No. 07-689

IN THE

Supreme Court of the United States

GARY BARTLETT, ET AL.,
Petitioners,

v.

DWIGHT STRICKLAND, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE HONORABLE VERNON SYKES AND THE HONORABLE ROGER CORBIN

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, The Honorable Vernon Sykes and The Honorable Roger Corbin respectfully move the Court for leave to file the attached brief *amici curiae* in support of the petition. Petitioners have consented to the filing of this brief. Respondents have not, necessitating this motion.

Amicus The Honorable Vernon Sykes is a state legislator representing District Forty-Four in the Ohio House of Representatives.

Amicus The Honorable Roger Corbin is a member and Deputy Presiding Officer of the Nassau County, New York Legislature.

Amici submit their brief in support of the petition because this case may present the best (and perhaps the only) opportunity for the Court to clarify the meaning of Section 2 of the Voting Rights Act before the 2010 Federal Decennial Census. *Amici* are concerned that Voting Rights Act rulings, such as the decision of the Supreme Court of North Carolina at issue here, apply an improper, mechanical approach to the application of Section 2 of the Voting Rights Act. This mechanical approach limits the scope of the Voting Rights Act in ways that are inconsistent with the language and intent of that statute.

In their brief, *amici* seek to present to the Court another aspect of the harm that is caused by rulings that improperly narrow the scope of Section 2 of the Voting Rights Act. Such rulings not only affect the voting rights of minority groups. They also force state and local legislators, like *amici*, to engage in mandatory state redistricting in the presence of conflicting and uncertain case law and may defeat claims that should otherwise fall under the protection of the Voting Rights Act.

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), *amici* respectfully request that the Court grant their motion for leave to file the attached brief *amici curiae* in support of the petition.

Respectfully submitted,

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DECEMBER 20, 2007

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BRIEF AMICI CURIAE OF THE HONORABLE VERNON SYKES AND THE HONORABLE ROGER CORBIN IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE[1]

Amicus The Honorable Vernon Sykes is a state legislator representing District Forty-Four in the Ohio House of Representatives.

Amicus The Honorable Roger Corbin is a member and Deputy Presiding Officer of the Nassau County, New York Legislature.

[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* made a financial contribution towards the preparation and submission of the brief.

Voting Rights Act rulings, such as the one at issue here, not only affect the voting rights of minority groups, but also adversely affect state and local legislators, such as *amici*, who are forced to engage in mandatory state redistricting in the presence of conflicting case law and evidence. All of the states will engage in redistricting once again after the 2010 Federal Decennial Census. State and local legislators, such as *amici*, need the benefit of guidance from this Court concerning the correct interpretation of Section 2 of the Voting Rights Act prior to the start of that redistricting process.

SUMMARY OF THE ARGUMENT

The Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6, is intended to ensure that all Americans have an opportunity to participate fully in the democratic process. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court provided a structure for analyzing claims that voting systems, including redistricting plans, violate Section 2 of the Voting Rights Act. *Amici* submit, however, that a number of courts, including the Supreme Court of North Carolina, have interpreted *Gingles* in a manner that undermines the purpose of the statute and may bar meritorious claims of vote dilution. *Amici* respectfully request that the Court grant the petition in order to provide needed guidance concerning the question of whether the first *Gingles* precondition permits Section 2 claims based on coalition districts.[2]

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[2] A district in which a cohesive minority comprises a majority of the voting age population is known as an effective

ARGUMENT

I. The Question Presented Is Of Great Significance Not Only To Minority Groups, But Also To Legislators Responsible For Creating Redistricting Plans That Comply With The Voting Rights Act.

This Court has long recognized that voting is a fundamental right. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). In recognition of this basic right, Congress enacted the Voting Rights Act to provide "essential protections" to voting rights and to encourage "the effort to achieve full participation for all Americans in our democracy...." S. Rep. 97-417, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181. Section 2 of the Voting Rights Act provides, in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

"majority-minority" district. A "coalition" (or "crossover") district, in contrast, is one in which the minority group constitutes less than a numerical majority but can elect its candidate of choice by being consistently joined by a predictably supportive group of voters outside that minority group. An "influence" district is one in which the minority group is not able to elect its candidate of choice, but does have significant influence over election outcomes.

42 U.S.C. § 1973(a). Under this statute, a violation is established where the "totality of circumstances" demonstrates that a political process is "not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members 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).

A. To Date, The Court Has Left Open The Question Of Whether Section 2 Applies To Claims Where Minority Groups Represent Less Than A Numerical Majority Of A Proposed District.

In *Gingles*, the Court established a three-part test to state a claim that a redistricting plan violates Section 2: (1) the minority population must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population must be "politically cohesive"; and (3) the majority population must "vote[] sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."[3] 478 U.S. at 50-51. In so holding, the Court left open the question of whether the first precondition requires a numerical majority of a proposed district, or whether it is sufficient that the minority population

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[3] Satisfaction of these three preconditions does not settle the matter, but rather the claim is then subject to a "totality of the circumstances" inquiry. *See Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

be large enough to have a significant impact on elections despite the fact that it is not large enough to control election outcomes without assistance from other groups. *See Gingles*, 478 U.S. at 46 n.12.

Since *Gingles*, the Court has declined to decide whether the first precondition for stating a claim under Section 2 requires a numerical majority. *See League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006) (Kennedy, J., plurality opinion) ("*LULAC*") (assuming, without holding, that it is possible for a minority group to assert a Section 2 claim where it makes up less than 50% of the relevant population); *Johnson v. De Grandy*, 512 U.S. 997 (1994) (assuming, without holding, that even if the minority group were not an absolute majority of the relevant population, the first *Gingles* prong may be satisfied); *Voinovich v. Quilter*, 507 U.S. 146 (1993) (assuming, without deciding, that a cognizable Section 2 claim may be based on crossover or influence districts); *Growe v. Emison*, 507 U.S. 25 (1993) (declining to decide whether a claim that a voting practice or procedure impairs a minority's ability to influence, rather than elect, requires a showing that the minority group constitutes a numerical majority in the relevant geographic area).

In short, in its post-*Gingles* decisions, the Court has been careful to avoid reading *Gingles* as applying Section 2's protections only to majority-minority districts, and thus to date has declined to endorse a mechanical approach to Section 2 claims. *See, e.g.*, *Voinovich*, 507 U.S. at 158 ("the *Gingles* factors cannot be applied mechanically and without

regard to the nature of the claim"). At this time, therefore, there is no clear guidance from the Court as to whether Section 2 protects coalition districts, as well as effective majority-minority districts.

B. Legislators Need Guidance From The Court Regarding The Proper Interpretation Of Section 2 In Advance Of The 2010 Federal Decennial Census.

The vast majority of state constitutions requires that, after each federal decennial census, the legislature (or other authorized body) construct a plan for redistricting state voting districts to adjust for population shifts reflected in each census.[4] Therefore, the states will engage in redistricting state legislatures and other legislative bodies after the 2010 Federal Decennial Census. Absent clear guidance from the Court regarding claims based on potential coalition districts, state

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[4] *See, e.g.*, Ala. Const. art. IX, § 200; Alaska Const. art. VI, § 10; Ark. Const. art. VIII, §§ 2-4; Colo. Const. art. V, § 48; Conn. Const. art. III, § 6; Del. Const. art. II, § 2A; Fla. Const. art. III, § 16; Idaho Const. art. III, § 2; Ill. Const. art. IV, § 3; Ind. Const. art. IV, § 5; Iowa Const. art. III, § 35; Kan. Const. art. 10, § 1; La. Const. art III. § 6; Md. Const. art. III, § 5; Minn. Const. art. IV, § 3; Miss. Const. art XIII, § 254; Mo. Const. art. III. § 2; Mont. Const. art. V, § 14; Neb. Const. art. III-5; Nev. Const. art. IV, § 5; N.H. Const. arts. IX, XXVI; N.C. Const. art. II, §§ 3, 5; N.D. Const. art. IV, § 2; Ohio Const. art. XI, § 1; Okla. Const. § V-11A; Or. Const. art. IV, § 6; Pa. Const. art. II, § 17; R.I. Const. art. VII, § 1, art. VIII, § 1; S.D. Const. art. III, § 5; Tenn. Const. art. II, § 4; Tex. Const. art. III, § 28; Utah Const. art. IX, § 1; Vt. Const. ch. 2, § 73; W. Va. Const. art. VI, § 6-4; Wis. Const. art. IV, § 3; Wyo. Const. art. III, § 47.

legislators will be unable to create redistricting plans that they can be sure comply with the requirements of the Voting Rights Act. The 2010 Federal Decennial Census is approaching rapidly, and the Court may not have another opportunity to clarify *Gingles* before state legislatures will be required to engage in redistricting.

The need for guidance from the Court on this matter is highlighted by the volume of litigation that has been filed after prior redistricting processes. After the 2000 Census, for instance, litigation arose in at least nine states involving questions of whether Section 2 gives rise only to claims based on effective majority-minority districts. *See Johnson-Lee v. City of Minneapolis*, Civil No. 02-1139, 2004 WL 2212044 (D. Minn. Sept. 30, 2004) (expressing a willingness to consider crossover districts, but finding insufficient evidence to satisfy the first *Gingles* element), *aff'd* 170 Fed. Appx. 15 (8th Cir. 2006); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (refusing to recognize influence districts; declining to reject crossover or coalition claims as a matter of law but noting disfavor for them), *aff'd without opinion* 543 U.S. 997 (2004); *Meza v. Galvin*, 322 F. Supp. 2d 52 (D. Mass. 2004) (declining to decide whether to recognize crossover districts where the case could be disposed of based on the "totality of the circumstances" test); *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) (per curiam) (Rhode Island) (refusing to foreclose the possibility that a party might be able to state a Section 2 claim based on a purported influence district); *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (considering

whether to permit Section 2 claims based on influence districts), *aff'd in part, rev'd in part, vacated in part, League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006); *Hall v. Virginia*, 276 F. Supp. 2d 528 (E.D. Va. 2003) (refusing to permit Section 2 claim based on influence, coalition or crossover districts), *cert. denied* 544 U.S. 961 (2005); *Parker v. Ohio*, 263 F. Supp. 2d 1100 (S.D. Ohio 2003) (refusing to consider Section 2 claim based on influence district), *aff'd without opinion* 540 U.S. 1013 (2003); *O'Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (refusing to recognize influence districts in the context of a Section 2 claim); *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (rejecting argument that redistricting plan violated Section 2 by creating influence districts rather than effective majority-minority districts), *vacated on other grounds* 248 F.3d 175 (3d Cir. 2001).

The lack of guidance from the Court is compounded by the fact that some redistricting authorities face conflicting direction from the courts in their jurisdictions regarding the permissibility of Section 2 claims based on coalition districts. For instance, New York legislators are faced with conflicting guidance from the Southern District of New York and the Eastern District of New York. *Compare Rodriguez*, 308 F. Supp. 2d at 384 ("The bright-line [numerical majority] rule effectuates the judicial duty to enforce voting rights....") *with Puerto Rican Legal Def. & Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) ("[T]here is no bright-line rule for discerning

an appropriate [voting age population] level within a district that passes Voting Rights Act muster.").

If the petition is not granted and the issue is left undecided, legislators, such as *amici*, will be forced to face another round of redistricting without sufficient guidance regarding the use of coalition districts, and many of the resulting plans likely will be subject to court challenge. Such litigation both drains government resources and creates significant uncertainty for subsequent elections, particularly if a court were to overturn a state or local redistricting plan. *See, e.g.*, *Page*, 248 F.3d at 195-96 (recognizing the "significant disruption" court action might have on upcoming state legislative elections). These consequences affect not only state legislators, but also court systems that are burdened by lengthy and complex litigation, and citizens of the affected districts, who are left with little certainty that their voting districts will remain intact.

As Justice Souter recognized in his concurring and dissenting opinion in *LULAC*, although the Court has previously "sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50% ... the day has come to answer it." 126 S. Ct. at 2648. State legislators need guidance from the Court before they engage in redistricting after the 2010 Federal Decennial Census. Absent such guidance, state and local legislators face a risk of court challenges to their redistricting plans that have the potential to significantly upset state and local election processes. Therefore, *amici* respectfully submit

that the Court should grant the petition in order to resolve the question of whether the first *Gingles* precondition permits Section 2 claims based on coalition districts.

II. The Petition Also Should Be Granted Because A Number Of Courts That Have Decided This Issue Have Adopted A Mechanical Approach That Is Contrary To The Intent Of The Voting Rights Act And Has Not Been Endorsed By The Court.

Despite the fact that the Court repeatedly has declined to decide whether Section 2 functions mechanically, protecting only effective majority-minority districts, a number of the courts of appeals that have considered this issue have chosen to adopt just such a mechanical approach.

As discussed previously, *Gingles* specifically left open the question of whether to permit Section 2 vote dilution claims involving coalition districts. Despite the Court's recognition that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim," *Voinovich*, 507 U.S. at 158, the Fourth, Fifth, Sixth and Seventh Circuits have taken just such a mechanical approach by requiring that the minority group constitute a numerical majority in the proposed district. *See Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004) ("we agree that *Gingles* establishes a numerical majority requirement for all Section 2 claims"), *cert. denied* 544 U.S. 961 (2005); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) ("we reject the

appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population"), *cert. denied* 528 U.S. 1114 (2000); *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (rejecting Section 2 claim based on coalition of minority groups where an individual group lacked sufficient members to state a claim alone); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) (refusing to allow a Section 2 claim that a system impairs a minority group's ability to influence elections), *cert. denied* 490 U.S. 1031 (1989). By favoring the expediency of a mechanical approach, these courts have ignored the intent of the Voting Rights Act.

Two other circuits, the Ninth and Eleventh, have declined to apply such a mechanical approach, and instead have reserved judgment on the issue, as has this Court. *See Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004) ("We leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim, i.e. a claim where 'members of the minority group are not a majority of the relevant voting population but nonetheless have the ability to *elect* representatives of their choice with support from a limited but reliable white crossover vote.'") (emphasis in original); *Romero v. City of Pomona*, 883 F.2d 1418, 1427 n.15 (9th Cir. 1989) ("we express no opinion as to whether section 2's protections extend to a *coalition* of racial or language minorities"), *overruled in part on other grounds by Townsend v Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990).

In contrast, the New Jersey Supreme Court has determined that claims based on influence districts are permitted under Section 2. *See McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003). Relying significantly upon the Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), under Section 5 of the Voting Rights Act, the New Jersey Supreme Court found that allowing such claims was consistent with the intent of the Voting Rights Act. *McNeil*, 828 A.2d at 853. The court further noted that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in eliminating discrimination against minority voters.'" *Id.* (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

Because courts have reached conflicting conclusions on this issue, and many of those courts have taken an approach that is directly contrary to the intent of the Voting Rights Act, the Court should grant the petition and provide needed guidance on the correct interpretation of the first *Gingles* precondition.

III. The Petition Should Be Granted To Clarify That Section 2 Of The Voting Rights Act Protects Coalition Districts.

A mechanical approach of numerical majority finds no support in the language of the Voting Rights Act and is inconsistent with the intent of that statute. Rather, it imposes an arbitrary dividing line that excludes claims that otherwise may present valid instances of vote dilution.

A. The Plain Language Of Section 2 Provides No Support For A Strict Requirement Of Numerical Majority.

The language of the Voting Rights Act requires an evaluation of the "totality of circumstances" to determine whether a violation has occurred:

> A violation of subsection (a) of this section is established if, based on *the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members 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) (emphasis added). Although the preconditions set forth by the Court in *Gingles*, properly applied, may screen out meritless claims of vote dilution, as discussed above, when improperly applied, they also may bar entirely meritorious claims. Moreover, a determination that these preconditions include a mechanical requirement of numerical majority would be inconsistent with the plain language of the statute. Section 2's "totality of circumstances" analysis becomes meaningless if the *Gingles* preconditions

are used as rigid checkboxes for establishing a vote dilution claim.

B. The Legislative History Of The Voting Rights Act Makes Clear That Section 2 Was Not Intended To Impose A Rigid Requirement Of Numerical Majority.

In developing the preconditions for a Section 2 claim, *Gingles* relied heavily upon statements in the Senate Judiciary Committee Majority Report accompanying the 1982 amendments to the Voting Rights Act. As noted by *Gingles*, the Senate Report stated:

> To establish a violation [of Section 2], plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.
>
> Typical factors include:
>
> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

> 3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. 97-417, at 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report went on to list certain other factors that might have

probative value in establishing a violation, including whether elected officials have demonstrated a significant lack of responsiveness to the needs of the minority group, and whether the policy underlying the challenged voting qualification, prerequisite, standard, practice or procedure is tenuous. *Id.* at 207. The Senate Report further noted that "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." *Id.*

Significantly, none of these factors requires that the minority group comprise a numerical majority in order to state a Section 2 vote dilution claim. Nor does the Senate Report endorse such a requirement at any other point. To the contrary, the variety of factors to be considered, along with the Senate Report's statement that "the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *id.*, illustrates that Congress intended Section 2 to be a flexible remedy guided by the "totality of circumstances," rather than by a mechanical checklist. Requiring that a minority group comprise a numerical majority in the proposed district thus would violate the intent of the statute.

C. Adopting A Mechanical Approach Of Requiring A Numerical Majority Would Defeat Claims Even Where It Is Recognized That Minority Populations Of Less Than 50% Have An Opportunity To Elect Their Chosen Officials.

As Justice O'Connor recognized in her concurring opinion in *Gingles*, "when the candidates preferred by a minority group are elected [ ], the minority group has *elected* those candidates, even if white support was indispensable to these victories." *Gingles*, 478 U.S. at 90 n.1. In this case, the Supreme Court of North Carolina recognized that "[p]ast election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates." *Pender County v. Bartlett*, 649 S.E.2d 364, 367 (N.C. 2007) (Pet. App. at 5a). This recognition highlights the arbitrary nature of the approach adopted by the Supreme Court of North Carolina. That mechanical approach forecloses Section 2 claims even in instances where a minority voting population of less than 50% creates an opportunity to *elect* the minority group's preferred candidate. *See also* J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 563-68 (1993) (illustrating how minority groups representing less than 50% of a district's population may be able to elect candidates

of their choice, whereas minority groups representing more than 50% of a district's population may not be able to do so depending on the level of cohesiveness of the minority and majority groups).

Simply put, the mechanical approach that requires a district to contain a numerical majority runs contrary to the evidence available to legislators regarding the impact of minority voters in coalition districts. That approach also requires legislators to create redistricting plans based on arbitrary criteria. *Amici* respectfully request the Court to grant the petition and clarify that the first *Gingles* precondition does not bar Section 2 claims based on coalition districts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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