No. 07-689

IN THE
# Supreme Court of the United States

GARY BARTLETT, *et al.*,
*Petitioners*,
*vs.*
DWIGHT STRICKLAND, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA SUPREME COURT

## BRIEF FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE ASIAN AMERICAN JUSTICE CENTER AS *AMICI CURIAE* ON BEHALF OF PETITIONERS

NINA PERALES
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476

LOIS D. THOMPSON
*Counsel of Record*
MICHAEL J. LEBOWICH
TRAVIS P. BRENNAN
GREGG SALKA
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
(310) 557-2900

TERRY M. AO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 296-2300

*Attorneys for Amici Curiae*

## TABLE OF CONTENTS

*Contents*

*Page*

## TABLE OF CITED AUTHORITIES

*Page*

**Federal Cases**

*Cited Authorities*

*Cited Authorities*



**State Cases**



**Federal Statutes**

*Page*

**Other Authorities**

This *amicus curiae* brief is submitted on behalf of the Mexican American Legal Defense and Educational Fund ("MALDEF") and the Asian American Justice Center ("AAJC") in support of Petitioners.[1]

## STATEMENT OF INTEREST OF *AMICUS CURIAE* THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND ("MALDEF")

MALDEF is a national civil rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States. MALDEF's mission includes a commitment to pursuing political and civil equality and opportunity through advocacy, community education, and the courts. MALDEF has represented Latino and minority interests in voting and civil rights cases in the federal courts, including before this Court in *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594 (2006). MALDEF therefore has a strong interest in the outcome of these proceedings.

---

1. Pursuant to Supreme Court Rule 37.3(a), the *Amici Curiae* state that the parties have consented to the filing of this brief and that they have filed letters of consent in the office of the Clerk. Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Amici Curiae* further state that no one other than MALDEF, AAJC and their counsel made a monetary contribution to the preparation or submission of this brief.

MALDEF agrees with petitioners that a categorical 50% rule should not be imposed as a condition that minority voters must meet before they may pursue a vote dilution claim under the Voting Rights Act. *Amici* write separately, however, to suggest how the *Thornburg v. Gingles*, 478 U.S. 30 (1986), prerequisite relating to the size of a minority group in a single-member district ought now to be modified and to underscore the continued importance of the Voting Rights Act in securing for racial minority voters equal opportunity to elect candidates of their choice.

## STATEMENT OF INTEREST OF *AMICUS CURIAE* THE ASIAN AMERICAN JUSTICE CENTER ("AAJC")

AAJC is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. AAJC works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. In accomplishing its mission, AAJC focuses its work to promote civic engagement, to forge strong and safe communities, and to create an inclusive society in communities on a local, regional, and national level. Collectively, AAJC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center, have over 50 years of experience in providing legal public policy advocacy and community education on voting rights in striving to protect Asian Americans' access to the polls, including playing a key role in 2006 in the reauthorization of the Voting Rights Act of 1965. AAJC was also an *amicus*

*curiae* in *Crawford v. Marion Co. Election Bd.*, 128 S. Ct. 1610 (2008), opposing the Indiana voter photo identification requirement as disproportionately depriving Asian Americans of the right to vote and providing an invitation to discriminate against Asian American voters.

The question presented by this case is similarly of great interest to AAJC as it implicates the availability of voting rights protections for Asian Americans in this country.

## SUMMARY OF ARGUMENT

Although "bright line" tests may have their uses, no bright lines are contemplated by the Voting Rights Act, 42 U.S.C. § 1973, the legislative history of the Act, or this Court's prior opinions. *Amici* urge the Court to reject a literal and mechanistic interpretation of the Act and of the statement in *Thornburg v. Gingles*, 478 U.S. 30, 51-52 (1986), that a minority group asserting a violation of Section 2 must demonstrate that it constitutes a majority in a single-member district ("the first *Gingles* prerequisite").

A less doctrinaire, more flexible approach is far more consistent with the language and purposes of the Act. When "society's racial and ethnic cleavages . . . necessitate majority-minority districts to ensure political and electoral opportunity, . . ." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), such districts will continue to be drawn. And, as we show below, majority-minority districts are required in certain parts of the country and under certain circumstances to ensure

electoral opportunity. Indeed, the persistence of racially polarized voting and the legacy of past discrimination, as well as, unfortunately, instances of recent discrimination, all demonstrate the continued need for the Voting Rights Act and, specifically, the creation of majority-minority districts to achieve the purposes of the Act. However, when the facts establish the existence of districts like North Carolina House District 18, in which African-Americans constitute fewer than 50% of the voters in the district but are able to elect candidates of their choice, the courts will countenance the creation of those districts[2] and thereby give full force to "a statute meant to hasten the waning of racism in American politics." *Id.*

*Amici* request the Court to answer the question presented by holding that a minority group satisfies the first *Gingles* prerequisite in one of two ways: (1) when it constitutes a numerical majority of a proposed district's population or (2) if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over non-minority votes, it has the ability to elect candidates of its choice.[3]

---

2. As discussed more fully below, see *infra*, at pp. 20-21, cross-over districts like North Carolina House District 18 are distinct from "influence" districts. "Influence" districts are not in issue in this case and do not offer minority voters the opportunity to elect candidates of their choice.

3. "Minority coalition" districts, discussed *infra*, at pp. 19-20, are not before the Court. Nothing in this brief is intended to preclude or limit the ability of minority groups in coalition to assert Section 2 claims of vote dilution under either prong of the *Gingles* prerequisite as formulated above.

## ARGUMENT

### POINT I

### THERE IS NO SUPPORT FOR A BRIGHT LINE "50% RULE" IN THE ACT, ITS LEGISLATIVE HISTORY, OR THE PRIOR OPINIONS OF THIS COURT

In their submissions to the Court, Petitioners and other *Amici* have demonstrated that "the Gingles factors cannot be applied mechanically and without regard to the nature of the claim," *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993), and that there is no place for a rigid, "bright line" rule in the interpretation and application of a statute like the Voting Rights Act which "'is peculiarly dependent upon the facts of each case' . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (internal citations omitted). The MALDEF and AAJC *Amici* will not burden the Court by repeating that presentation here but incorporate and rely on it to inform their discussion of the question before the Court.

## POINT II

## BECAUSE RACIALLY POLARIZED VOTING, BLOC VOTING, AND IMPEDIMENTS TO MINORITY GROUP VOTING PERSIST IN MANY JURISDICTIONS, THE VOTING RIGHTS ACT CONTINUES TO PLAY A VITAL ROLE IN SECURING EQUAL OPPORTUNITY FOR RACIAL AND LANGUAGE MINORITY VOTERS

The Voting Rights Act of 1965 continues to play a vital role in ensuring that minority voters are able to participate meaningfully in the political process and elect candidates of their choice. Although more than four decades have passed since the original Act was signed into law, voting-related discrimination against racial and language minorities persists. As discussed in detail below, just since the 2000 Census, which generated the last major redistricting effort, the courts have been presented with numerous voting schemes that have diluted the votes of minority voters and, in some cases, have prevented them from voting at all.

Violations occur in a wide array of districts, counties and states, in all sections of the country, in both covered and non-covered (§ 5) jurisdictions and against various racial and language minority groups. It remains a troubling fact that, in many areas and in many circumstances, racially polarized voting and, in some instances, intentional acts of discrimination have prevented large numbers of minority voters from electing the candidates of their choice. The cases discussed below are merely a subset from the last eight years that barely scratch the surface in highlighting the violations that still regularly occur.

In its most recent examination of the Act, the Court, in *League of United Latin American Citizens ("LULAC") v. Perry*, 126 S. Ct. 2594 (2006), addressed these very problems. A five-member majority found that the Texas Legislature had, in violation of Section 2 of the Act, dismantled a Latino opportunity district (District 23) when it drew its congressional redistricting plan. The District Court found, and this Court acknowledged, that racial polarization and bloc voting were prevalent throughout the State of Texas, with the specific district in question showing extreme polarization (92% of Latinos voted for one candidate, while 88% of Anglos voted for another). *Id.* at 2615. Then, in examining the totality of the circumstances affecting the redistricting, the Court found that the Legislature had intentionally redrawn the district to protect an incumbent, who was not the preferred candidate of Latino voters, from a Latino constituency that had been gaining in numbers in the district and had been voting against him. *Id.* at 2623.

The Court specifically noted that before the redistricting, the Latino share of the citizen voting-age population had been 57.5% in District 23 while, after the redistricting, the Latino share of the citizen voting-age population had dropped to 46%. *Id.* at 2615. It then quoted the District Court's finding that in the redrawn district, Latino voters were "'certainly not an effective voting majority.'" *Id.* at 2613. The Court held that the redrawing of District 23 constituted vote dilution in violation of Section 2 of the Act. [4]

4. On remand, District 23 was redrawn to comply with the Court's ruling. The District Court's 2006 remedial redistricting (Cont'd)

The lower courts, too, have confronted telling evidence of the persistence of racially polarized voting when called on to adjudicate challenges to post-2000 Census redistricting plans. In *Colleton Co. Council v. McConnell*, 201 F. Supp. 2d 618, 640-641 (D. S.C. 2002), for example, the District Court noted that racially polarized voting in South Carolina is "long and well-documented" and "has seen little change in the last decade." Specifically, the court found that voting was racially polarized in all regions of the state and that white voters engaged in significant bloc voting. These findings were supported by statistical evidence showing that between 1992 and 2000, black voters voted for black candidates in 98% of general elections in which a black candidate and a white candidate were contesting a single seat and that "white voters almost always vote in blocs to defeat the minority's candidate of choice." *Id.* Further, the court remarked on the "extensive documentation of the history of voting-related racial discrimination in South Carolina," *id*. at 641, and the "[e]vidence of the depressed socio-economic and educational status of blacks in the state which hinders their ability to participate effectively in the political process and to elect representatives of their choice. . . ." *Id.* at 642. The court

---

(Cont'd)

plan created a new District 23 with a 57.4% Latino citizen voting-age population. *League of United Latin American Citizens ("LULAC") v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006). Incumbent Henry Bonilla, who, in 2002 had received only 8% of the Latino vote and was found not to be the Latino-preferred candidate in *Session v. Perry*, 298 F. Supp. 2d 451, 519 (E.D. Tex. 2004), was defeated by Ciro Rodriquez in the election that followed the 2006 redistricting. Office of United States Representative Ciro Rodriquez, http://www.rodriquez.house.gov.

declined to permit the creation of proposed "influence" districts with black voting-age populations ranging from 44.61% to 48.19% of the total voting-age population and instead found, after consideration of extensive expert and other evidence, that "a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." *Id.* at 643.

The District Court in *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1024 (D. S.D. 2004), *aff'd*, 461 F.3d 1011 (8th Cir. 2006), rejected South Dakota's 2001 legislative redistricting plan because it illegally "packed" Native Americans into a district with a 90% supermajority and thereby minimized the total number of districts in which Native Americans had the opportunity to elect candidates of their choice. In reaching that conclusion the District Court considered extensive evidence of racially polarized voting together with five illustrative redistricting plans drawn by plaintiffs' expert, all of which showed that it would be possible to create at least one additional majority Native American district in South Dakota. *Id.* at 1010-17.

In its analysis of the totality of the circumstances affecting electoral opportunity, the *Bone Shirt* court referenced trial evidence of "recent efforts on the part of South Dakota political subdivisions to deny Indians the right to participate in the political process." *Id.* at 1023. It cited as one example an instance that had occurred as recently as 1999, when Day County, South Dakota officials specifically designed the boundaries of their sanitary district to exclude land owned by Native Americans (notwithstanding that it comprised 87% of

the relevant land area) and thereby denied the Native American owners of that land the right to vote. *Id.* The court also noted the many barriers to Native American voter registration that had been erected by state officials, *id.* at 1024-25, and quoted statements by state legislators who opposed an effort after the 2002 election to enact laws that would have made it easier for Native Americans to register. Such statements included the following, which the court found "referenced Indian voters." "'I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system . . . I'm not sure we want that sort of person in the polling place. I think the [existing] effort of registration . . . is adequate.'" *Id. at 1026* (internal citations omitted).

In yet another post-2000 case, *St. Bernard Citizens For Better Gov't v. St. Bernard Parish Sch. Bd.*, 2002 U.S. Dist. LEXIS 16540 (E .D. La. Aug. 28, 2002), *amended* September 4, 2002, a Louisiana District Court struck down a school board plan adopted by parish voters to move from eleven single-member districts to five single-member and two at-large districts because it found that the new plan was dilutive of the votes of the parish's black population as compared to the previous plan. In reaching that conclusion, the court cited evidence of discrimination, racial polarization and bloc voting. It quoted at length from the lower court decision in *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1116 (E. D. La. 1986), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U. S. 905 (1989), saying that it "aptly" described the parish's history of racial segregation:

> [I]t would take a multi-volumed treatise to properly describe the persistent, and often

> violent, intimidation visited by white citizens upon black efforts to participate in Louisiana's political process.

*St. Bernard Citizens*, at *29. Summing up its analysis of the factors set forth in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, the court concluded:

> With respect to the seventh factor, whether members of the minority group have been elected to public office in the parish, the answer is "no." Only three blacks have run and none has come even close to being elected . . . [T]his factor, along with racial polarization in voting, [which the court separately stated was "clearly present"] is considered the most significant in support of a voting rights violation.

*Id.* at *33-*34.

At-large election schemes continue to give rise to Section 2 violations throughout the country. In *United States v. Blaine Co.*, 363 F.3d 897 (9th Cir. 2004), the Ninth Circuit affirmed a District Court holding that an at-large scheme for electing members of a Montana county commission violated Section 2. The Court of Appeals described the challenged scheme as follows:

> The Blaine County Commission consists of three commissioners, each of whom must reside in one of three different residential districts. Each commissioner is elected by

> a majority vote of . . . the district. The commissioners serve six-year staggered terms, such that [in] each even-numbered year one commissioner stands for election.

*Id.* at 900. Although Native Americans constituted 45.2% of the population and 38.8% of the voting-age population in the county, a Native American had never been elected to the county commission. *Id.* After reviewing the evidence of political cohesion and bloc voting that had been considered by the lower court, the Court of Appeals also discussed the evidence that supported the District Court's finding that "Blaine County's electoral procedures enhanced the opportunity for discrimination against American Indians." *Id.* at 914. In particular, the court remarked that the "evidence showed that staggered terms prevent[ed] American Indians from bullet voting, and the County's enormous size [made] it extremely difficult for American Indian candidates to campaign county-wide in at-large elections." *Id.* at 913-914 (footnote omitted). Finally, the Court of Appeals observed that after the District Court ruled, the county had submitted a remedial plan, adopted by the court, that provided for three single-member districts. In the first election conducted under that new plan, the voters in County District 1, which had a Native American voting age population of just over 87%, elected Blaine County's first Native American County Commissioner. *Id.* at 901 & n.2.

In *United States v. Osceola Co.*, 475 F. Supp. 2d 1220, 1222 (M.D. Fla. 2006), the United States sued to "'cure the dilution of Hispanic votes caused by [a Florida] [c]ounty's at-large method of electing for seats on that

body.'" (Internal citations omitted.) The county defendants conceded that Latinos in the county were politically cohesive and that white voters usually voted in a bloc to defeat minority candidates. *Id.* at 1232. The Government's expert provided evidence that "most elections in the County are ethnically polarized and that the degree of polarization is 'extraordinarily high.'" *Id.* After reviewing the evidence, the court concluded that

> there has been a history of a lack of Hispanic success at the polls, except for the brief period when the County employed a single-member district plan. Since 1996, no Hispanic candidate has been elected to either the [County Commission] or the County's School Board despite the fact that Hispanic candidates continue to run and the Hispanic population continues to grow. Indeed, even Hispanic-preferred candidates [who were not themselves Latino] have historically been unable to attain public office in countywide (at-large) elections.

*Id.* at 1233 (internal citations omitted). Holding that the County's at-large election system violated Section 2, the court also discussed evidence of recent instances of discrimination against Latino voters and candidates in the County. Focusing on elections held in 2000, the court wrote:

> Hispanics suffered from discrimination at the polls when they were turned away without being allowed to vote, refused assistance, forbidden to use their own interpreters, asked

> for multiple forms of identification (unlike non-Hispanic voters), and treated in a hostile manner by poll workers.

*Id.* at 1235. The court then noted that the County had entered into a consent decree with the Department of Justice in 2002 and had agreed to provide information and assistance to voters in Spanish, but, according to the court, "[w]hile this has improved conditions somewhat, problems have persisted and the County has not met all of the requirements of that decree." *Id.*

Just this year, in *United States v. Vill. of Port Chester*, 2008 U.S. Dist. LEXIS 4914 (S.D.N.Y. Jan. 17, 2008), the Southern District of New York found that Latinos were denied "an equal opportunity to participate in the political process" by the at-large voting system of the Village of Port Chester, New York. *Id.* at *1. Although Latinos made up 46.2% of the Village population, it was "undisputed that no Hispanic candidate has ever been elected to public office in Port Chester — not Mayor, not to the Board of Trustees, and not to the School Board." *Id.* at *73. Further, plaintiffs' experts presented evidence that in 12 out of 16 elections between 2001 and 2007, "the candidates of choice of Hispanic voters in Port Chester were defeated by the candidates of choice of non-Hispanic voters." *Id.* at *86. The District Court also reviewed evidence that while the citizen voting-age population of the Village taken as a whole was 21.9% Latino, alternative single-district plans provided for the creation of at least one district with a Latino citizen voting-age population in excess of 50%. *Id.* at *10, *28-29.

In reaching its decision, the District Court additionally considered evidence of official discrimination and racial appeals in political campaigns. In 2005, the United States and the County of Westchester (in which the Village of Port Chester is located) had entered into a Consent Decree pertaining to language assistance at polling sites in the County. *Id.* at *53. According to one of the experts whose testimony the court reviewed, as measured against the standard set in that Consent Decree, Port Chester failed to provide sufficient Spanish language assistance at polling places for Village Trustee elections held between 2001 and 2006. *Id.* at *54. The court also received "extensive testimony about a flyer . . . that was used as part of the 2007 Mayoral election . . . [that] [w]ithout question, . . . must be considered a racial appeal." *Id.* at *69.

Just two months ago, on April 16, 2008, the Northern District of Ohio issued its order in *United States v. City of Euclid*, Case No. 1:06cv01652 (N.D. Ohio April 16, 2008), setting forth its findings of fact and conclusions of law in support of the extensive oral rulings it had made when it found that the City of Euclid's method of electing its City Council violated Section 2. In that order, the court recited, *inter alia*, the proof of racial bloc voting that had been adduced at trial. This included data relating to elections for City Council in which there had been both African-American and white candidates. In six such contests, the African-American preferred candidate received an average of 76.4% of the votes cast by African-American voters and only an average of 12.78% of the votes cast by white voters. Order at 22. "As a result, despite strong support from African-

American voters, none of the African-American candidates prevailed." *Id.*

The court also recited evidence presented by the Government's expert that it was feasible to create eight single-member councilmanic districts in Euclid that would include two districts in which African-American voters would be a majority, one with 67% and the other with 56% of the voting-age population. Order at 14. Ultimately, the parties presented a remedial plan to the court that provided for the creation of such districts. In March 2008, a special councilmanic election was held. "On that date, for the first time in the City's history, an African-American was elected to the Euclid City Council, having been elected from one of the majority-minority districts established by the remedial plan." Order at 2.

Although the "heart" of the case involved violations of Section 4(e) of the Voting Rights Act, rather than vote dilution claims under Section 2, the District Court's decisions in *United States v. Berks Co.*, 250 F. Supp. 2d 525, 526 (E.D. Pa. 2003) (preliminary injunction), and *United States v. Berks Co.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (permanent injunction), provide powerful recent reminders of the wrongs the Voting Rights Act is intended to address and of its continued vital importance. The case grew out of an investigation conducted by the Department of Justice that focused on election practices in the Berk County, Pennsylvania, City of Reading whose Latino population had doubled in the course of ten years. *Berks*, 250 F. Supp. at 527-528. The majority of that Latino population was comprised of United States citizens of Puerto Rican descent, *id.* at 528, many of whom had been born in

Puerto Rico where, the court noted, the primary language of instruction is Spanish. *Id.*

The court recounted the instances of hostile and unequal treatment of Latino voters that the Government had documented during its investigation. For example, "[p]oll workers turned away Hispanic voters because [the poll workers] could not understand their names, or refused to 'deal' with Hispanic surnames;" "[p]oll workers made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as . . . 'They can't speak, they can't read, and they come in to vote.'" *Id.* at 529. Further, "[p]oll workers placed burdens on Hispanic voters that [were] not imposed on white voters," including requiring "only Hispanic voters to verify their addresses" and provide photo identification. *Id.* The court also noted that there had been a lack of bilingual poll workers and bilingual election materials and recited numerous instances in which voters were not permitted to bring English-speaking assistors of their choice into the polling booth. *Id.* at 529-531. The court ultimately entered a detailed permanent injunction after having made extensive findings of fact and conclusions of law, including with respect to Section 2 of the Act, that "the totality of the circumstances . . . demonstrates that Defendants' practices and procedures result in an electoral system in which Hispanic and Spanish-speaking voters have less opportunity than other members of the electorate to participate in the electoral process." *Berks*, 277 F. Supp. at 581.

The City of Boston also was the subject of recent Voting Rights Act litigation. The Government filed suit in 2005, in the case of *United States v. City of Boston*, Case No. 05-11598-WGY (July 2005),[5] alleging, *inter alia*, that Boston had abridged the rights of Latino, Chinese, and Vietnamese voters by treating them disrespectfully when they sought to exercise their right to vote, refusing to permit limited English proficient Latino and Asian American voters assistors of their choice, and improperly influencing, coercing or ignoring the ballot choices of such voters. Complaint at ¶ 20. The City thereafter entered into a settlement agreement which required it to undertake substantial remedial action, including hiring bilingual election officers to assist Latino, Chinese, and Vietnamese voters, permitting assistors of choice for limited English proficient voters, and training election officers to be respectful and courteous to all voters. Order dated October 18, 2005 in *United States v. City of Bosto*n, Case No. 05-11598-WGY.[6]

Again, this is but a sample of the many voting rights cases that have been litigated in recent years. In light of the overwhelming evidence that racial polarization, intentional discrimination, and the inability of minorities to elect candidates of their choice still remains a critical problem in the United States, there can be no question that the Act remains of vital importance and must be interpreted in the manner that best effectuates Congress' intent.

---

5. The Complaint is available at www.usdoj.gov/crt/voting/sec_203/documents/boston_comp.htm.

6. The Order is available at www.usdoj.gov/crt/voting/sec_203/documents/boston_cd2.htm.

## POINT III

## THE COURT SHOULD APPLY THE FIRST *GINGLES* PREREQUISITE IN THE MANNER THAT BEST ACHIEVES ITS PURPOSE: TO ESTABLISH THAT MINORITY VOTERS HAVE THE POTENTIAL TO ELECT REPRESENTATIVES OF THEIR CHOICE

When the Court first applied the *Gingles* prerequisites to single-member districts, Justice Scalia, writing for a unanimous Court, stated that the first prerequisite was "needed to establish that the minority has the potential to elect a representative of its own choice. . . ." *Growe v. Emison*, 507 U.S. 25, 40 (1993). That purpose, which is rooted in the language of the Act, is served by the interpretation of the *Gingles* prerequisite that *Amici* urge this Court to adopt.

*Amici* urge the following standard for the first *Gingles* prerequisite: A minority group asserting a Section 2 vote dilution claim satisfies the first *Gingles* prerequisite when it demonstrates that it constitutes a majority of a proposed district's population. A minority group that constitutes less than 50% of a proposed district's population also satisfies the first *Gingles* prerequisite and may proceed with a Section 2 vote dilution claim if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over votes, it has the ability to elect candidates of its choice.[7]

---

7. "Minority coalition" districts, that is, districts in which minority groups have come together in coalition to constitute a

(Cont'd)

Opportunity or potential to elect is the key. "Influence" districts (that is, districts in which a minority group does not have the opportunity to elect candidates of its choice) do not satisfy the requirements of the Voting Rights Act.[8] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577 (2006).

The record in this case clearly establishes that the voting district in issue, North Carolina House District

---

(Cont'd)
politically cohesive voting bloc that has the potential to elect candidates of their combined, mutual choice, are not now before the Court. In fact, some courts have allowed minority group coalitions to satisfy the first *Gingles* prerequisite. *See, e.g.*, *Campos v. Baytown*, 840 F.2d 1240, 1244 (1988) (Fifth Circuit allowed African-Americans and Latinos to be combined for purposes of satisfying the first *Gingles* prerequisite so long as the groups could show that they were politically cohesive); *Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526-27 (1990) (in which the Eleventh Circuit stated: "Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner"); and *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S. Ct. 35, 129 L. Ed. 2d 931 (1994) (Second Circuit combined African-Americans and Latinos for purposes of satisfying the first *Gingles* prerequisite).

8. Courts have been inconsistent in their use of the term "influence" district. *Compare Voinovich*, 507 U. S. at 150, with *Georgia v. Ashcroft*, 539 U.S. 461, 474-75 (2003). The MALDEF and AAJC *Amici* understand "influence" district to have the meaning set forth in the text above.

18, is an African-American opportunity district. As explained by the Supreme Court of North Carolina:

> The General Assembly drew House District 18 to meet the requirements of Section 2 of the Voting Rights Act of 1965 . . . Past 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. Accordingly, in the 2003 House redistricting plan, the General Assembly fashioned House District 18 with a total African-American population of 42.89 percent and an African-American voting age population of 39.36 percent. Defendants refer to House District 18 as an "effective black voting district," with a sufficient African-American population to elect representatives of their choice.

*Pender Co. v. Bartlett*, 649 S.E.2d 364, 366-67 (N.C. 2007). For this Court now to hold that a district like North Carolina's House District 18 meets the first *Gingles* prerequisite is a natural extension of, and consistent with, its prior rulings.

Just one week after it rendered its unanimous opinion in *Growe*, the Court issued a second unanimous Voting Rights Act decision, *Voinovich*, 507 U.S. 146. In *Voinovich*, it cited the holding in *Growe* but then added a note of caution, saying: "Of course, the Gingles factors

cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 158. Although the Court used the term "influence" districts to describe the type of districts that appellees had argued should have been created by the Ohio state apportionment board, *id.* at 150, what it described were opportunity districts: "districts in which black voters would not constitute a majority, but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice." *Id.* The Court assumed for purposes of resolving the *Voinovich* case that such districts would satisfy the first *Gingles* prerequisite but, mindful of its own admonition to eschew mechanical application, went on to observe that the prerequisite would "have to be modified or eliminated," *id.* at 158, were it to be applied to districts like those then in issue.

*Amici* urge that the Court, having undertaken to explicate further what is required to satisfy the first *Gingles* prerequisite, now modify that prerequisite as follows: a minority group asserting a Section 2 claim should always be able to satisfy the first *Gingles* prerequisite by showing that it is sufficiently numerous to constitute a majority in a single-member district. In addition, a minority group seeking to assert a Section 2 vote dilution claim may also satisfy the first *Gingles* prerequisite by demonstrating that it constitutes a functional majority in a single-member district.

Such modification of the first *Gingles* prerequisite will further the purposes of the Act by providing greater flexibility. "An inflexible rule . . . run[s] counter to the textual command of [Section] 2 . . ." *De Grandy*, 512 U.S. at 1018.

Toward the end of their brief, Petitioners draw parallels to this Court's analysis in *De Grandy* and argue that it is inappropriate to create a "safe harbor" for legislatures that are engaged in redistricting. *Brief of the Petitioners ("Pet. Br.")* at 43-44. That argument does not conflict with the flexible, two prong application of the first *Gingles* prerequisite that *Amici* urge here.

In *De Grandy*, this Court recognized that the "need for . . . 'totality' [of circumstances] review springs from the demonstrated ingenuity of state and local governments in hobbling minority power, a point recognized by Congress when it amended the statute in 1982 . . ." *De Grandy*, 512 U.S. at 1018 (internal citations omitted). Petitioners therefore urge this Court to avoid enunciating a rule that state legislatures could turn into a vehicle to dilute minority voting strength. *Pet. Br*. at 43-44. However, permitting plaintiffs and the Government to continue to satisfy the first *Gingles* prerequisite by demonstrating that minority voters constitute a numerical majority in a proposed Section 2 district (that is, by satisfying the first prong of the modified *Gingles* prerequisite urged here by *Amici*) hardly poses such a risk.

Petitioners also reference certain factual issues that may arise in determining numerical majorities, *Pet. Br*. at 41-43. And the brief of the Persily *Amici*, *Brief for Nathaniel Persily, Bernard Grofman, Theodore Arrington, and Lisa Handley as Amici Curiae on Behalf of Neither Party*, further expands on this subject. *Amici* well recognize that the Census has a history of undercounting minorities and overcounting whites and

that certain data, including citizen voting-age population data, may not be available on as timely a basis as other data. *Amici* also understand that the parties and other *Amici* are seeking guidance in anticipation of redistricting that will be required upon the completion of the 2010 Census. However, the question certified for decision by this Court is considerably more focused. It assumes that a minority group that constitutes 50% or more of a proposed district's population can state a vote dilution claim and now asks if a group that constitutes *less* than 50% can do so as well. The MALDEF and AAJC *Amici* urge this Court to avoid any response to that question which erects any new hurdles for minority voters or the Government asserting a Section 2 vote dilution claim. Minority voters and the Government should continue to be able to state a claim that satisfies the first *Gingles* prerequisite by alleging the existence of a minority group that constitutes 50% of a proposed district's population. Whether that population should be voting-age population, citizen voting-age population or some other metric is not an issue presented by the case before the Court and therefore need not be addressed now. *Amici* suggest that that issue is in any event best determined in particular cases in the context of the "intensely local appraisal" that this Court reaffirmed in *LULAC*, 126 Sup. Ct. at 2620, is "necessary" to the adjudication of Voting Rights Act claims.

## CONCLUSION

*Amici* urge the Court to answer the question presented by holding that a minority group satisfies the first *Gingles* prerequisite in one of two ways: (1) when it constitutes a numerical majority of a proposed district's population or (2) if it can demonstrate that it is a functional majority, that is, with the addition of a reasonably predictable level of cross-over votes, it has the ability to elect candidates of its choice.

Respectfully submitted,

NINA PERALES
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476

LOIS D. THOMPSON
*Counsel of Record*
MICHAEL J. LEBOWICH
TRAVIS P. BRENNAN
GREGG SALKA
PROSKAUER ROSE LLP
2049 Century Park East
Suite 3200
Los Angeles, CA 90067-3206
(310) 557-2900

TERRY M. AO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 296-2300

*Attorneys for Amici Curiae*