No. 07-689

In the

SUPREME COURT OF THE UNITED STATES

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GARY BARTLETT, *et al.*,

Petitioners,

v.

DWIGHT STRICKLAND, *et al.*,

Respondent.

———————————

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA SUPREME COURT

———————————

BRIEF FOR NATHANIEL PERSILY, BERNARD GROFMAN,
BRUCE CAIN, THEODORE ARRINGTON, AND LISA HANDLEY
AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

———————————

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INTEREST OF THE *AMICI CURIAE*

Professor Nathaniel Persily, Professor Bernard Grofman, Professor Bruce Cain, Professor Theodore Arrington, and Doctor Lisa Handley are all political scientists who have been appointed by courts as nonpartisan experts to draw redistricting plans.[1] *See Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004) (Persily); *In re Legislative Redistricting of State*, 805 A.2d 292 (Md. 2002) (Persily); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002) (Persily and Grofman); *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (Grofman); *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982) (Grofman); *Navajo Nation v. Ariz.*

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[1] Counsel of record for the parties received notice of *amici*'s intention to file this brief, and the parties have consented to this filing. As required by Rule 37(6) of the Rules of the Supreme Court of the United States, *amici* state that the accompanying brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation of this brief was made by any person other than *amici curiae* and their counsel. Nathaniel Persily is Professor of Law and Political Science and Director of the Center on Law and Politics at Columbia Law School; his CV is available at http://www.persily.com/. Bernard Grofman is Professor of Political Science and Director of the Center for the Study of Democracy at the University of California, Irvine, and holds the Jack W. Peltason Bren Foundation Endowed Chair; his CV is available at http://www.vsocsci.uci.edu/~bgrofman/. Bruce Cain is the Heller Professor of Political Science at the University of California at Berkeley and Executive Director of the University of California Washington Center; his biography is available at http://www.polisci.berkeley.edu/faculty/bio/permanent/Cain,B/. Theodore Arrington is Professor of Political Science at the University of North Carolina at Charlotte; his CV is available at http://www.politicalscience.uncc.edu/tarrington/. Lisa Handley is President of Frontier International Election Consulting.

Indep. Redistricting Com'n, 230 F. Supp. 2d 998 (D.Ariz. 2002) (Cain); *Puerto Rican Legal Defense and Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681 (E.D.N.Y. 1992) (Arrington); *The Fund for Accurate and Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662 (N.D.N.Y. 1992) (Arrington); *Allen v. Pataki*, Index No. 101712/02 (N.Y. Sup. Ct. May 3, 2002) (Handley).

In addition, *amici* have served as expert witnesses in many redistricting cases across the United States and have authored numerous publications that have been cited by federal and state courts, including the U.S. Supreme Court. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986) (Grofman); *Abrams v. Johnson*, 521 U.S. 74, 108 (1997) (Grofman); *Bush v. Vera*, 517 U.S. 952, 1040-41 (1996) (Grofman); *Shaw v. Hunt*, 517 U.S. 899, 912 (1996) (Grofman); *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (Grofman); *Shaw v. Reno*, 509 U.S. 630, 636 (1993) (Grofman); *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994) (Grofman and Handley); *Holder v. Hall*, 512 U.S. 874, 895 (1994) (Grofman and Handley); *N. Y. State Bd. of Elections v. Lopez Torres*, 128 S.Ct. 791, 802 (2008) (Kennedy, J. concurring) (Persily); *Vieth v. Jubelirer*, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting) (Persily); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 226-27 (1999) (Rehnquist, C.J., dissenting) (Persily); *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (Cain); *United States v. Charleston County*, 365 F.3d 341, 344 (4th Cir. 2004) (Arrington); *United States v. Blaine County*, 363 F.3d 897, 910 (9th Cir. 2004) (Arrington); *Hines v. Ahoskie*, 998 F.2d 1266, 1270 (4th Cir. 1993) (Arrington). *Amici* expect to draw redistricting plans for the 2010 round of redistricting and therefore take an interest in this

case because it may affect the principles and methodologies employed by *amici* in future redistricting plans.

Amici submit this brief on behalf of neither party in this case with the goals of assisting the Court in its assessment of the practical effect of its decision and of providing some empirical data that may be absent from the principal parties' briefs. In this brief, *amici* do not take a position on the question before the Court concerning the propriety or desirability of the so-called 50% rule, but seek instead to inform the Court of the impact its decision might have on the 2010 redistricting process.

INTRODUCTION AND
SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to address whether minority communities that constitute less than 50% of a potential district can state a vote dilution claim under section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2006). In answering that question, the Court ought to consider two practical issues concerning the way any governing standard will affect the drawing of districts and the challenges brought under section 2. The Court should understand (1) the strengths and weaknesses of different population statistics that can be used to construct or to challenge a redistricting plan; and (2) the legal and political variables that will determine the population percentages necessary for minorities to have an equal opportunity to elect their candidates of choice.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court addressed a situation in which a minority

population could constitute a majority of a potential single member district. The Court, however, has never specified which of the following population statistics are the appropriate metrics for that inquiry:

- "total population," the total number of residents in a given geographic area;
- "voting age population" ("VAP"), the total number of residents at least 18 years of age;
- "citizen voting age population" ("CVAP"), the total number of citizens who are at least 18 years of age;
- "eligible voters," the total number of residents who are legally eligible to vote;
- "registered voters," the total number of residents who are actually registered to vote; or
- "actual voters" the total number of residents who turn out to vote.

In the instant case, the North Carolina Supreme Court, like many other courts, adopted CVAP as the relevant statistic for measuring population size. *See Pender County v. Bartlett*, 649 S.E.2d 364, 370-71 (N.C. 2007).

Only total population and voting age population will be made available from the Census Bureau at the block level for the 2010 redistricting. For various reasons concerning the well-known undercount of racial minorities, the new way that the Census Bureau has been tabulating race, and the number of ineligible voters captured by such statistics, aggregate population and voting age population census data should not be viewed as precise measurements of potential voters. For the 2010 round of redistricting, moreover, citizenship

status will not be included as a question on the "short form" of the census. Consequently, citizenship data will not be part of the Census Bureau's P.L. 94-171 datafile, the dataset that provides the block level data necessary to form redistricting plans. Citizenship data will only be available from the American Community Survey, which is sent to three million households every year and which cannot provide reliable estimates at the block level, if they are provided at all in time for redistricting.

Of course, no population statistic—by itself—is sufficient to demonstrate the likelihood that a minority community will have an equal opportunity to elect its candidate of choice. Section 2 dictates an inquiry into the "totality of the circumstances" that can affect minority political opportunity, and *Gingles* emphasizes, in particular, the importance of racially polarized voting to demonstrating vote dilution. Fifty percent is seen as a magic number by some because under conditions of complete racial polarization and equal rates of voting eligibility, registration, and turnout, the minority community will be able to elect its candidate of choice. In practice, such extreme conditions are never present. The required percentage for an opportunity district will vary considerably based on the relative eligibility and turnout of minority voters, the extent of racial polarization in the electorate, the potential for coalitions to form among racial minority groups, the minority population share of the primary electorate, and the incumbency status of the district. Based on these factors, some districts must be more than 50% minority, while others can be less than 50% minority, in order for the minority community

to have an equal opportunity to elect its candidate of choice.

ARGUMENT

I. THE AVAILABILITY AND ACCURACY OF POPULATION DATA CAN HAVE A SUBSTANTIAL EFFECT ON THE ESTIMATES OF THE MINORITY POPULATION NECESSARY TO ELECT A MINORITY CANDIDATE OF CHOICE.

As redistricting experts we are called upon by courts and jurisdictions to draw plans either following the decennial census or after a court decision strikes down a jurisdiction's plan under state or federal law. Creating a plan usually involves moving census-defined geographic units, such as census blocks, from one district to the next while keeping in mind the relative populations of each district. Census redistricting data (the so-called "P.L. 94-171 datafile") include aggregate population and voting age population broken down by race for all census geographies. To comply with the one-person, one-vote rule and the Voting Rights Act (the "VRA"), those drawing districting plans must pay close attention to how each addition or subtraction of a census block shifts a district's total population and changes its racial composition.

In addition to census redistricting data, those constructing a plan may have other information, such as precinct-based election results, data reflecting communities of interest, locations of incumbents' residences, and various defining features of the geography being carved up. In jurisdictions with a history of racial polarization in voting patterns, past election data will prove critical

in assessing the potentially dilutive effect of a plan. To avoid violations of section 2 of the VRA, an expert must understand the likely electoral consequences of drawing a district with particular racial percentages in a given area based on its unique electoral history. Even within the same state, two districts that have the same racial makeup may "perform" quite differently based on the different history and political behavior of voters and candidates in those areas. When assessing whether a district will give minorities an equal opportunity to elect their candidates of choice, demographic and electoral data are critically important tools that often must be supplemented with a common sense appreciation for local political circumstances.

A. Section 2 of the VRA Must Be Interpreted to Accommodate the Imperfect Nature of the Population Data Available to Jurisdictions and Potential Plaintiffs

All available population estimates—total population, voting age population, citizen voting age population, eligible voters, registered voters, and voters who turn out—may be important in assessing whether a district can provide minorities with an equal opportunity to elect their candidates of choice. However, each estimate has its own sources of error and bias, as well as other drawbacks, such as its unavailability in time for redistricting or the level of geography at which such data are released. These data-related challenges are an inherent part of the redistricting process, and the interpretation of section 2 of the VRA must account for them.

Some population statistics underrepresent the number of potential minority voters in a district, while other data sets overrepresent it. For example, "total population" or "voting age population" (the data available in the P.L. 94-171 dataset) do not account for people who are ineligible to vote because they are not citizens, or because they are incarcerated or disenfranchised. In some jurisdictions, high rates of incarceration of a minority population or felon disfranchisement can affect the minority population's share necessary (or even possible) for the minority community to elect its preferred candidates. One study has found "256 counties that have more than a quarter of their Black population behind bars." *See* Peter Wagner, *Outdated Methodology Impairs Census Bureau's Count of Black Population* (2004), http://www. prisonersofthecensus.org/news/2004/05/03/blackpopu lation/.[2] In areas with large prison populations and severe racial polarization in voting, a district may often need to be greater than 50% minority VAP or CVAP for minorities to have an equal opportunity to elect their candidate of choice.

Even as a measurement of the population they purport to count, census data are not precise—particularly with respect to minority populations. The decennial census always misses and double counts millions of people, and those errors are not randomly distributed throughout the population.

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[2] Although most such counties have small black populations, the study excluded any county that had fewer than 100 African Americans behind bars. Moreover, given that the study looks only at the share of the total population behind bars, rather than the voting age population, the number of such counties where a quarter of the black voting age population is incarcerated is probably higher.

See generally Margo J. Anderson & Stephen E. Feinberg, *Who Counts?: The Politics of Census-Taking in Contemporary America* (1999); Nathaniel Persily, *The Right to Be Counted*, 53 Stan. L. Rev. 1077, 1081-82 (2001). Prior to the 2000 census, the undercount (and particularly the "differential undercount" among minority groups) was quite dramatic. The 1990 census, for example, missed about 4% of African Americans, 5% of Hispanics, 2.3% of Asian Americans and Pacific Islanders, 12.2% of American Indians on reservations, but only 0.7% of non-Hispanic whites. *See* Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 Minn. L. Rev. 899, 903 (2001). Because of intense efforts to correct the "differential undercount" in the 2000 census, those figures were cut in half, but substantial differences still remained between racial groups. *See* Executive Steering Comm. for Accuracy and Coverage Evaluation Policy [hereinafter ESCAP], Bureau of the Census, U.S. Dep't of Commerce, [hereinafter Census Bureau] *Recommendation Concerning the Methodology to be Used in Producing the Tabulations of Population Reported to States and Localities* 2-3 (March 1, 2001), http://www.census.gov/dmd/www/pdf/Escap2.pdf. (noting that "Census 2000 continued longstanding patterns of differential coverage, with minority groups, renters, and children all exhibiting lower coverage rates"). It remains unclear whether adequate funding and similar efforts to correct the differential undercount will be present for the 2010 census.

In addition, the new multiracial checkoff format for the census race question—adopted for the first time in the 2000 census and continuing in the 2010 census—creates additional variation in the way

racial statistics will be expressed. The 2000 census was the first census to allow respondents to check off more than one race. As a result, census racial statistics can be expressed by placing each respondent into one of 126 different racial and ethnic combinations[3] or by reaggregating multiracial respondents into the seven racial and ethnic groups on the census.[4] *See, e.g.*, Joshua R. Goldstein & Ann. J. Morning, *Back in the Box: The Dilemma of Using Multiple-Race Data for Single Race Laws*, in *The New Race Question: How the Census Counts Multiracial Individuals* 119, 121-22 (Joel Perlmann & Mary Waters eds., 2002). For some racial groups, the differences as to "who" counts as "what" can be quite large. For the number of American Indians and Alaska Natives nationally, for example, the difference between those two counting approaches differs by more than 60%, because a large share of those who check off "American Indian" also check off another category such as "white". For most other

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[3] The P.L. 94-171 datafile presents racial data in a 126 category format. The 126 categories result from the potential combinations among the 6 census race categories and the Hispanic origin category. *See* Persily, *Color by Numbers*, *supra*, at 927 n.112. The six census race categories are White, African American, Asian, Native Hawaiian or Other Pacific Islander, American Indian or Alaska Native, and Some Other Race. The census also asks a separate Hispanic Origin question.

[4] OMB Bulletin No. 00-02 requires the reaggregation of multiple race respondents back into single-race categories. Responses that combine more than one minority race are allocated to the minority race, while responses that include two or more minority races are allocated in different manners, depending on the purpose of the calculation. *See* Office of Management and Budget, Bulletin No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement (March 9, 2000), *available at* http://www.whitehouse.gov/omb/bulletins/b00-02.html.

minorities the differences between the statistics are smaller (5% for African Americans, for example), but should be expected to grow with each subsequent census. Even the current differences in the various statistics could have an impact if the VRA is interpreted as requiring specified minority population levels.

The legal significance of these statistical issues to voting rights cases will vary greatly depending on the minority group and the area of the country involved. *See* Nathaniel Persily, *The Legal Implications of a Multiracial Census*, in *The New Race Question: How the Census Counts Multiracial Individuals*, *supra*, 161, 171-74. If population percentages and thresholds will continue to constitute one part of the test for a viable voting rights claim, courts will need to consider these important statistical issues when conducting a context-specific analysis of the nature of a vote dilution claim. Although racial statistics must continue to perform a central role in defining and filtering vote dilution claims, the limits of available statistics counsel against any rule that would allow particular quirks in the data to determine the viability of a claim.

> **B.**   **Although Citizenship Rates Affect the Minority Population Share Necessary for an Opportunity District, Citizenship Data Will Not Be Part of the 2010 Census Redistricting Datafile.**

At the time of the next redistricting, the only population data generally available to linedrawers at the census block level will be total population and

voting age population. Very few states maintain voter registration statistics by race, *see* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1405 n.69 (2001), or provide estimates of the eligible voter population. *See* Michael McDonald, United States Elections Project, *Voter Turnout Frequently Asked Questions*, http://elections.gmu.edu/Voter_Turnout_FAQ.htm (last visited June 9, 2008). As was true in the 2000 census, the "short form" of the 2010 census (from which all census redistricting data are generated) will not ask whether the respondent is a citizen. *See* Census Bureau, *United States Census 2000 Form D-61A (2000)*, http://www.census.gov/dmd/www/pdf/d61a.pdf. This Court has noted the importance of accounting for citizenship status in estimating a minority population's ability to elect a candidate of its choice. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S.Ct. 2594, 2616 (2006) [hereinafter *LULAC*] ("the relevant numbers must include citizenship . . . because only eligible voters affect a group's opportunity to elect candidates"). If citizen voting age population (CVAP) is to be the metric against which vote dilution claims will be judged, linedrawers will need to employ estimates from sample surveys from previous years to generate rough approximations of the CVAP of districts.

The P.L. 94-171 datafile provided by the Census Bureau to states and localities in time for the 2010 redistricting will contain aggregate population and voting age population data broken down by race and Hispanic origin for all levels of census geography down to the census block level. *See* Census Bureau, *Census 2000 Redistricting Data*

(Public Law 94-171) Summary File, http://factfinder.
census.gov/servlet/DTSelectedDatasetPageServlet
(last visited June 9, 2008). Those data are derived
from what was formerly known as the "short form" of
the census, which is sent to every American
household for which the Census Bureau has an
address. In the 2000 census, one out of six
Americans received the "long form" of the census,
which contained more detailed questions concerning
housing characteristics, ancestry, and citizenship.
The long form has been abandoned for the 2010
census. *See* Census Bureau, *United States Census
2010: 2010 Census is Different* (2008),
http://www.census.gov/2010census/about_2010_
census/ 007622.html.

To replace data formerly supplied by the long
form, the Census Bureau has conducted the
American Community Survey (ACS) every year since
2005.[5] The ACS is a survey akin to the previous long
form, but sent to only three million households each
year instead of one sixth of American households at
the time of the decennial census. The Bureau
contends that estimates derived from each
individual ACS are reliable for geographic areas of
65,000 or more, and that three years of aggregated
data from the ACS will produce accurate estimates
for geographic areas of 20,000 or more. By 2011, the

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[5] *Id.* The Census Bureau conducted a smaller scale of the ACS
from 1996 to 2004 in selected counties throughout the United
States. In 2005 it began sampling in every county in the
United States. *See* Census Bureau, *American Community
Survey*, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_
pageId=sp1_acs (last visited May 30, 2008); Census Bureau,
Question & Answer Center, *American Community Survey:
Geographic coverage for 2005–2010*, https://ask.census.gov/cgi-
bin/askcensus.cfg/ php/enduser/std_adp.php?p_faqid=951 (last
visited May 30, 2008).

Census Bureau might produce estimates derived from the previous five years of the ACS for some smaller levels of geography, such as census tracts and block groups. *See* Census Bureau, *American Community Survey*, *supra.* The Census Bureau does not plan to incorporate any data from the ACS into the P.L. 94-171 redistricting datafile and estimates derived from the ACS, in any case, will not be provided at the census block level. Such estimates will also be expressed according to census-defined geography from the 2000, not 2010, census, they will not tabulate multiracial respondents in the same way as the P.L. 94-171 file, and they will define residency somewhat differently.

Because the ACS is the only census survey that includes a question concerning citizenship, citizen voting age population (CVAP) data will not be available in time for the 2010 redistricting, if ever, at a comparable level of accuracy and granularity to the short form data. This data challenge will be particularly acute for redistricting of county and city governmental bodies and subsequent section 2 challenges to such districts, which represent the lion's share of section 2 lawsuits. *See* Ellen Katz & The Voting Rights Initiative, *VRI Database Master List (2006)*, www.votingreport.org (listing only 96 out of 331 cases (29%) under Section 2 as involving districts for state elections, as compared to city, county, school, or other local election districts); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 677-78 (2006). Assessments of whether a district passes any particular CVAP threshold (such as 50%) must be tempered by a recognition that estimates of the citizen population will be quite rough for many

redistricting plans, particularly but not exclusively at the local level. As a result, the difference between a 45% and 51% minority CVAP district, in many instances, may be more illusory than real.

The data-related challenge presented by the lack of any citizenship data at the census block level does not mean that experts cannot factor in citizenship rates in their assessments of what constitutes an opportunity district. Quite the contrary, linedrawers are well aware of which areas contain large noncitizen populations and of how unrepresentative other official statistics may be. Although they may use aggregate and voting age population data as the building blocks for a plan, they will recognize the population "cushion" necessary for certain districts with large noncitizen populations to be able to have an equal opportunity to elect the minority's candidate of choice.

II. THE POPULATION SHARE NECESSARY FOR MINORITIES TO HAVE AN EQUAL OPPORTUNITY TO ELECT THEIR CANDIDATE OF CHOICE VARIES ACCORDING TO THE LEGAL AND POLITICAL CONTEXT OF A REDISTRICTING PLAN.

The plain language of section 2's "totality of the circumstances" test and *Gingles'* emphasis on "an intensely local appraisal" recognize that a minority community's opportunity to elect its candidate of choice is not merely a function of its relative size, but also of the voting behavior and other characteristics of all racial groups in a given jurisdiction. 42 U.S.C. § 1973 (2006); *Gingles*, 478 U.S. at 78, 79. In particular, the opportunity of a minority group to elect its preferred candidates of choice will depend on: (1) the relative rates of

turnout of different racial groups; (2) the likelihood that other voters in the district will cross over to vote for the minority's candidate of choice; (3) the minority share of the relevant primary electorate; and (4) the status of the district as incumbent-held or open. With increasing minority voter turnout and crossover voting, the share of a given district that a minority needs to have an equal opportunity to elect its candidate of choice decreases. Similarly, a minority-preferred candidate who can run in a favorable primary electorate or who enjoys the advantages of incumbency will require a lower minority percentage in order to have an equal opportunity to be elected. *See generally* Grofman, et al., *Drawing Effective Minority Districts*, *supra*, (operationalizing the argument set forth in this section).

> A. The Relative Turnout of Minority and Nonminority Voters Will Affect the Population Share Required for Minorities to Have an Equal Opportunity to Elect Their Preferred Candidates.

The relative rates of voter turnout for each racial group in a given district will greatly affect the size of the minority population necessary to elect its candidate of choice. A given jurisdiction's minority turnout rate is, in part, a function of the legal barriers to voting and registration and of the eligibility and registration rates of its minority voters.

In the nation as a whole, the voter turnout rates of different racial groups have varied over time

and among different locations since the passage of the 1982 amendments to the Voting Rights Act. The most recent estimates from the Census Bureau show that in the 2004 election, 65.7% of non-Hispanic Whites, 56.2% of Blacks, and 28.0% of Hispanics reported voting. *See* Census Bureau, *Reported Voting Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2004*, (2005), http://www.census.gov/population/socdemo/voting/ta bA-1.xls. As the table below depicts, these numbers are higher than they were in 1980 for African Americans and non-Hispanic whites, but not for Hispanics. In the intervening years, for the most part, turnout for each racial group has gone up and down, showing no clear monotonic trend upward. Rates of citizenship explain a great deal, but not all, of the variation in reported turnout among racial groups.

Reported Voting and Registration by Race, Hispanic Origin, Sex and Age Groups: Nov. 1964 to 2004									
(Numbers in thousands)									
Year	Total Voting-Age Populati	Total Percent		White non-Hispanic		Black		Hispanic (any race)	
		Total Pop.	Citizen Pop.	Total Pop.	Citizen Pop.	Total Pop.	Citizen Pop.	Total Pop.	Citizen Pop.
Voted									
2004	215,694	58.3	63.8	65.7	67.1	56.2	59.9	28.0	47.2
1980	157,085	59.3	64.0	62.8	66.2	50.5	53.9	29.9	46.1
Registered									
2004	215,694	65.9	72.1	73.5	75.1	64.3	68.6	34.3	57.9
1980	157,085	66.9	72.3	70.3	74.1	60.0	64.1	36.4	56.0

Source: *Id.*

State specific turnout rates reveal remarkable variability not apparent from the national averages.

For example, in 2004, Hispanics in New Mexico reported voting at a rate of 50.6%, whereas their neighbors in Arizona reported a rate nearly half that (25.5%). *See* Census Bureau, *Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin, for States: November 2004* (2004), http:// www.census.gov/ population/socdemo/voting/cps2004/tab04a.xls. Only 43.6% of African Americans in New York say they voted in the 2004 elections, as compared to 61.3% of African Americans in California. *See id.* More importantly, the gap between minority and Anglo-white turnout shows a great degree of variation: In Florida in 2004, for example, a twenty percentage point gap separates black and Anglo-white turnout rates (64.9% to 44.5%); whereas in neighboring Georgia, the gap was only three percentage points (57.4% to 54.4%). *See id.*

Moreover, the turnout of a given racial group also varies with the types of candidates on the ballot and the competitiveness of a given race. The record turnout among African Americans in the 2008 Democratic presidential primaries attests to the impact that African American candidates can have on African American voter turnout. *See, e.g.*, Laura Litvan, *Obama's Coattails May Drive Record Black Turnout in House Races*, Bloomberg.com,May 29, 2006, http://www.bloomberg.com/apps/news?pid= 20601103&sid=adkPhlSZYS0Q&refer=u. Political scientists have also shown, for example, that African American and Hispanic turnout can increase in the first election following the creation of a majority-minority district. *See, e.g.*, Susan A. Banducci, et al., *Minority Representation, Empowerment and Participation*, 66 J. Pol. 534, 538-39, 552 (2004); Matt A. Barreto, *The Mobilizing Effect of Majority-*

Minority Districts on Latino Turnout, 98 Am. Pol. Sci. Rev. 65, 70-74 (2004).

>   **B.   The Severity of Racial Bloc Voting Among All Racial Groups in the Jurisdiction Is the Most Important Factor in Determining the Population Share Required for Minorities to Have an Equal Opportunity to Elect Their Candidate of Choice.**

The numerosity requirement of *Gingles* exists in an interactive relationship with the second and third *Gingles* prongs, which require an analysis of minority political cohesion and white bloc voting. *See, e.g.*, *Metts v. Murphy*, 363 F.3d 8, 11-12 (1st Cir. 2004). As racial polarization decreases, the percentage of a racial group necessary for it to elect its preferred candidate will also decrease. The more non-minority voters who are willing to vote for the minority's candidate of choice, the smaller the minority population that is necessary to elect that candidate. In communities exhibiting extreme racial polarization and low relative turnout, a slim majority of the voting age population in a district will probably be insufficient for a minority group to elect its preferred candidate. However, if a sufficient number of voters outside of the minority group are willing to cross over, such a majority will be unnecessary.

In the time that has passed since the enactment of the 1982 Amendments to the Voting Rights Act, racial polarization in some parts of the country has declined and in others it has remained largely unchanged. *See, e.g.*, Richard Pildes, *Is*

Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s, 80 N.C. L. Rev. 1517, 1530-32 (2002). In some jurisdictions in which a given minority group constitutes less than 50% of the relevant electorate, minority-preferred candidates, particularly incumbents, can reliably secure sufficient crossover votes to be elected. Since 1982, seventeen of the nation's current twenty-five largest cities have elected African American or Hispanic mayors. *See* Census Bureau, *County and City Data Book: 2007* 710 (2007), http://www. census.gov/prod/2008pubs/07ccdb/fig3.pdf; Census Bureau, *Census 2000 Data Highlights*, http://www. census.gov/main/www/cen2000.html (last visited June 16, 2008). Only three of those cities are majority-African American and only two are majority Hispanic; however, most are cities in which Anglo-whites also constitute a minority.

The same is true for most of the members of the Congressional Black Caucus who have greatly benefited from the general election votes of other minorities. Half of the forty current members of the Congressional Black Caucus have been elected from districts that are under 50% African American VAP. However, all but five represent districts in which non-Hispanic whites are also a minority of the VAP.[6] *See* Census Bureau, *110th Congressional District Summary File*, Tbls. P4 and P6, http:// factfinder.census.gov/servlet/DatasetTableListServle t?_ds_name=DEC_2000_110H&_type=table&_progra m=DEC&_lang=en&_ts=230490388528. Several of

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[6] Seven of the twenty-seven Hispanic members of Congress represent districts that are minority Hispanic VAP; however, only two represent districts in which Non-Hispanic whites constitute a majority of the VAP. *See* Census Bureau, *110th Congressional District Summary File*, *supra*, tbls. P4 and P6.

the current CBC members were elected in 1992 from majority-African American districts, later redrawn after court decisions to become minority-African American districts. While almost all of these incumbents were reelected, this was in no small measure because they did not confront any primary challengers, *see* Part II.C, *infra*, and also benefited from their incumbent status in other ways, *see* Part II.D, *infra*. *See* Grofman, et al., *supra*, at 1402-04, 1407-08; Charles. S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L.J. 1209, 1223 (1999).

Just as some areas of the country have witnessed declines in racial polarization, racial bloc voting in other areas has remained resilient. In Louisiana, for example, one study found extreme racial polarization in seventy-eight of the ninety elections analyzed featuring an African American candidate, with supermajorities of African Americans supporting the African American candidate and super majorities of whites supporting others. *See Voting Rights Act: The Continuing Need for Section 5: Hearing Before the H. Subcomm. on the Constitution, H. Comm. On the Judiciary*, 109th Congress (2005) (Testimony of Richard L. Engstrom), *available at* http://judiciary.house.gov/media/pdfs/engstrom102505.pdf. As late as 2006, this Court characterized the level of racially polarized voting in a contested Texas congressional district, House District 23, as "especially severe" after crediting expert findings presented to the District Court that showed 92% of Latinos voted for their candidate of choice while 88% of Anglo-whites voted against him. *LULAC*, 548 U.S. 399, 162 S. Ct. at 2615. State House elections in South Carolina

throughout the 1990s also provide useful data to demonstrate the persistence of differing political preferences of white and African American voters. One study has found that in the nineteen general elections in the 1990s that featured an African American candidate of choice, the candidate of choice received an average of 93% of the black vote but only 31% of the white vote. Grofman et al., *supra*, at 1420. Indeed, non-incumbent black candidates garnered, on average, only 16% of the white vote. Such patterns are often even more severe at the local level. *See, e.g.*, *Charleston County*, 365 F.3d at 350 (noting racially polarized voting in all ten County Council elections involving a black candidate).

C. The Size of the Minority Group's Share of a District's Primary Electorate Often Affects the Group's Opportunity to Elect Their Candidate of Choice.

The minority share of the primary electorate and the rules governing the primary often exist as critical factors in determining whether minorities have an equal opportunity to elect their candidate of choice. Because party allegiance will lead many non-minority voters to support almost any party nominee in the general election, the critical question in some jurisdictions is whether minority voters can control the primary election.

In jurisdictions with closed primaries and high rates of party voting in general elections, a minority group that constitutes a substantial majority of the primary electorate will sometimes have an equal opportunity to elect its candidate of choice, even if it comprises less than 50% of the

electorate in the general election. Because of political segregation, in most legislative districts in the country one or the other party tends to dominate, such that the critical election for such districts occurs at the primary stage, rather than the general election. *See* Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008). A minority population that can control the primary election will be able to elect its candidate of choice if sufficient numbers of fellow non-minority partisans will cross over in the general election.

If the primary is an open primary or nonpartisan primary, the required minority share may need to be greater. If, in effect, whites from both parties can control which candidates will appear on the general election ballot, a large minority community might not have an opportunity to vote for its candidate of choice in the general election. Under such conditions, and especially if party loyalty plays a limited role in white voters' preferences, a district in excess of 50% may be necessary for minorities to have an equal opportunity to elect their candidate of choice.

> **D. A Minority Group's Electoral Opportunity Often Depends on Whether Its Candidate of Choice Is an Incumbent.**

The ability to scare off primary challengers is just one of the advantages of incumbency that can enable minority-preferred candidates to win in districts with minority populations below 50%. More specifically, the minority percentages necessary for a

minority-preferred candidate to have an equal opportunity to be elected will escalate depending on whether the district is already held by a minority-preferred candidate, is an open seat without an incumbent, or is a seat held by an incumbent who is not the minority's candidate of choice. Rates of incumbent reelection in the U.S. House of Representatives have exceeded 95% in most recent elections. *See, e.g.*, Alan Abramowitz, The Am. Pol. Sci. Ass'n, *The 2004 Congressional Elections* (2004), http://www.apsanet.org/content_5179.cfm. Incumbent minority candidates of choice enjoy similar reelection rates, although some studies have found that black incumbents do not experience as large an electoral "bump" due to incumbency as white incumbents do. *See, e.g.*, Bullock & Dunn, *supra*, at 1230-31 (1999).

The different minority percentages necessary for an incumbent, a challenger, or an open seat candidate to win are clearly demonstrated by the history of the districts that this Court struck down in its *Shaw v. Reno* line of cases. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995). At their inception in 1992, many of those districts were substantial majority-minority districts, almost all of which elected new minority candidates in open seats. When this Court and the lower courts struck down nine of those majority African American congressional districts as excessively race-based, eight were redrawn with African American populations below 50%. Grofman et al., *supra*, at 1397. In seven of those districts, the African American incumbent ran and won reelection from the redrawn district. (In one, the Louisiana 4th, neither the African American incumbent nor any other African American candidate competed.) *Id.*

at 1400. Because so few faced any serious primary opposition and because they all won about one-third of the white vote in the general election, all easily won reelection throughout the 1990s, even from minority-African American districts. *Id.* at 1401.

The study of South Carolina data, discussed earlier, also shows the importance of a district's incumbency status. Because African American incumbents rarely faced primary challengers and could rely on some white crossover votes in the general election, the study found that such incumbents had a 50% chance of winning from districts that were as low as 37% African American. Grofman et al., *supra*, at 1421. However, a district would need to be as much as 64% African American for an African American challenger to have an equal chance of defeating a white incumbent. In open seats, the required percentage for African Americans to have an equal opportunity to elect their candidate of choice was in the middle (51%). *See id.*

> **E.   The Methodology Employed by Expert Witnesses in Vote Dilution Cases Does Not Depend on Legally Prescribed Population Thresholds.**

The role of an expert witness in a vote dilution case will not change based on whether the Court interprets section 2 of the VRA to apply only to potential districts that satisfy certain population thresholds. Determining whether a potential district presents minority groups with an equal opportunity to elect their candidates of choice will continue to require careful racial bloc voting analyses and locally based assessments similar to those that experts have been making since *Gingles* and even long before.

Indeed, those methods and assessments, themselves, will also provide a limit on the potential number of viable dilution claims.

Because the secret ballot prevents one from knowing exactly which voter of which race cast a particular vote, experts must estimate the relationship between race and vote choice from aggregated data. There are three principal statistical approaches that experts use to assess the extent of racial bloc voting: homogeneous (or extreme) precinct analysis, ecological regression, and ecological inference. *See* Bernard Grofman, *A Primer on Racial Bloc Voting Analysis*, in *The Real Y2K Problem*: *Census 2000 Data and Redistricting Technology* (N. Persily ed., 2000) (describing all three methods). Each method relies on a comparison of election results with race data for a particular geographic area to establish whether there is "'a consistent relationship between the race of the voter and the way in which the voter votes.'" Gingles, 478 U.S. at 53 n. 21 (quoting testimony of Grofman).

Homogeneous (or extreme) precinct analysis requires a comparison of election results in precincts heavily dominated by voters of one race. If, to take the extreme case, precincts with no African American voters vote for one candidate while precincts with only African American voters vote for a different candidate, one might safely assume that voting in the jurisdiction is polarized. Of course, the ability to perform such analysis rests on the existence of a certain number of near-homogeneous precincts, and in any event might require the analyst to throw away most of the election data available if it comes from more integrated precincts. The next two methods do not have those flaws.

Ecological regression is a familiar tool not only for racial bloc voting analysis but for a multitude of scientific and social scientific inquiries. The basic task of the analyst is to gather election and race data for particular geographic units, such as precincts, and then to estimate the share of the minority and majority population voting for and against particular candidates. Each precinct provides a data point both as to the racial percentages in the district and the vote for the minority-preferred candidate, and the closer the relationship between the minority share of precincts and the vote shares received by the candidate, the more racially polarized the electorate. In other words, under conditions of racial polarization, as a precinct becomes more heavily minority, it also tends to vote more heavily for a particular candidate.

Ecological inference, as developed by political scientist Gary King, is more complicated than the other methods (and impossible to describe briefly here), but this method attacks more specifically the problem of estimating individual behavior from aggregate data. *See* Gary King, *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data* (1997). Each precinct can be described according to the possible share of the minority community voting for the minority candidate of choice. In a precinct that is 50% white and 50% African American but in which the African American candidate receives only 50% of the vote, it is possible that all African Americans voted for the African-American candidate, none did, or any percentage in between those two extremes did. In other precincts (as with near homogeneous precincts voting almost unanimously for the African American candidate)

the possible range of options will be more limited. All of these bounded probabilities from each precinct can then be used to estimate with some degree of confidence the likelihood that a certain percentage of the minority community tended to vote for the minority candidate.

Although each method will produce different estimates of the tendency for voters of different races to vote for different candidates, under conditions of racial polarization all methods usually will point in the same direction. However, racial bloc voting analysis and the estimates derived from it do not supplant a common sense appreciation for local political circumstances. Even within the same state, two districts that have the same racial makeup may "perform" quite differently based on the different history and political behavior of voters and candidates in those areas. As our discussion of turnout, incumbency, and the primary electorate indicates, accurate assessments of minority political opportunity often require more than an examination of racial and political data.

With that said, it should be clear that racial bloc voting analysis puts a serious constraint on the potential number of section 2 claims that can be brought, irrespective of any population threshold required as part of the vote dilution inquiry. At a minimum, for example, any potential district that will require a majority of white voters to cross over to vote for the minority-preferred candidate cannot be said to give rise to a viable section 2 claim. Similarly, if voting patterns are completely polarized, a minority community that would constitute a small share of a potential single-member district cannot plausibly make the claim that their political opportunity would be equal if

such a district were constructed. It may be the case that allowing claims for potential districts that are under 50% minority might increase the number and variety of such claims. However, the requirement of the existence of racial bloc voting will continue to act as a serious constraint on which claims have merit and which jurisdictions will be vulnerable.

CONCLUSION

Judicial interpretations of the Voting Rights Act ought to account for the practical realities that confront experts drawing redistricting plans or testifying in redistricting cases. One of those realities concerns the variety and limitations of statistics to describe minority population percentages. Another concerns the range of jurisdiction-specific factors that influence whether a minority community has an equal opportunity to elect its candidate of choice.

Regardless of the outcome of this particular case, redistricting experts will continue to employ the best available data to estimate the likely minority share of electorate. Their inquiries will be constrained by what the Census Bureau makes available in its redistricting datafile, as well as by the biases and errors that necessarily accompany any usable measures of the national population. The Court's interpretation of section 2 of the Voting Rights Act ought to recognize these data-related challenges in estimating the actual size of the minority population in potential districts.

Even with agreed-upon population metrics, however, accurately assessing a minority group's opportunity to elect its candidate of choice will

require a sensitive inquiry into the unique local political dynamics of a given jurisdiction. The minority population share necessary to provide such equal opportunity (for both the primary and general election) will vary substantially by region and racial group, and will depend on such factors as the levels of racial bloc voting, relative voter turnout, the potential for coalition building among minorities, and the incumbency status of a district. Such assessments will vary over time, between different states, and often within states, given the evolution of local politics and demographic change. As in other arenas of election law, when it comes to evaluating whether a minority community has an equal opportunity to elect its candidate of choice, there may be "no substitute for the hard judgments that must be made." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

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