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 Supreme Court of North Carolina

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, CINDY MOORE, MILFORD FARRIOR, MARY JORDAN, AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICI CURIAE

INTEREST OF 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 experience of the NAACP and its affiliates and members in litigating cases under Section 2 of the Voting Rights Act shows why the North Carolina Supreme Court's construction of Section 2 was incorrect.

The individual *amici* – Cindy Moore, Milford Farrior, and Mary Jordan – are African American citizens, residents, and voters living in Pender County, North Carolina, and North Carolina House District 18, the district at issue in this case. They are members of various civic and social organizations

[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

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 from House District 18, a representative who is familiar with, and responsive to, the needs of their community. If the decision of the North Carolina Supreme Court were to be upheld, however, they would be denied the ability to elect such a representative.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of that goal, the ACLU has long been active in defending the equal right of racial and other minorities to participate in the electoral process. The ACLU has appeared before this Court in numerous voting cases over the years, including those seeking to enforce the provisions of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *e.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984), *Rogers v. Lodge*, 458 U.S. 613 (1982), *Hunter v. Underwood*, 471 U.S. 222 (1985), *Holder v. Hall*, 512 U.S. 874 (1994), and *Abrams v. Johnson*, 521 U.S. 74 (1997), both as counsel for parties and as amicus curiae. The ACLU of North Carolina is a statewide affiliate of the national ACLU.

INTRODUCTION

The question presented in the petition for certiorari is phrased as "[w]hether 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." Pet. i. While *amici* believe that such claims can be brought against jurisdictions whose failure to

create such "coalitional districts"[2] results in minority voters "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" – the touchstone of a Section 2 violation, 42 U.S.C. § 1973(b) – this Court need not resolve that question as an abstract proposition to decide this case in petitioners' favor.

This case involves not a state's failure to create a coalitional district, but rather a challenge to a specific coalitional district that a State voluntarily created in an effort to comply with Section 2. The North Carolina General Assembly drew that coalitional district – House District 18 – to continue providing minority voters who had previously lived in a majority-black state legislative district with an equal opportunity to elect a legislator of their choice. As this Court explained in its foundational Section 2 decision, *Thornburg v. Gingles*, 478 U.S. 30 (1986) – itself a case involving North Carolina state legislative districts – applying Section 2 demands "a searching practical evaluation of the past and present reality" within the relevant jurisdiction, 478 U.S. at 79 (quoting S. Rep. No. 97-417, p. 30 (1982)). "This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact" of the relevant electoral practices." *Id.* (internal quotation marks and citations omitted).

As the facts in this case illustrate, Pender and New Hanover Counties originally were a single county, divided into two counties as part of an explicit and intentional plan to dilute the voting strength of newly enfranchised black voters in 1875. *Cf. Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (intentionally

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[2] This phrase comes from the Court's opinion in *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (describing "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice").

carving black voters out of a jurisdiction violates Fifteenth Amendment). Since the state originally created two counties to divide an effective black voting population, and now wants to allow that population to remain united in a coalitional district for legislative elections, the district should be protected by the Voting Rights Act.

However, instead of conducting a fact-specific and local appraisal, the North Carolina Supreme Court adopted a categorical rule that the "whole county provision" (WCP) of the North Carolina Constitution, art. II, § 5(3)[3] should trump all efforts to comply with Section 2 unless those efforts can culminate in the creation of a district in which a majority of the citizens of voting age are black. Rigid application of that rule, in light of the past and present reality of voting rights in this region of North Carolina, threatens to undo the significant but incomplete progress the State has made in providing all its citizens with the right to participate in the political process and elect representatives of their choice.

SUMMARY OF ARGUMENT

The whole county provisions of the North Carolina Constitution should not be permitted to bar the state's use of coalitional districts to provide its long-excluded minority voters with an equal opportunity to elect legislators of their choice. The whole county provisions themselves are an aspect of the State's long history of racial discrimination impairing minority citizens' right to vote and elect their preferred candidates to office.

In an important sense, House District 18 reflects significant progress in overcoming that sad history. While levels of racial bloc voting within the district remain high, it is now possible for black voters to elect a representative of their choice.

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[3] A parallel whole county provision applies to state senatorial districts. N.C. Const., art. II, §3(3).

The wisdom of rejecting the North Carolina Supreme Court's rigid rule is further illustrated by other coalitional districts in North Carolina, including the congressional district at issue in *Easley v. Cromartie*, 532 U.S. 234 (2001). If the whole county provisions of state law were to preclude adopting such districts in areas where minority voters will otherwise be excluded from effective participation in the political process, then those provisions themselves would violate Section 2.

More generally, absent the presence of a substantial number of coalitional districts, North Carolina would soon revert to having a virtually all-white legislature. If this Court were to affirm the North Carolina Supreme Court's holding that black voters are entitled to no consideration of their interests unless they can show that it is possible to draw districts that are majority-black with respect to citizens of voting age, it would implicitly invite the abandonment of the districts that have finally provided black North Carolinians with representation of their choice.

ARGUMENT

I. House District 18 Gives Black Voters in New Hanover and Pender Counties the Ability to Participate Equally in the Political Process and to Elect a Representative of Their Choice.

For most of its history, North Carolina denied its black citizens the right to participate fully in its political processes and to elect representatives of their choice. Sometimes, this denial was purposeful. Other times, while unintentional, this denial violated Section 2 of the Voting Rights Act. Only in the last two reapportionment cycles did black voters in New Hanover and Pender Counties, the counties that constitute House District 18, finally achieve the ability to participate effectively in state legislative elections.

A. North Carolina Has an Extensive History of Racial Discrimination Touching the Right To Vote, and Particularly Diluting the Voting Strength of Black Residents of New Hanover and Pender Counties.

1. This Court is well acquainted with the barriers to full political participation in state legislative elections that North Carolina's black citizens have faced. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court relied on extensive findings of past and continuing discrimination, as well as pervasive racial bloc voting in the challenged districts, to conclude that the state's use of multimember house districts and the way in which it drew a state senate district violated the rights of minority voters under Section 2 of the Voting Rights Act. *See id.* at 39-41.

While some of this Court's findings in *Gingles* were specific to those districts, many of them implicated the voting rights of black citizens across the state. For example, North Carolina had officially discriminated against blacks from 1900 to 1970 through the use at different times of a poll tax, a literacy test, a prohibition against single shot voting, and designated seats for multi-member districts. *See id.* at 38-39. Black voter registration was depressed and was traceable "to the historical pattern of statewide official discrimination." *Id.* at 39. There was also a statewide history of discrimination with respect to education, housing, employment, and health services which resulted in a lower socioeconomic status for blacks. This lower status both created "special group interests and hinders blacks' ability to participate effectively in the political process and to elect representatives of their choice." *Id.* The state also used other voting procedures "that may operate to lessen the opportunity of black voters to elect candidates of their choice," such as a majority vote requirement for primary elections and the lack of a subdistrict residency requirement for members of the General Assembly elected from multi-member districts. *Id.* White candidates for public office "encouraged voting along racial lines by appealing to

racial prejudice," a tactic that "persists to the present day," including in the 1984 campaign for a seat in the United States Senate. *Id.* at 40.

In light of all these factors, it was entirely foreseeable that the districts at issue in *Gingles* "exhibit[ed] severe and persistent racially polarized voting." *Id.* at 41. It was the interaction of that racially polarized voting with the configuration of the challenged districts that gave rise to liability under Section 2.

2. In the wake of *Gingles*, jurisdictions across North Carolina changed their election practices on the basis of either judicial findings or concessions that voting was racially polarized and that as a result, current electoral district boundaries impermissibly diluted minority voting strength. For representative cases see *Ward v. Columbus County*, 782 F.Supp. 1097, 1102 (E.D.N.C. 1991) (invalidating at-large elections; finding "racial appeals" in elections and that "racial bloc voting has been extreme and persistent among the white voters" in county adjacent to Pender County); *see also, Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993); *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991); *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988); *NAACP v. City of Statesville*, 606 F.Supp. 569 (W.D.N.C. 1985); *Johnson v. Halifax County*, 594 F.Supp. 161 (E.D.N.C. 1984); *Harry v. Bladen County*, 1989 WL 253428 (E.D.N.C. 1989); *Wilkins v. Board of Comm'rs*, No. 93-12-CIV-2-BO (E.D.N.C. 1995); *Fussell v. Town of Mount Olive*, Civ. No. 93-303-CIV-5-D (E.D.N.C. 1995); *Speller v. City of Laurinburg*, No. 3:93 CV 365 (M.D.N.C. 1994); *Rowsom v. Tyrell County Comm'rs*, No. 93-33-CIV-Z-D (E.D.N.C. 1994); *Lewis v. Wayne County Bd. of Educ.*, Civ. No. 91-165-CIV-5-H (E.D.N.C. 1992); *Daniels v. Board of Comm'rs*, Civ. No. 89-137-CIV-4-H (E.D.N.C. 1990); *Hall v. Kennedy*, Civ. No. 88-117-CIV-3 (E.D.N.C. 1989); *Patterson v. Siler City*, Civ. No. C-88-701-D (M.D.N.C. 1989); *United States v. Sampson County*, Civ. No. 88-121-CIV-3 (E.D.N.C. 1989); *Green v.*

City of Rocky Mount, No. 83-81-CIV-8 (E.D.N.C. 1984),. *See generally*, Anita S. Earls, et al, *Voting Rights in North Carolina, 1982-2006*, 17 Rev. L. Soc. Just. 575, 593-640 App. B (2008) (summarizing voting rights cases); William R. Keech and Michael P. Sistrom, *North Carolina*, in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1900, 155-190 (Chandler Davidson and Bernard Grofman eds. 1994).

3. Black citizens of New Hanover and Pender Counties were, of course, subject to all of the statewide practices and conditions identified by this Court in *Gingles*, such as the history of official discrimination touching the right to vote and the presence of electoral practices that enhanced the dilutive impact of at-large elections. The three-judge state court in this case concluded that black citizens in Pender and New Hanover Counties, "were victims of racial discrimination." App. to Pet. Cert. 113a. They remain at a disadvantage compared to whites "with regard to income, housing, education, and health which hindered their ability to participate effectively in the political process and elect representatives of their own choosing." *Id.* at 114a. As discussed *infra*, Section I.B., they bear the brunt of significant racial bloc voting. In addition, however, the region has its own distinct, and distinctively troubling, history of discrimination impairing black citizens' political participation.

The very genesis of Pender County lies in intentional discrimination against black voters. Originally part of New Hanover County, Pender County was created in 1875 as a result of racially infected Reconstruction politics. At that time, Republicans allied themselves with African American populations and were able to control the city of Wilmington and New Hanover County. Conservatives in the General Assembly, however, "sought to isolate the influence of Republicans and African Americans in New Hanover County by taking the northern two-thirds of the county" and forming Pender County. J.A. 144. By separating the African American and Republican coalition, conservatives effectively eliminated the African American population's ability to elect

their candidate of choice and eventually gained control of Pender County. The North Carolina Supreme Court ignores the fact that, but for this racially tainted splitting of New Hanover County, House District 18 would not even implicate the whole county provision.

In 1898, the Democratic Party undertook a white-supremacy political campaign to seize control from the Fusionists, whose legislative programs were favorable to African Americans. "This campaign, characterized by blatant racist appeals by pamphlet and cartoon, aided by acts of outright intimidation, succeeded in restoring the Democratic Party to control of the legislature in 1898." *Gingles v. Edmisten*, 590 F.Supp. 345, 359 (E.D.N.C. 1984). In 2006, an official commission examined the events of 1898. It described the Democratic Party's victory as the product not only of racialized campaign tactics and ballot-box stuffing in a majority-black precinct but also of intimidation that deterred black citizens from registering to vote by threatening them with losing their jobs or physical attack if they sought to register. *See* Wilmington Race Riot Commission, Final Report (May 31, 2006), available at http://www.ah.dcr.state.nc.us/1898-wrrc/report/report.htm (last visited June 15, 2008). The day after the election, the Democratic Party passed resolutions requiring the mayor and chief of police to resign. Whites took up arms and began shooting African Americans on the street. Ultimately the violence led to the deaths of an unknown number of African Americans in Wilmington and a mass exodus of over 2,100 individuals in what was mislabeled for over a century as a race riot. In 2006, an official commission concluded that the event was in actuality a coup d'etat that "spurred the subsequent development of statutory basis for segregation (i.e., Jim Crow) and disfranchisement legislation in North Carolina." *Id.* at 5.

On March 6, 1899, the North Carolina legislature ratified "An Act to Restore Good Government to the Counties of North Carolina." It was designed to "solidify Democratic control

over county governments statewide." *Id.* at 208. The act applied to New Hanover and twelve other counties, primarily those with African American majorities or near majorities. "The law removed the election of the county commissioners from the popular vote and placed the responsibility with justices of the peace appointed by the General Assembly." *Id.*

More recently, this region of the state has been the site of continuing discrimination affecting the ability of African Americans to participate equally in the political process. In 1971, two years after desegregation of Wilmington's high schools, nine African American men and one white woman (referred to as the "Wilmington Ten") were charged and eventually convicted of felonious burning of property and conspiracy to assault emergency personnel at the scene of the burning. At the time, there was an "atmosphere of tension, anxiety, and stress that existed" as black and white students adjusted to the interracial schooling. J.A. 105-06. The incident became internationally known when allegations arose that evidence against the Wilmington Ten had been fabricated. In 1980, the convictions were reversed. *See Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980).

In 1972, Pender County was one of the 19 counties on which the state imposed an Anti-Single Shot Law (North Carolina General Statutes §§ 163-151(2)(d) and 163-151(3)(b)). That law was successfully challenged by African-American voters as unconstitutional because "the legislature wished to blunt the voting strength of Negroes in the counties to which the law applies." *Dunston v. Scott*, 336 F.Supp. 206, 212 (E.D.N.C. 1972).

4. Black voters in New Hanover and Pender Counties did not have the opportunity to elect the state legislator of their choice until the 1990's. Following the 1990 census, the State redrew the state legislative boundaries. Because thirty-four counties in North Carolina are covered by the special preclearance provision of Section 5, 42 U.S.C. § 1973c, *see* 28

C.F.R. Part 51 Appendix (2007),[4] the state submitted its legislative redistricting plan to the Department of Justice. The Attorney General interposed an objection to the state's 1991 plan because of the existence of racially polarized voting and because boundary lines did not fairly recognize minority voting strength. One area of the state where the Attorney General found that the plan appeared "to minimize black voting strength" was the southeast, containing Pender, New Hanover, and six other counties. Letter from John R. Dunne, Assistant Attorney General, to Tiare B. Smiley, December 18, 1991. The plan, he concluded, appeared "to manipulate black concentrations in a way calculated to protect white incumbents," and "submerges concentrations of black voters in several multimember, white majority districts." *Id.*; *see* J.A. 68.

In response, the legislature adopted a revised redistricting plan in 1992 that received preclearance. That plan required, among other things, splitting some precincts in order to fairly reflect black voting strength. Among the districts created by that plan was one denominated House District 98, which included portions of New Hanover and Pender Counties. *See id.* That district was a majority-minority district; House District 18 is the successor to that district drawn after the 2000 census.

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[4] Neither New Hanover nor Pender County is a covered jurisdiction.

B. Despite the Continued Presence of Significant Racial Bloc Voting, House District 18 Gives Black Voters in New Hanover and Pender County the Ability to Elect a Representative of Their Choice.

The parties agree that elections within House District 18 continue to exhibit significant racial bloc voting. See App. to Pet. Cert. 9a.[5]

Nonetheless, black voters in House District 18 have succeeded in electing the candidate of their choice. This is because racial bloc voting, while still significant both practically and legally, has diminished enough to enable candidates preferred by the black community to attract a level of white crossover voting sufficient to win elections.

A central reason for this salutary development lies in the fact that since the time of *Gingles*, North Carolina has become a two-party state. House District 18 has a total population that is 42.89% black and a voting age population that is 39.36% black. App. to Pet. Cert. 46a. But black voters form a majority (53.72%) of Democratic registered voters in the district. App. to Pet. Cert. 46a. Black voters are thus able to nominate the candidate of their choice in the primary. That candidate is then able to run in the general election with major party support. At the 2004 election held under the challenged plan, the candidate of choice of minority voters was in fact reelected. *Id.*

That black voters can elect their candidate of choice from House District 18, however, does not mean that they would be able to elect their candidate of choice absent that district. As the North Carolina Supreme Court recognized, "[p]ast election results in North Carolina demonstrate that a legislative voting

[5] In addition, there was uncontested evidence in the record below that voting in Pender County continues to be racially polarized. A report prepared by Richard Engstrom, Ph.D., indicated that "analysis of recent elections in both Pender and New Hanover Counties in which voters have been faced with a biracial choice of candidates reveal racially polarized voting." J.A. 122 (Engstrom Report ¶ 12).

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." App. to Pet. Cert. 5a. House District 18 satisfies that standard, but by a relatively narrow margin. It would be impossible to draw a district without splitting New Hanover and Pender Counties that would have sufficient numbers of black voters for the minority community anywhere in southeastern North Carolina to elect its legislator of choice.

II. The Whole County Provision Is Itself a Practice That Raises Serious Concerns Under the Voting Rights Act.

The reason the North Carolina Supreme Court gave for requiring the reconfiguration of House District 18 was its failure to fully satisfy the whole county provision. It would be bad enough if an entirely neutral state practice posed a barrier to achievement of full political equality for minority voters. It would be even worse if a state practice that has been suspended in significant parts of the state precisely because of its discriminatory consequences were to deprive black voters in House District 18 of the ability they now enjoy to elect the candidate of their choice.

The Department of Justice has interposed 63 objections to voting changes submitted by North Carolina and its political subdivisions from March 17, 1971, to June 25, 2007, 46 of which were entered from 1982 forward. *See* http://www.usdoj.gov/crt/voting/ sec_5 /nc_obj2.htm (last visited June 15, 2008). A number of these objections are connected to North Carolina's attempts to impose a whole county provision or its close analog, a whole precinct provision.

In 1968, North Carolina adopted amendments to its constitution, H.B. No. 471 (1967), which provided that no county could be divided in the formation of a senate or house district. When that amendment was finally submitted for

preclearance, the Department of Justice interposed an objection. The objection was based upon the fact that the whole county provision led to the use of large multi-member districts which, given "the racial bloc voting that seems to exist," would submerge "cognizable minority population concentrations into larger white electorates." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex Brock, November 30, 1981.[6]

Subsequently, on December 7, 1981, the department objected to a proposed senate redistricting plan because the whole county concept had resulted in the submergence of cognizable black communities into large, predominantly white, multi-member districts. The department was unable to conclude that the plan "is free of a racially discriminatory purpose or effect." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex Brock, December 7, 1981.[7]

The following year, the department objected to a reapportionment plan for the North Carolina house on similar grounds that the state had applied the whole county concept and that "the use of large multi-member districts effectively submerges sizeable concentrations of black population into a majority white electorate." Letter from Wm. Bradford Reynolds, Assistant Attorney General, to Alex K. Brock, January 20, 1982. The department concluded that the state

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[6] As the letter provided: "In the present submission . . . we are evaluating a legal requirement that every county must be included in the plan as an undivided whole. As noted above, the inescapable effect of such a requirement is to submerge sizeable black communities in large multi-member districts." Letter of November 30, 1981.

[7] At the same time, the Department also objected to a proposed congressional redistricting plan because District 2, "the only district where blacks could have the potential for electing a candidate of their choice," had been drawn in a "strangely irregular" shape to exclude a politically active black community and had reduced the black population to 36.7% compared to 40.2% in the preexisting plan. *Id.*

failed to carry its burden of showing that the proposed plan "is free of a racially discriminatory purpose and effect." *Id.*

In 1995, despite the fact that the state split some precincts in its 1992 redistricting plan to draw districts that fairly reflected minority voting strength, *see* J.A. 68, the General Assembly passed a law, Chapter 355 (1995), patterned after the whole county provision, that prohibited state legislative and congressional district boundaries from crossing voting precinct lines. The Department of Justice objected to the new law because it would make it more difficult to draw majority black districts and because it was evident the law was adopted with "a racially discriminatory purpose." Letter from Loretta King, Acting Assistant Attorney General, to Charles M. Hensey, February 13, 1996.

In 2002, the Department of Justice withdrew its objection to the whole county provision. It did so because the state supreme court had given the WCP a new construction in *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), that "could be harmonized with the requirements of the Voting Rights Act [VRA] so as to overcome concerns expressed in the November 30, 1981, objection." Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to Knox V. Jenkins, Jr., July 12, 2002. The withdrawal letter quoted *Stephenson*, 562 S.E.2d at 396, that "the WCP may not be interpreted literally because of the VRA and 'one-person, one-vote' principles," but that "[f]ederal law . . . preempts the State Constitution only to the extent that the WCP actually conflicts with the VRA and other federal requirements relating to state legislative redistricting." Letter of July 12, 2002. The withdrawal letter further quoted *Stephenson*, 562 S.E.2d at 391 n.4, "that complete compliance with federal law is the first priority before enforcing the WCP." The department concluded that "the burden of the State under Section 5 has been met with regard to Chapter 640 (1967), as construed in *Stephenson*." Letter of July 12, 2002.

Even after the withdrawal letter, use of the whole county provision in a covered portion of the state would remain illegal if it violated or conflicted with Section 5. So, for example, if the state were to redraw a legislative district that included part of a covered county to avoid splitting counties and, as a result, there was a retrogression in minority voting strength, that use of the whole county provision would prompt a new Section 5 objection. *Cf. Beer v. United States*, 425 U.S. 130 (1976); Letter of December 7, 1981 (objecting to a congressional district because the black population had been reduced from 40.2% in the preexisting plan to 36.7% in the proposed plan).

But under the North Carolina Supreme Court's interpretation of Section 2, use of the whole county provision in the remainder of the state would be immune from challenge, even if it too eliminated a district from which black voters had previously been able to elect the candidate of their choice. While this Court has cautioned that liability under Sections 2 and 5 cannot mechanically be equated, *see Georgia v. Ashcroft*, 539 U.S. 461, 477-79 (2003), in this situation they would reflect overlapping concerns.

III. Coalitional Districts Are Critical to Providing North Carolina's Black Citizens an Equal Opportunity to Elect Candidates of their Choice and Section 2 Should Be Construed to Recognize the Role These Districts Play.

Upon his departure from Congress in 1901, George White, a black Republican from Tarboro, North Carolina, announced that "[t]his is perhaps the Negro's temporary farewell to Congress." Michael Barone with Richard E. Cohen, eds., *The Almanac of American Politics* 1225 (2003). History proved him correct. It was not until 1991, almost a century later, when Melvin Watt and Eva Clayton were elected from two majority black districts, that North Carolina voters again sent an African American to Congress. Watt's 12th District was 57% black, and it became a lightning rod for challenges by white voters.

The constitutionality of its boundaries was considered by this Court no less than four times. *See Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Easley v. Cromartie*, 532 U.S. 234 (2001). As a result of that litigation, District 12 was redrawn in 1997, not as a majority-black district but as a district with a total black population of 47% and a black voting age population of 43%. Blacks were 46% of the registered voters. *Hunt v. Cromartie*, 526 U.S. at 544. Despite that reduction in black population, Representative Watt continued to be elected based on the power of incumbency and the support of white voters in his heavily urban district. Under the North Carolina Supreme Court's construction of Section 2, however, the state would be permitted to redraw District 12 at its discretion, free and clear of Section 2's constraints.

A similar situation obtains at the state legislative level in North Carolina as well. Today, seven African Americans serve 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 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 achieved proportionality: While African Americans are approximately 20% of the voting age population in North Carolina, they are able to elect candidates of their 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 percent rule adopted by the state court, the state would be free under Section 2 to eliminate all these districts and thus relegate

African Americans to token representation in the North Carolina General Assembly.

Such a result would be neither compelled by the text of Section 2 nor required by this Court's decisions. In *Gingles* itself, not only did this Court require that Section 2 claims be assessed under "the totality of circumstances," 478 U.S. at 79 (quoting 42 U.S.C. § 1973(b)), which includes looking at "the facts of each case" and conducting a "searching practical evaluation of the past and present reality" within the relevant jurisdiction, *id.* (internal quotation marks omitted, citing S. Rep. No. 97-417 p. 30 (1982)), but it declined to adopt the bright line rule for vote dilution claims propounded by the North Carolina Supreme Court here. *See id.* at 46 n.12. *See also id.* at 91 n.1 (O'Connor, J., concurring in the judgment) (stating that "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").

Decisions of the Court subsequent to *Gingles* have similarly declined to adopt a bright line test for proof of the first *Gingles* factor, or assumed that it would not apply. *See Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993) (declining to adopt a bright line test for geographic compactness); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (assuming *arguendo* that a group would state a claim under Section 2 if it were "a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority"); *Johnson v. DeGrandy*, 512 U.S. 997, 1009 (1994) ("we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied"); *LULAC v. Perry*, 126 S. Ct. 2594, 2624 (2006)

("we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population") (Kennedy, J., plurality opinion); *id*. at 2651 (Souter & Ginsburg, JJ., concurring in part and dissenting in part) (arguing that the Section 2 claim challenging the dismantling of a coalitional district should be returned to the district court for reconsideration "untethered by the 50% barrier"); *id*. at 2645 n.16 (Stevens, J., concurring in part and dissenting in part) (agreeing that "the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory dilution inquiry").

To be sure, not every minority community will be able to obtain an order from a federal court requiring that the state draw a coalitional district. This Court's decisions in cases like *Johnson v. DeGrandy*, 512 U.S 997 (1994), and the *Shaw* cases mean that a state is not required to maximize the number of districts from which minority voters elect their preferred candidates and may be affirmatively prohibited from purposefully drawing a coalitional district that flouts traditional districting principles such as contiguity and compactness. But surely in a case where the district at issue raises problems under state law only because it contains pieces of two counties that were split from one another at the end of Reconstruction for the very purpose of diluting minority voting strength, Section 2 can properly be construed to protect that coalitional district. Holding that the North Carolina General Assembly was complying with Section 2 when it drew House District 18 to preserve the already realized ability of black voters to elect a candidate of choice raises no difficult questions.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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