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 AND BRIEF OF THE NAACP, CINDY MOORE, MILFORD FARRIOR, AND MARY JORDAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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 Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NAACP, CINDY MOORE, MILFORD FARRIOR AND MARY JORDAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 37.2(b), the National Association for the Advancement of Colored People ("NAACP"), Cindy Moore, Milford Farrior, and Mary Jordan hereby move for leave to file the attached *amicus curiae* brief in support of the petition for certiorari in this case.

The NAACP is the nation's oldest and largest civil rights organization. The NAACP has affiliates and members nationwide, including over 100 branches with more than 20,000 members in North Carolina. This Court has long recognized the NAACP's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The experience of the NAACP and its affiliates and members in litigating cases under section 2 of the Voting Rights Act shows the importance of having the Court resolve the question presented in this case.

Amici Moore, Farrior, and Jordan are African-American citizens, voters, and residents of Pender County, North Carolina. Their state legislative district is the subject of this lawsuit. Under the 2003 redistricting plan at issue in this case, they were able to elect a representative of their choice to the North Carolina General Assembly, but if the North Carolina Supreme Court's decision is allowed to stand, they will no longer be able to elect such a representative.

Counsel for proposed *amici* made a good-faith effort to obtain the consent of all parties to the filing of their brief. Petitioners have consented to the filing of this brief. Counsel for respondent indicated that he would be unable to consent because one of his clients cannot be reached and he is unable to provide consent without his client's approval.

Wherefore, the NAACP, Cindy Moore, Milford Farrior and Mary Jordan respectfully move for leave to file this brief.

Respectfully submitted,

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DECEMBER 2007

INTEREST OF THE *AMICI CURIAE*[1]

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization. The NAACP has affiliates and members nationwide, including over 100 branches with more than 20,000 members in North Carolina. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of racial and ethnic bias.

Since its founding, the NAACP has been involved in litigation on behalf of minority voters as well as in the legislative efforts that culminated in the passage, amendment, and extension of the Voting Rights Act of 1965. This Court has long recognized the NAACP's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The

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[1] Consent of all parties of record was requested ten days in advance of the filing of this brief, but was not received, necessitating the motion that precedes this brief. No party, counsel for a party, or person other than the *amici*, the members of *amicus* NAACP, or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

experience of the NAACP and its affiliates and members in litigating cases under section 2 of the Voting Rights Act shows the importance of having the Court resolve the question presented in this case.

The individual *amici* – Cindy Moore, Milford Farrior, and Mary Jordan – are African-American citizens, voters, and residents of Pender County, North Carolina. They are members of various civic and social organizations that sponsor voter registration and voter education efforts in the African-American community. Under the 2003 redistricting plan at issue in this case, they were able to elect a representative of their choice to the North Carolina General Assembly, a representative who is familiar with, and responsive to, the needs of their community. If the decision of the North Carolina Supreme Court is allowed to stand, however, they will no longer be able to elect such a representative.

SUMMARY OF ARGUMENT

Since this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court and the lower courts have repeatedly confronted the question whether the Voting Rights Act requires the creation of "coalitional districts," *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003): districts that are less than 50% black (or Latino) in voting-age population but which nonetheless enable minority voters to elect the candidates of their choice, given minority political cohesion and sufficient white crossover votes. For doctrinal and practical reasons, the time has come

for this Court to answer that question and to hold that minority plaintiffs can bring section 2 lawsuits seeking the creation of coalitional districts.

First, the Voting Rights Act has always required an "'intensely local appraisal'" of whether "the absence of [a particular majority-minority] district constitutes impermissible vote dilution." *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2620 (2006) (quoting *Gingles*, 478 U.S. at 79 and *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). Today, as a result of small but sometimes significant changes in the level of racial bloc voting, minority voters in some jurisdictions are able to elect candidates of their choice from coalitional districts. The failure to create such districts (or the decision to eliminate such districts where they now exist) would therefore deny minority voters the ability to elect representatives of their choice protected by section 2. Continued insistence on a rigid 50% rule – under which minority voters are protected only if they can show the possibility of creating a majority-minority district and in which the remedy they receive if they prevail must be a majority-minority district – threatens both to leave some minority voters unprotected and to require the unnecessary packing of other minority voters.

Second, this Court's decision in *Georgia v. Ashcroft* recognized, under section 5 of the Voting Rights Act, that coalitional districts can serve as a means of complying with the Voting Rights Act's requirement that covered jurisdictions provide minority voters with an undiminished opportunity to elect representatives of their choice. Although

sections 2 and 5 of the Act are not identical, they do operate in complementary ways, and this Court should now clarify that coalitional districts can also be an appropriate remedy – and the failure to create such districts can serve as a trigger for liability – under section 2.

ARGUMENT

In *Gingles*, this Court laid out a framework for assessing claims of racial vote dilution under section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. Among other things, section 2 forbids states from using districting plans that "result" in members of minority groups "hav[ing] less opportunity than other members of the electorate . . . to elect representatives of their choice." The Court identified three "preconditions" whose presence it thought "necessary" for plaintiffs to establish in order to show impermissible vote dilution through the use of multimember districts. *Gingles*, 478 U.S. at 50. The first of these preconditions – the one centrally at issue in this case – provides that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. In a footnote, however, the Court observed that the case before it presented "no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitution a majority in a single-member district, alleging that the use of a multimember district impairs its ability *to influence* elections." *Id.* at 46 n.12.

Over the past twenty years, this Court has clarified the *Gingles* analysis in some respects, but it has left other critical issues unresolved. In *Growe v. Emison*, 507 U.S. 25 (1993), and *Johnson v. De Grandy*, 512 U.S. 997 (1994), for example, this Court held that the *Gingles* factors should apply to claims of vote dilution in the configuration of single-member districts as well as to challenges to multimember systems. And in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), a case arising under section 5 of the Voting Rights Act,[2] this Court held that a state can sometimes meet its obligation to avoid diluting minority voting strength by constructing "coalitional districts," *id.* at 483, in which minority voters, albeit a minority of the electorate, nonetheless have the

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[2] Section 5, 42 U.S.C. § 1973c, applies only to specified "covered" jurisdictions. *See* 42 U.S.C. § 1973b(b). Forty counties in North Carolina are covered jurisdictions. *See* 28 C.F.R. Part 51 Appendix (2007). Section 5 forbids these covered jurisdictions from making any change in their existing voting practices without first proving that the change will have neither a discriminatory purpose nor a discriminatory effect. Under this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976), a change has a discriminatory effect if it results in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. As this Court explained in *Georgia v. Ashcroft*, because sections 2 and 5 "differ in structure, purpose, and application," 539 U.S. at 478 (quoting *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion)), the relative stringency of the two provisions can differ from case to case: sometimes, practices that pass muster under section 2 will nonetheless run afoul of section 5, while other times practices that receive preclearance under section 5 will nonetheless later be held to violate section 2, as was the case in *Gingles* itself.

ability to build bi- or multi-racial coalitions to elect representatives of their choice. But as the State of North Carolina notes in its petition for certiorari, this Court has repeatedly left open the question whether minority voters can use section 2 to *require* the construction of such districts. *See LULAC v Perry*, 126 S. Ct. 2594, 2624 (2006); *Johnson v. De Grandy*, 512 U.S. at 1008-09; *Growe*, 507 U.S. at 41 n.5 (1993); *Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993).

That question may originally have seemed to be primarily of academic interest, given that high levels of racial bloc voting in many jurisdictions prevented minority voters from electing their preferred candidates unless they constituted a majority of the electorate. But over the twenty-five years since the amendments to section 2, many jurisdictions have seen a decline in racial bloc voting that enables minority voters, under some circumstances, to form coalitions with like-minded white voters to elect a candidate sponsored by the minority community. Even in many of these communities, however, the level of white crossover voting remains sufficiently low that creating a coalitional district requires including a large minority community within the putative coalitional district. If the jurisdiction instead splits a geographically compact and politically cohesive minority community among several districts, then minority voters will remain unable to participate equally in the political process and to elect candidates of their choice.

This Court has long recognized that vote dilution cases require "a searching practical evaluation of

past and present reality." *Johnson v. De Grandy*, 512 U.S. at 1018 (quoting S. Rep. No. 97-417 at 30 (1982), and *White v. Regester*, 412 U.S. 755, 776, 770 (1973)); *see Gingles*, 478 U.S. at 66, 75, 79. *LULAC v. Perry*, 126 S. Ct. 2594, 2621 (2006) (conducting a detailed totality-of-the-circumstances inquiry into the political reality of southern Texas in concluding that the state had violated section 2). Given the present realities of nascent coalitional politics and continued racial bloc voting, this Court needs to clarify that section 2 reaches lawsuits by minority voters who have been denied the right to elect candidates of their choice in coalitional districts.

I. THE 50% RULE CONSTRAINS AND PENALIZES PROGRESS MADE TOWARDS AMELIORATING RACIALLY POLARIZED VOTING.

When section 2 was amended in 1982, it was true in many jurisdictions that minority voters needed to be 65% of the electorate in order to have a realistic chance of electing a candidate of their choice. *See, e.g.*, *Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (describing it as "a rule of thumb that blacks must be at least 65 percent of the total population of a district in order to be able to elect a black," given the age distribution, levels of registration and voter eligibility, turnout, and racial bloc voting); *Latino Political Action Comm. v. Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (holding that "where voting is highly polarized, a 65 percent figure is a generally accepted threshold which has been used by the Department of Justice and reapportionment experts"); *Ketchum v. Byrne,* 740 F.2d 1398, 1408 n.7 & 1413-16 (7th Cir. 1983), *cert.*

denied, 471 U.S. 1135 (1985) (holding that the district court had abused its discretion in failing to create districts with a minority supermajority of 60 to 65% of the population as a remedy for a section 2 violation); *see also* Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act – Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, n.3 (1983) (noting that the Department of Justice often assumed that a district would provide minority voters with a chance to elect a candidate of their choice only when minorities constituted a supermajority of the district's population).

Yet even as early as *Thornburg v. Gingles* itself, Justice O'Connor recognized that districts which are less than 50% minority can enable minority voters to elect their candidate of choice when there is less severe racially polarized voting and minority candidates receive some white crossover votes. Her opinion concurring in the judgment noted that:

> when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if 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.

Gingles, 478 U.S. at 106 n.1 (emphasis in original).

The analysis offered by Justice O'Connor stands in sharp contrast to the reasoning of courts such as the Fourth Circuit, which have imposed a rigid rule that minority voters cannot maintain a section 2 claim unless they constitute a majority of the population within a proposed district and have insisted "minority voters have the potential to elect a candidate *on the strength of their own ballots*" alone. *Hall v. Virginia,* 385 F.3d 421, 429 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005) (emphasis in original). Using this cramped definition of what it means to be able to elect a candidate of choice, the *Hall* court concluded that section 2 protects minority voters only when they can create majority-minority districts; it provides no protection when they can create districts that are less than 50% minority but from which minority voters can elect their preferred candidates. This conclusion is out of step with modern political reality and indeed inhibits the very progress that the Voting Rights Act is intended to achieve.

In the twenty years since the *Ketchum* 65% standard was appropriate, racially polarized voting has decreased in some places, making it possible for minority voters to elect their candidates of choice even when they are less than 50% of the population of a district. The 1982 state legislative elections that formed the backdrop against which *Gingles* was decided resulted in no African Americans being elected to the state senate. Even then, however, five black candidates won seats in multi-member State House districts that were 21% to 36% black. *See*

Gingles, 478 U.S. at 75 & n.35. Today, there are seven African Americans in the North Carolina Senate. While all of them represent districts with significant black populations, none of them serves a district that has a black majority in voting-age population. And eleven African-American members of the North Carolina state house represent districts that range from 39.36 to 49.97% black in voting-age population. To be sure, even with this decrease in racially polarized voting, black voters have not been able to achieve proportionality: While African Americans are approximately 20% of the voting age population in North Carolina, they are able to elect candidates of choice in only 14% of the state's senate districts and 16% of the state's house districts. But this level of progress was achieved only because the state has drawn districts with significant black populations. Black voters who have been assigned to districts with smaller minority populations remain unable to elect the representatives of their choice. Under the rigid 50% rule, the State would be free, as a matter of section 2, to eliminate all these districts and thus relegate African Americans to only token representation in the General Assembly.

The North Carolina experience is replicated elsewhere in the United States. After studying twenty southern elections from the 1990s, political scientists Bernard Grofman, Lisa Handley, and David Lublin concluded that the question whether minority groups can elect their candidate of choice cannot be reduced to a single cut-off number, but must be based on the political realities of each case:

> As our analysis of recent congressional elections in the South—and state legislative contests in South Carolina—clearly demonstrates, no simple cutoff point of 50% minority or any other percent minority guarantees minority voters an equal opportunity to elect candidates of choice. A case-specific functional analysis, which takes into account such factors as the relative participation rates of whites and minorities, and the degree of cohesion and crossover voting that can be expected, as well as the type of election . . . and the multi-stage election process, must be conducted to determine the percentage minority necessary to create an effective minority district.

What Minority Populations Are Sufficient To Afford Minorities a Realistic Chance To Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence 79 N.C. L. REV. 1383, 1423 (2001). Grofman, Handley, and Lublin conclude that in most cases African-American voters needed to constitute only 33-39% of the voters to give an African-American candidate 50% of the votes. *See id*. at 1409.[3]

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[3] For other studies arguing that coalitional districts can sometimes be an effective method for achieving minority representation, see, *e.g.*, Ellen D. Katz, *The Law of Democracy: New Issues In Minority Representation: Resurrecting the White Primary* 153 U. PA. L. REV. 325, 368 (2004); David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 39-48 (1997); David Lublin, *Racial Redistricting and African-American Representation: A*

In the face of this progress, a rigid 50% rule misreads the intent and purpose of the Voting Rights Act, reads section 2 of the Act inconsistently with section 5, and, most tragically, denies protection to some of the very districts that have proven to be effective in providing minority voters an equal opportunity to elect representatives of their choice.

If districts that are 40 to 50% minority in voting age population are not protected under section 2 of the Voting Rights Act, one of two things will happen, neither of which is desirable. Either jurisdictions will draw new districts that pack black voters in higher percentages than are necessary to elect the minority community's candidates of choice, or, except where protected by the non-retrogression principle of section 5 of the Voting Rights Act, states will be free to dismantle coalitional districts for any reason, including purely partisan considerations, and minority voters will be subjected once again to unreachable vote dilution.

II. THE CURRENT SITUATION IN NORTH CAROLINA AND AROUND THE COUNTRY SHOWS WHY IT IS CRITICAL FOR THIS COURT TO CLARIFY THE

Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" 93 AM. POL. SCI. REV. 183, 185 (1999); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1535-36, 1555 (2002); Note,*The Ties That Bind: Coalitions and Governance Under Section 2 the Voting Rights Act,* 117 HARV. L. REV. 2621, 2625 (2004).

SCOPE OF SECTION 2 BEFORE THE NEXT REAPPORTIONMENT BEGINS.

The rigid 50% rule adopted by the North Carolina Supreme Court in this case may result in the immediate redrawing of all of the state's House and Senate districts on the eve of the 2008 elections. This case formally challenged just one of North Carolina's House districts. Pet. App. 2a & n.1. However, the North Carolina Supreme Court recognized that its decision would require "redistrict[ing] not only House District 18 but also other legislative districts directly and indirectly affected by this opinion." Pet. App. 33a. While it is unclear whether the court was referring to adjacent house districts that would be necessarily affected by any change to the boundaries of House District 18, or whether some additional legislative districts that are less than 50% black and cross county lines should also be redrawn, the North Carolina Supreme Court was clear that "[t]o minimize disruption to the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election." Pet. App. 34a.

As the petition in this case was being filed, however, another group of twelve individual voters filed suit in the United States District Court for the Eastern District of North Carolina, asking that court to enter a preliminary injunction prohibiting the use of the current house and senate districts in the 2008 election. *Dean v. Leake*, No. 2-07-CV-51-FL, (E.D.N.C. filed Nov. 21, 2007). Their complaint attacks every coalitional district as an unconstitutional racial gerrymander that cannot be

justified by a compelling governmental interest in complying with the Voting Rights Act because the districts "fail to meet the standards for creation of Voting Rights Act districts in that these districts fail to contain a majority of minority voting age population." Complaint ¶ 143. The Dean plaintiffs ask the federal court to compel the legislature to draw a new redistricting plan or implement a court-drawn plan in time for the 2008 elections. *Id.* ¶ 153.

Thus, the ruling in this case now imperils all of the state's Senate districts and over half of the state's House districts that currently provide black voters in North Carolina with an opportunity to elect their representatives of choice. The Dean plaintiffs would effectively force the legislature either to pack black districts with more black voters than are necessary to provide a reasonable opportunity to elect a representative of choice or to abandon altogether the provision of fair representation for the state's black voters.

Ultimately the 50% rule, if imposed nationally following the 2010 round of redistricting, would dramatically decrease the number of African-American representatives in state legislatures around the country and in Congress. Both of North Carolina's congressional districts that elect black voters' candidates of choice are less than 50% black in voting age population. Nationally, twenty-two of the forty-two members of the Congressional Black Caucus are elected from districts that are less than 50% black in voting-age population. *See* www.cbcfinc.org/pdf/constituents.pdf. (last visited Dec. 20, 2007). While some of these districts are in

jurisdictions covered by section 5 of the Voting Rights Act and would presumably be protected by the non-retrogression principle during the post-2010 Census round of redistricting, *see Georgia v. Ashcroft*, those that are in non-covered jurisdictions could be vulnerable to being dismantled without recourse for minority voters. The fact that the question whether section 2, like section 5, protects districts that provide minority voters a realistic opportunity to elect representatives of choice has been presented to this Court and the lower courts so many times already, *see supra* at 8; *see also, e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999) *cert. denied*, 528 U.S. 1114 (2000); *Hall v. Virginia,* 385 F.3d 421 (4th Cir. 2004), *cert. denied*, 544 U.S. 961 (2005), shows that the issue will continue to arise and is an important one to resolve before the next round of redistricting begins at the local, state and federal levels throughout the country.

III. THIS COURT'S DECISION IN *GEORGIA V. ASHCROFT* REQUIRES ADDRESSING WHETHER A SIMILAR ANALYSIS SHOULD GOVERN SECTION 2 CASES AS WELL.

In *Georgia v. Ashcroft,* this Court expressly rejected a rigid 50% rule in the context of section 5. *See* 539 U.S. at 480-85. All nine Justices agreed that coalitional districts which provide minority voters a demonstrable opportunity to elect their representatives of choice with some white crossover votes are a valid means of complying with section 5's

requirement that covered jurisdictions not diminish minority voter's effective exercise of the franchise. *See id.* 480-85 (opinion of the Court); *id.* at 492-93 (Souter, J., joined by Stevens, Ginsberg & Breyer, JJ., dissenting) (distinguishing between coalitional districts and "influence districts," which cannot satisfy the non-retrogression requirement). Throughout both the majority and dissenting opinions' analyses, the touchstone is the ability to elect a candidate of choice, not a bright-line 50% rule.

The Court noted that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine." 539 U.S. at 480. It did not hold that minority voters are entitled to have the ability to elect their candidates of choice protected only if they live in a majority-minority district. The dissent made this point even more clearly, explaining that "[t]he prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters." *Id.* at 492.

The actual electoral experience in North Carolina and elsewhere confirms that minority voters in many jurisdictions can elect a representative of choice through coalitional districts as efficiently as through majority-minority districts, depending on the

political realities of each case. As the trial court in this case found:

> The proper factual inquiry in analyzing a 'coalition' or an 'ability to elect district', in our opinion, is not whether or not black voters make up the majority of voters in the single-member district, but whether or not the political realities of the district, such as the political affiliation and number of black registered voters when combined with other related, relevant factors present within the single member district operate to make the black voters a **de facto** majority that can elect candidates of their own choosing.

Pet. App. 93a (emphasis in original). This understanding of what it means to be able to elect a candidate of choice is as true under section 2 of the Voting Rights Act as it is under section 5.

IV. IF SECTION 2 IS TO TREAT THE EXISTENCE OF COALITIONAL DISTRICTS AS A DEFENSE TO LIABILITY, THEN IT SHOULD ALSO TREAT THEIR ABSENCE AS POTENTIALLY ACTIONABLE.

In a number of section 2 cases, courts have rejected claims seeking the creation of majority-minority districts by pointing to the fact that minority voters are already electing candidates of their choice from coalitional districts. In *Gingles*, for example, this Court held that North Carolina House District 23, a three-seat multi-member district which was approximately 36% black and which had elected

an African-American to one of the three seats in the past six elections, provided black voters with an equal opportunity to elect their representatives of choice and thus single-member districts were not required in that area of the state. *See Gingles,* 478 U.S. at 77. More recently, lower courts have denied relief to plaintiffs seeking single-member majority-minority districts where minority voters' candidates of choice win in districts that are less than 50% minority. *See, e.g.*, *United States v. Alamosa Co.*, 306 F. Supp. 2d 1016 (D. Colo. 2004) (finding no violation of Section 2 when Hispanic voters elect a candidate of choice at-large with 41% of the total population); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 990-91 (1st Cir. 1995), *on remand*, 960 F. Supp. 515 (D. Mass. 1997) (holding that influence districts in which Hispanic voters are 28% of the population are relevant to totality of the circumstances test under Section 2).

If plaintiffs can demonstrate all of the other *Gingles* factors, including the totality of circumstances elements, and they can prove that they have a reasonable and reliable ability to elect a representative of choice in a district that is 49.9% minority in voting age population, the failure to draw such a district and to instead relegate them to districts where they form ineffectual minorities and are unable to elect candidates robs them of an equal opportunity to participate in the electoral process just as surely as it would if they are 50.1% of the voting age population in the illustrative district. The 50% rule appears nowhere in the text or legislative history of the Voting Rights Act, it has been

repudiated under section 5 of the Act, and this Court should act now to make clear that this judicial gloss on the Act cannot be used to dismantle effective minority districts in North Carolina.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANGELA CICCOLO
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ANITA EARLS
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DECEMBER 2007