, courts are faced with the intractable task of determining whether a non-majority group has the potential to state a claim under Section 2 of the VRA. *See id.*

The Amici States discuss the Senate Report accompanying the 1982 amendments to Section 2 as demonstrating that courts should "undertake a functional review of § 2 claims, and to focus their analysis on the totality of the circumstances rather than the presence or absence of a single factor." Amici States Brief, pg. 15. This analysis misses the point, however, that this Court stated in *Gingles* that claimants must *first* establish the *threshold* requirements for a vote dilution claim, *before* it can be determined whether, under the totality of the circumstances, their voting rights have actually been diluted. The first threshold factor is to establish a majority of the population that would create an opportunity, absent the challenged practice or structure, to actually elect the minority group's preferred candidate. Nothing in the legislative history from 26 years ago (five years before *Gingles* was decided) conflicts with this threshold requirement.

The holding of the North Carolina Supreme Court therefore finds clear support in the VRA and *Gingles*, and it gives the Act its intended effect. Lacking a majority, citizen groups must work and campaign for their desired candidates on the same footing as other groups, as there is no specific obligation to provide a preferred opportunity to any specific group where no clear majority exists.

### B. Federal circuit courts have universally adopted the numerical "majority-minority" rule as a threshold requirement under the VRA and *Gingles*.

The "majority-minority" approach has gained acceptance among all the federal circuit courts that have interpreted the first *Gingles* precondition. The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have adopted or favorably discussed the "50% rule," and no circuit has clearly adopted a contrary standard or interpretation of the first *Gingles* threshold.

More than twenty years ago, the Seventh Circuit Court of Appeals was the first to weigh in on the initial threshold requirement for a vote dilution claim under Section 2 of the Voting Rights Act. In *McNeil v. Springfield Park Dist.,* 851 F.2d 937 (7th Cir. 1988), African American voters challenged the city's at-large voting system as diluting their votes under the VRA. The Seventh Circuit affirmed summary judgment in favor of the city because the voters did not demonstrate that their minority group would make up a majority in a proposed district. The

minority population in *McNeil* made up less than ten percent of the total population, and as such the *Gingles* threshold was not satisfied. *See id.* at 939, n.2, 942.

The court explained that *Gingles* "combines the desire of Congress to remove barriers to section 2 claims with the Court's concern that without preconditions section 2 as amended might lead to a multitude of essentially irremediable claims." *Id.* at 943. As such, "[m]ovement away from the *Gingles* standard invites courts to build castles in the air, based on quite speculative foundations." *Id.* at 944. The bright-line "majority-minority" rule gives courts clarity in deciding whether minorities can elect candidates in their proposed districts, and even though they may be able to elect their candidates without a numerical majority, "that possibility alone is not a good reason to destroy the interests in clarity and uniformity furthered by a brightline test." *Id.*

The court therefore adhered to the bright-line "50% rule," reasoning that the only way a minority group can show that its potential to elect is "solid and substantial," and not "speculative," is to demonstrate that it comprises a majority in the district that could not be overcome by any other voting bloc. *See id.* Because the minority group in *McNeil* did not comprise a majority of the voting population in either potential district, there could be no violation of Section 2 of the VRA. *See id.*; *see also Latino Political Action Comm. v. City of Boston*, 609 F. Supp. 739 (D. Mass. 1985) (holding that Boston's districting plan did not dilute Hispanic voting strength because the minority group could not show

that a district containing a Hispanic voting majority could be created).

The Tenth Circuit favorably discussed this interpretation in *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996). Although the court held that a state legislative district unlawfully diluted Hispanic voting strength under Section 2 of the VRA, the court reasoned that the first *Gingles* precondition ("sufficiently large and geographically compact") requires a "majority-minority" determination in order to determine whether there is a possibility of a Section 2 remedy. *See id.* at 1311. Otherwise, "if the minority group is small and dispersed, no single member district could be created to remedy its grievance." *Id.* As such, the court found that "satisfaction of the first [*Gingles*] precondition requires plaintiffs show a majority-Hispanic district is feasible; a remedy is possible." *Id.* at 1314.

In *Negron v. City of Miami Beach, Florida*, 113 F.3d 1563, 1568 (11th Cir. 1997), the Eleventh Circuit Court of Appeals held that a Hispanic minority group had failed to meet the first *Gingles* prerequisite when it failed to show a single district where Hispanics could form a majority. The court explained that because no numerical majority population existed in any of the proposed Hispanic districts, there could be no Section 2 violation. *See id.*[3] The court reasoned that "if, although

[3] As Respondents point out in their opposition to the petition, the Eleventh Circuit arguably addressed this issue in dicta in a subsequent decision, *Dillard v. Baldwin County Commissioners*, 376 F.3d 1260 (11th Cir. 2004). In *Dillard*, the (Continued…)

geographically compact, the minority group is so small in relation to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure." *Id.* at 1569. In other words, the court recognized that the minority group by itself has to make up a numerical majority in order to have the possibility of electing its preferred candidate.[4]

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Eleventh Circuit stated that the *Gingles* precondition requires some sort of "threshold level of numerical substantiality" for the minority group, and it appeared to acknowledge, in a footnote, that this level need not be a strict numerical majority. *See id.* at 1265-66, n.5. Nonetheless, the court held that the minority group's less than 10% population did not meet this threshold. *See id.* at 1266. In any event, nothing in *Dillard's* dicta changes the prior Eleventh Circuit panel's reasoning in *Negron.*

[4] More recently, the Eleventh Circuit addressed the issue of so-called "influence districts" as a remedy under the VRA. In *Thompson v. Glades County Board of Commissioners,* 493 F.3d 1253 (11th Cir. 2007), the court found that a proposed district with a 50.23% African American population – a razor-thin numerical majority – was nonetheless satisfactory under the first *Gingles* prong. The court reversed a district court decision that held that the proposed district, while a very slim majority, was nonetheless an "influence district" that did not satisfy the "majority" requirement of *Gingles. See id.* at 1267. Moreover, the Eleventh Circuit panel reasoned that "crossover votes" (i.e., coalitions between blacks and whites) would make the slim majority-minority district satisfactory under the VRA. *See id.* at 1264. The county sought rehearing en banc, however, and the full Eleventh Circuit split equally, 6-6, on rehearing, thereby affirming the district court's reasoning by operation of law. *See Thompson v. Glades County Board of County Commissioners,* (Continued…)

The Fifth Circuit addressed the first *Gingles* precondition in *Valdespino v. Alamo Heights Independent School Dist.*, 168 F.3d 848 (5th Cir. 1999), explicitly holding that a minority group had to prove that it exceeded 50% of the population in the proposed district to meet the first *Gingles* threshold. The court emphatically held that "we reject the appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population." *Id.* at 850. Accordingly, because Hispanics made up "only 47.9%" of the voting age citizen population, the minority group could not meet the initial *Gingles* precondition to state a Section 2 claim. *Id.* at 851.

The court stressed that it "has interpreted the *Gingles* factors as a bright line test," and as such "vote dilution claimants [must] prove that their minority group exceeds 50% of the relevant population in the demonstration district." *Id.* at 852. The court based this determination on this Court's reference to a "majority" in *Gingles*, and as such 50% would have to be the threshold population in a proposed district. *See id.* Only upon proving a numerical majority exists would the plaintiffs be able to attempt to prove vote dilution under the VRA.

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2008 WL 2599661 (11th Cir. 2008); *see also Thompson*, 493 F.3d at 1273 (Tjoflat, J., dissenting) ("I cannot conclude that the district court clearly erred in declining to account for the white crossover vote in its analysis of whether the plaintiffs satisfied the first *Gingles* requirement."). In other words, not only are "coalitions" not subject to consideration as to the first *Gingles* threshold in the Eleventh Circuit, one district court also held that a slim *numerical majority* may fail to meet the first *Gingles* requirement.

Most recently, in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), the Fourth Circuit Court of Appeals addressed the issue, holding that unless African American voters could prove that they actually had less opportunity than other groups to elect their preferred candidates, there could be no Section 2 claim. Because the minority plaintiffs in *Hall* were "not sufficiently numerous to form a voting majority in any single-member district in the Commonwealth of Virginia," they could not demonstrate that they would have the opportunity to elect their candidates with the drawing of the proposed district. *Id.* at 423. The court therefore affirmed dismissal of the plaintiffs' case.

In the reconfigured district at issue in *Hall*, the court pointed out that blacks only constituted 33.6 percent of the total population. *See id.* at 424. The court refused to recognize a potential district with less than a numerical majority of the minority group, along with alleged "crossover" voting from other groups, as a potential basis for a claim under the VRA. Instead, the court stated that "*Gingles* states very clearly that Section 2 plaintiffs must demonstrate that a minority group is large enough to form 'a majority' in the district," and as such "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." *Id.* at 427, 429 (emphasis in original).

The court concluded that when minority groups are too small to form a majority in their proposed districts, "they have no ability to elect

candidates of *their own* choice, but must instead rely on the support of other groups to elect candidates," and therefore they cannot show that their electoral opportunities have been diluted under Section 2. *Id.* (emphasis in original). Only by establishing the *independent* ability to dictate electoral outcomes can proposed districts meet the *Gingles* threshold, and as such "[a]s a group that could only form a minority of the voters in [the proposed district] even before the Plan's enactment, the ability to elect candidates of their own choice" would never be possible for minority groups. *Id.* at 430. Without this lost opportunity to vote on equal footing with other voters, there can be no claim for dilution.

In *Hall*, the court emphasized that the minority group constituted only 40% of the former district's population before redistricting, and therefore the group possessed the same opportunities as all other groups "that cannot form a majority of the voters in the district." *Id.* at 431. While a minority group that comprises less than a numerical majority can still join with other groups to elect a preferred candidate, "such groups will be obliged 'to pull, haul, and trade to find common political ground' with other voters in the district." *Id.* (*quoting Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). A Section 2 claim cannot be based on alleged lost opportunities to form coalitions with other political groups, and groups cannot state a claim for vote dilution based on an alleged entitlement to a preferred voting opportunity. *See id.*; *see also Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) ("To the extent that African-American voters have to rely on cross-over voting to prove that they have the 'ability

to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their candidate is undercut.").

The North Carolina Supreme Court properly followed the reasoning and holdings of these federal courts, each adopting the "50% rule." All have concluded that the only way groups may demonstrate illegal vote dilution is to first show that they could have elected the candidate of their choice; and the only way their candidate could win an election is if a minority group's numbers are sufficient to elect the candidate without help from any other group. Absent the ability to create a numerical "majority-minority" district, no lost electoral opportunity exists, exactly what Congress intended in passing the VRA.[5]

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[5] Notably, the United States has agreed with this "majority-minority" position as amicus curiae in past cases before this Court. The United States has stated that it agrees with federal courts that have rejected the possibility "that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population." *See* Br. for the U.S. as Amicus Curiae at 16, *Voinovich v. Quilter* (No. 91-1618). The government has reasoned that "[u]nless a minority group can demonstrate that it *could* constitute a majority so as to enable it to elect its preferred candidates, the alleged fragmentation of that group's voters into multiple districts could not possibly have denied that group an equal 'opportunity' to elect representatives of [its] choice.'" *Id.* at 11; *see also* Br. for U.S. as Amicus Curiae at 7, *Grove v. Emison* (No. 91-1420) ("[a]bsent proof that the plaintiff minority group could form a majority of a single-member district, that group 'cannot claim to have been injured by' the challenged districting scheme.") (citations omitted). In one case, however, the United States did assert

(Continued…)

### C. This Court's adoption of a "majority-minority rule" for Section 2 vote dilution claims would comport with Section 5 of the VRA.

Petitioners argue that adoption of the "50% rule" would create disharmony between Section 2 and Section 5 of the Voting Rights Act, as well as this Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Similarly, the Amici States argue that the Court's rejection of the "50% rule" in *Ashcroft* counsels against adoption of the rule in the Section 2 context. Both Petitioners and the Amici States miss the mark in attempting to strictly align Section 2 vote dilution claims with Section 5 redistricting, retrogression, and pre-clearance issues.

As the Amici States recognize, this Court in *Ashcroft* explicitly stated that Section 2 (vote dilution) and Section 5 (pre-clearance and retrogression) "'combat different evils'" and "'impose very different duties upon the States.'" *Ashcroft*, 539 U.S. at 478 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)). Claims for vote dilution brought by individuals or minority groups differ significantly from the pre-clearance requirements that states face in demonstrating that there is no "retrogression" (backsliding) in voting opportunities for minority groups when district lines are periodically redrawn. The Court noted in *Ashcroft*

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that a near-majority minority population might in some cases be able to state a claim for vote dilution. *See* Br. for U.S. as Amicus Curiae at 11, 13, *Valdespino v. Alamo Heights Indep. Sch. Dist.* (No. 98-1987).

that "Section 5 of the Voting Rights Act 'has a limited substantive goal: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 477 (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (internal citations omitted). Plans can satisfy Section 5's preclearance requirements if they simply preserve "current minority voting strength"; in other words, there is no backsliding. *Id.* (quoting *City of Lockhart v. United States*, 460 U.S. 125, 134, n.10)).

The Court specifically rejected Georgia's claim that a plan should automatically be pre-cleared under Section 5 if it would satisfy Section 2, meaning newly-created districts could not be subject to a successful vote dilution claim. *See id.* at 477-78. In rejecting this argument, the Court reasoned that Section 5 involves a comparison of new and old districting plans, while Section 2 involves claims that "'a certain electoral law, practice or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" *Id.* at 478 (quoting *Thornburg*, 478 U.S. at 47)). As such, "the two sections 'differ in structure, purpose, and application.'" *Id.* (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994)). The Court flatly refused to "equate" vote dilution under Section 2 with the retrogression analysis of Section 5. *See id.*

This differentiation of the two sections of the VRA comports with Congressional analysis of the Act. Petitioners point out that in amending Section 5 in 2006, Congress stated that retrogression under

that section "should focus exclusively on whether a districting plan will have the effect of diminishing a minority group's 'ability . . . to elect their preferred candidates of choice.'" Pet. Brief, pg. 35; 42 U.S.C. § 1973c(b).

It appears, however, that Congress has clearly distinguished the test under Section 5 from that under Section 2. Senate Report 109-295 from the Senate Judiciary Committee, S. Rep. No. 109-295 (2006), discusses the amendments to Section 5 of the VRA at length. In clarifying the requirements under Section 5, the Committee stated that the amendments abrogated *Ashcroft* in part, as they were meant to "protect naturally occurring districts that have a clear majority of minority voters." S. Rep. No. 109-295, at 8 (2006). The Committee posited that "[i]f a state has a large minority population concentrated in a particular area, ordinary rules of districting . . . would recommend that those voters be given a majority-minority district." *Id.* at 9. In short, this analysis expressly recognized the numerical "majority-minority" approach in redistricting.

In amending the retrogression analysis in Section 5, the Committee extensively discussed adherence to this "majority-minority" approach. It stressed that the VRA is meant to prevent discrimination, not to protect coalitions that seek to elect a certain party candidate. *See id.* The Committee's discussion of retrogression focused on "naturally occurring majority-minority districts," calling the standards laid out in *Ashcroft* "functionally unworkable" because "[t]he concept of 'influence' is vague and the concept of 'coalition'

district is difficult to define." *Id.* In fact, the Committee discussed the potential for *Ashcroft* to "open a door to cracking" or diluting minority voting power by "unpacking" natural majority-minority districts into "influence" or "coalitional" voting districts, thereby spreading out and diluting minority voting power. *Id.* at 10.

Accordingly, the Committee report emphatically states that the 2006 amendments were meant to protect "naturally occurring" and compact majority-minority districts. *See id.* Without the standard, covered jurisdictions under Section 5 of the VRA could facilitate discrimination and dilution by breaking up numerical majorities of minority groups and replacing them "with vague concepts such as influence, coalition, and opportunity." *Id.* The amendments therefore did *not* "protect any district with a representative who gets elected with some minority votes. Rather, [they protect] only districts in which 'such citizens' – minority citizens – are the ones selecting their 'preferred candidate of choice' *with their own voting power,*" not districts in which minorities are "forced to compromise with other groups." *Id.* (emphasis added). The Committee acknowledged that this standard of retrogression, focusing on clear "majority-minority" districts, would not only adhere to the original intent of the VRA, but would "provide predictability to all involved, and reduce wasteful litigation." *Id.*[6]

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[6] In his additional comments, Senator Jon Kyl, R-Ariz., emphatically agreed with this reasoning. He wrote separately to emphasize that Congress cannot require state and local (Continued…)

Therefore, Amici States' conclusion that "it would be illogical to allow courts to consider coalition districts as a defense to § 5 liability but to preclude the use of coalition districts as a remedy for § 2 violations" is not borne out by this legislative history. This Court's adoption of a standard for minority dilution claims should naturally differ from its analysis of whether a state's proposed redistricting plan constitutes "backsliding" by spreading minority groups out further and eliminating previous opportunities to elect their preferred candidates. The amendments to Section 5 in 2006 make clear that such "coalition districts" are *not* protected in the redistricting process, and there is no charge from Congress for states to create or protect such districts. Adoption of the "50% rule" for purposes of Section 2 is therefore in no way inconsistent or in conflict with the retrogression analysis of Section 5 of the VRA.

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governments to retain "districts that do not have a majority of minority voters but that nevertheless reliably support candidates and parties supported by minority voters" because to do so would overstep Congress's bounds to enforce the Equal Protection Clause pursuant to the Fourteenth Amendment. *See id.* at 11 (additional views of Mr. Kyl). If such "influence" and "coalition" districts were protected, Senator Kyle stated that the redistricting process would be distorted to protect party candidates rather than to protect against discrimination, which would be outside of Congress's power under the Fourteenth Amendment. *See id.* Senator Kyle thereby recognized that the VRA is not meant to give any group of voters superior opportunities to other groups, and to apply Section 5 in this way so as to "spread out" minority groups would violate Section 2 of the Act. *See id.*

## II. ANY STANDARD BELOW THE "50% RULE" CANNOT BE EFFECTIVELY ADMINISTERED BY THE LEGISLATURE, AND IMPROPERLY INVOLVES COURTS IN REDISTRICTING DECISIONS.

The North Carolina Supreme Court also correctly reasoned that the "50% rule" is "straightforward and easily administered" and thus readily applicable by state legislatures in practice. *Bartlett*, 649 S.E.2d at 373. The court was correct in surmising that the protection of less-than-majority districts would "open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes," and as such stronger VRA claims should be protected while promoting judicial economy and providing legislatures with the ability to redistrict without improper judicial second-guessing. *Id.* (citations omitted).

The "50% rule" will reduce the number of cases in which the judiciary must intrude into legislative redistricting decisions. Without a clear, straightforward threshold, courts will increasingly engage in complicated decisions involving potentially conflicting claims of competing minority groups – such as the African American and Cuban populations in Florida. *See, e.g., Hall v. Virginia,* 385 F.3d 421 (4th Cir. 2004) (involving an increase of an African American population from 32% to 40% by redrawing district lines to take population from a majority African American district). In other words, competing minority groups such as those in Florida will continuously spar for electoral advantages as the

necessary margin of population dwindles under the first *Gingles* precondition. *Cf. McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) ("Courts might be flooded by the most marginal Section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections.").

A good example of this potential problem in Florida is reflected in the population trends in its most populated area, Miami-Dade County. Many compact, competing minority groups reside in South Florida: African Americans, Cubans, Hispanics from other countries, and a host of other immigrant populations. Forcing the Florida Legislature to choose between competing minority groups in this area is simply unworkable in practice absent a "majority-minority" rule. The Legislature must inevitably make choices under a "coalition district" system that will leave the State open to a host of Section 2 challenges. This does not comport with the language and spirit of the VRA, and it does not square with this Court's reasoning in *Gingles* and its progeny.

A clear, straightforward "50% rule" greatly reduces the instances where the judiciary must get involved in fights over the drawing of district lines, which is an inherently political act. These redistricting decisions generally should be left to legislatures. *See Abrams v. Johnson,* 521 U.S. 74, 101 (1997) (holding that "[t]he 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."); *see also Bartlett,* 649 S.E.2d at 373 (holding that redistricting is a legislative function, and reasoning that without the "50% rule," "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.").

The Amici States assert that members of this Court have proposed a rule that would require "'that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary or dominant party.'" Amici States' Brief, pg. 30 (quoting *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2648 (2006) (Souter, J., concurring in part and dissenting in part)). However, by urging recognition of "coalition districts" as protected from vote dilution under Section 2, Petitioners and the Amici States are essentially asking this Court to protect the opportunities of *political parties* to potentially elect their candidates of choice, as opposed to protecting *minority groups* from discrimination. It is the latter, not the former, that is the subject of the Voting Rights Act.

As the Senate Judiciary Committee recognized in discussing the amendments to Section 5 of the Act in 2006, the VRA protects against discrimination; it does not require legislatures to protect coalitions that seek to elect a certain party candidate. *See* S. Rep. No. 109-295, at 8 (2006). In fact, protection for anything other than "naturally occurring majority-minority districts" under the VRA would be

"functionally unworkable" because "[t]he concept of 'influence' is vague *and the concept of 'coalition' district is difficult to define*." *Id.* at 9 (emphasis added). The Committee accordingly recognized the fallacy of requiring covered jurisdictions such as Florida to break up numerical majorities of minority groups and replace those districts with districts encompassing "vague concepts such as influence, coalition, and opportunity." *Id.* at 10. Instead, by focusing on numerical "majority-minority" districts, Congress meant to "provide predictability to all involved, and reduce wasteful litigation." *Id.*

Petitioners argue that the recognition of coalition districts could be judicially manageable, and at the same time, adherence to a "50% rule" presents its own enforcement problems because census data regarding voting-age population is inevitably inaccurate. Pet. Brief, pp. 41-42. What this contention fails to recognize, however, is that census data is often the only fixed, objective data available on minority populations when redistricting occurs. States do not possess the kind of data that could be called "coalition data" – i.e., data on political party voting patterns in a given area – when they engage in drawing districts. In any event, this subjective data is *not* the kind of information that should be of concern to a legislature when it is re-districting in conformance with the VRA. Instead, legislatures should be concerned with relatively fixed, objective census data that can be relied upon in determining where compact, naturally-occurring minority populations are located.

Moreover, requiring legislatures to protect "coalition districts" could actually require states to break up or "crack" naturally occurring majority-minority districts, leading to a spreading out and dilution of natural minority voting power. *See id.* This result certainly flies in the face of the intent of the VRA, and it undermines the Petitioner and Amici States' contentions that Congress meant to protect "coalition districts" (as opposed to "influence districts") in amending Section 5 of the Act. *See id.*; *see also* Br. for the U.S. as Amicus Curiae at 23, *League of United Latin American Citizens, et al. v. Perry* (Nos. 05-204, 05-276, and 05-439) ("If Section 2 prevented legislatures from redrawing districts in which minorities constituted only a small fraction of voters, then race could become a predominant factor in a great many redistricting decisions."). The "50% rule" is the standard that can be properly administered by legislatures.

## III. ADHERENCE TO THE "50% RULE" COMPORTS WITH PRINCIPLES OF EQUAL PROTECTION.

Finally, Amici States' argument that recognizing "coalition districts" is the only way to make the VRA comport with the Equal Protection Clause misses the point. As the Act makes clear and this Court discussed in *Gingles*, the purpose of the VRA is to prevent discrimination by protecting naturally occurring, compact majority-minority districts from being diluted through redistricting, thereby negating any opportunity for minority groups to elect their preferred candidate. By protecting "coalition districts," this Court would be

sanctioning dilution, watering down the purpose and effect of the VRA.

Petitioners argue that adherence to the "50% rule" encourages the "packing" of minority groups into isolated districts, thereby reducing incentives to form coalitions and allowing states to "pack as many minority voters as possible into a district that is already a safe majority-minority district," resulting in the elimination of minority voting power in surrounding coalition districts. Pet. Brief, pp. 37-39. This argument fails to recognize that Section 2 deals only with claims of vote dilution. Adhering to a "50% rule" as a threshold to state a Section 2 claim does not discourage the formation of coalitions between groups to elect their preferred candidate; nor does it sanction the intentional "packing" of minority groups into districts where they are not naturally located or the fragmentation of naturally occurring groups into multiple districts where they would not form a numerical majority.

Instead, adhering to a "50% rule," recognizing that states must pay attention to those naturally occurring, compact minority districts or face dilution claims, squares with the limited purpose and intent of the VRA. It does not run afoul of equal protection principles, but in fact prevents dilution of minority voting power by protecting against the *"unpacking"* of natural majority-minority districts. *See* S. Rep. No. 109-295, at 10 (discussing Section 5 of the VRA); *see also id.* at 11 (additional comments of Senator Jon Kyl, R-Ariz., reasoning that Congress *cannot require* state and local governments to retain districts that do not have a majority of minority

voters under Section 5 of the VRA, because to do so would go beyond Congress's powers to enforce equal protection guarantees pursuant to the Fourteenth Amendment by protecting political parties rather than combating discrimination). The threshold adopted by the North Carolina Supreme Court therefore comports with both the VRA and equal protection guarantees against discrimination.

## CONCLUSION

For all of the above reasons, this Court should affirm the North Carolina Supreme Court and hold that when a racial minority group constitutes less than 50% of a proposed district's population, there can be no vote dilution claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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