No. 103A06 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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<tr><td>PENDER COUNTY, DWIGHT STRICKLAND, Individually and as a Pender County Commissioner, DAVID WILLIAMS, Individually and as a Pender County Commissioner, F.D. RIVENBARK, Individually and as a Pender County Commissioner, STEPHEN HOLLAND, Individually and as a Pender County Commissioner, and EUGENE MEADOWS, Individually and as a Pender County Commissioner

PLAINTIFFS,

V.

GARY BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROERT CORDLE, GENEIVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE in Their Official Capacities as Members Of the North Carolina Board of Elections; JAMES B. BLACK in His Official Capacity as Co-Speaker) of the North Carolina House of Representatives; RICHARD T. MORGAN, in His Official Capacity as Co-Speaker of the North Carolina House of Representatives; MARC BASNIGHT, in His Official Capacity as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, in His Official Capacity as Governor of the State of North Carolina; ROY COOPER, in His Official Capacity as Attorney General of the State of North Carolina;

DEFENDANTS</td><td>From Wake County
(Three Judge Panel on Redistricting)
No. 04 CVS 0696</td></tr>
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BRIEF OF CINDY MOORE, MILFORD FARRIOR AND MARY JORDAN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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

****

QUESTION PRESENTED

DID THE NORTH CAROLINA GENERAL ASSEMBLY HAVE A REASONABLE BASIS FOR CONCLUDING THAT SECTION 2 OF THE VOTING RIGHTS ACT REQUIRED DRAWING A DISTRICT THAT ALLOWED MINORITY VOTERS TO CONTINUE TO ELECT THEIR CANDIDATE OF CHOICE, EVEN THOUGH THE DISTRICT CONTAINS LESS THAN AN ABSOLUTE NUMERICAL MAJORITY OF VOTING AGE AFRICAN-AMERICANS?

STATEMENT OF THE CASE

On May 14, 2004, Pender County and its Board of Commissioners in both their individual and official capacities and Dwight Strickland, Steve Holland, and David Williams, who are citizens and registered voters in Pender County, ("the appellants") filed an action in Wake County Superior Court challenging the 2003 redistricting plan for election of representatives to the North Carolina House of Representatives ("NC House"), adopted by the North Carolina General Assembly on November 25, 2003. Appellants alleged that the plan violates the whole county requirement of Article II, Section 5(3) of the North Carolina Constitution, because Pender County is divided between two House Districts, 16 and 18. On June 4, 2004, the North Carolina State Board of Elections, the Governor of North Carolina, the Attorney General of North Carolina, the Co-Speakers of the NC House, and the President Pro Tempore of the North Carolina State Senate ("the appellees"), all in their official capacities, filed an Answer, asserting among other defenses, that creation of the NC House district was permissible under the North Carolina Constitution because it was required by Section 2 of the Voting Rights Act.

On June 11, 2004, the appellants moved for a preliminary injunction. The Panel conducted a hearing on the motion, denied the motion verbally, and entered a written Order on September 30, 2004.

On February 25, 2005, after completion of discovery, the parties filed cross motions for summary judgment. The Panel conducted a hearing on August 30, 2005 and entered an Order partially granting and partially denying summary judgment on December 2, 2005. A Notice of Appeal was taken from the partial grant and denial of summary judgment on December 30, 2005. After the parties entered a joint stipulation, the Panel entered a final Order and Judgment on January 9, 2006.

In the final Order, the Court found that Pender County and its County Commissioners, acting in their official capacities, lacked standing to bring the action, and that NC House district 18 was permissible under the whole county provision of the North Carolina Constitution because the General Assembly legitimately concluded that Section 2 of the Federal Voting Rights Act required creation of the district. Pender County and its County Commissioners were dismissed from this suit while the claims of Dwight Strickland, Steve Holland, and David Williams remain. A notice of Appeal from the final Order was filed on February 2, 2006. On February 10, 2006, the parties settled the record on appeal. The settled record was served on

February 24, 2006, and the Honorable Clerk of the North Carolina Supreme Court mailed the printed record on March 2, 2006.

STATEMENT OF THE FACTS

At stake in this appeal is whether the historically disenfranchised population of southeastern North Carolina will continue to have the opportunity to elect a candidate of their choice to the North Carolina House of Representatives. Elections in Pender County continue to be characterized by racially polarized voting. (R. pp. 107-109) Nevertheless, past election results in North Carolina demonstrate that black voters have an effective opportunity to elect candidates of their choice, even where there is racially polarized voting, in state house districts with a black population of 41.54% and above, or a black voting age population of 38.37% and above. (R. p. 46, Affidavit of Representative Martha B. Alexander) In redrawing state legislative districts, the legislature found that an important indicator of effective black voting strength was the percentage of registered Democrats who are black. (*Id.*) In past elections, candidates of choice of black voters have been elected in districts with black Democratic registration ranging from 52.58% to 78.87%. (R. pp. 46-47)

In addition, black voters in North Carolina have been able to elect candidates of choice in congressional districts with less than a 50% black voting age population. (R. p. 47) For example, in the 2002 elections, candidates of choice of black voters won in Congressional District 1, at

47.82% black voting age population, and in Congressional District 12, at 45.56% black voting age population. (*Id.*) This experience is similar to that of other states in the south with significant black population. *See, e.g.,* Grofman, Handley & Lublin, *What Minority Populations Are Sufficient To Afford Minorities a Realistic Chance To Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence* 79 N. C. L. Rev. 1383, 1394-98 (2001) (All of the thirteen new African-American representatives elected to Congress in 1992 were from thirteen newly drawn districts with more than an absolute numerical majority of voting-age African-Americans. When, over the course of the 1990s, the courts ordered the redrawing of nine Southern districts, eight of these redrawn districts contained less than an absolute numerical majority of black voting age population. Seven of the African-American incumbent representatives in these districts sought reelection, and all seven won.)

When *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) was decided, eleven African-Americans served in the NC House. All of these representatives were elected from districts with more than an absolute numerical majority of voting age African-Americans. When the General Assembly adopted the 2003 redistricting plan for election of

representatives to the state legislature, there were eighteen African-American representatives serving in the NC House, several of whom were elected from districts with less than an absolute numerical majority of voting age African-Americans. (R. p. 50) In addition, the General Assembly had significant evidence before it of continued racially polarized voting and data illustrating that black voters still suffered disparities in education and economic status as a result of past discrimination, that affected their ability to participate in the political process. (R. p. 135-137) The North Carolina legislature was legitimately concerned that there may be a challenge to House District 18 under Section 2 of the Voting Rights Act if it were not maintained as an effective black voting district. (R. p. 48)

Pender County is a coastal county in southeastern North Carolina with a 2000 Census population of 41,082. (R. p. 37) New Hanover County, home to the Wilmington race riots in 1898 (R. pp. 99; 131-32), is a coastal county in southeastern North Carolina that shares its northern border with Pender County. Pender County and New Hanover County combined have sufficient populations to support three NC House districts. (R p. 17) Pender County's population is sufficient to comprise only 61.25% of the population needed for an ideal NC House district. (Id.)

In its 1992 redistricting plan, the North Carolina General Assembly ("General Assembly") divided Pender County between three districts: District 96 (which included portions of Pender, Cumberland, Bladen and Sampson counties); District 12 (which included portions of Pender, and Sampson counties); and District 98 (which included portions of Pender, Brunswick, Columbus and New Hanover counties). With a total African-American 1990 Census population of 59.26% and a total African-American 1990 Census voting age population of 55.72%, District 98 was identified by the General Assembly as a district required by the Voting Rights Act. Based on the 2000 Census, District 98 had a total African-American population of 50.70%, and a total African-American voting age population of 47.07%. District 98 elected Representative Thomas Wright, an African-American Democrat, in 1992, 1994, 1996, 1998, and 2000.

In 2001, the General Assembly proposed a redistricting plan that split Pender County among five NC House districts. (R p. 14) Opposed to the plan, Pender County officials submitted an amicus brief in *Stephenson v. Bartlett (Stephenson I),*, 355 N.C. 354, 562 S.E.2d 377 (2002), arguing that the redistricting plan violated Article II, Section 5(3) of the North Carolina Constitution by unjustifiably refusing to create a single-member district that traverses the county's borders only to the extent necessary to comply with

ideal district population requirements and the federal "one-person, one vote" standard. The North Carolina Supreme Court found in Pender County's favor and imposed a plan that kept Pender County wholly within a single NC House district (as did the subsequent 2002 plan proposed by the General Assembly). (R. p. 14) The plan created District 18, which had a total African-American Census population of 46.99% and an African-American Census voting age population of 43.44%. District 18 elected Representative Wright in 2002.

On November 25, 2003, the North Carolina General Assembly adopted a redistricting plan that created three districts wholly within the borders of the two counties combined. (R p. 17) Of the three NC House districts, one (the 19th) lies solely in New Hanover County, while both the 16th and 18th districts are composed of parts of both counties. The 2003 District 18 contains much of the population of the previous District 18, but is not identical to it. District 18 has a total African-American population of 42.89% and total African-American voting age population of 39.36%. (R. p. 48.) The legislature designated District 18 as a "Voting Rights Act (VRA)" district.

INTEREST OF AMICI CURIAE

Cindy Moore, Milford Farrior, and Mary Jordan are African-American citizens and residents of Pender County. They strive to improve African-American political participation in their County. They are members of various social organizations that promote voter registration and voter education. They have a significant interest in having a representative in the General Assembly who is familiar with the needs of the African-American community.

Cindy Moore is the chairperson of Pender County Fair Share, a local chapter of North Carolina Fair Share. North Carolina Fair Share is a statewide non-partisan, non-profit membership, advocacy, and leadership development organization comprised almost entirely of non-wealthy citizens, many of whom are African-American. In June of 2004, Cindy Moore filed an affidavit in the North Carolina Superior Court emphasizing her concern that the African-American minority community would have little or no representation in Pender County if NC House District 18, as it existed, was redrawn for the purposes of keeping Pender County wholly within one single member district.

Milford Farrior is a lifelong resident of Pender County. He has remained involved in community affairs affecting the African-American

community in Pender County all of his life. In June of 2004, he also filed an affidavit with the North Carolina Superior Court stressing his concern that an African-American candidate would not be elected if Pender County were kept whole in the formation of a NC House district.

Mary Jordan is a retired educator. She is a member of the local branch of the National Association for the Advancement of Colored (NAACP). The NAACP is a non-partisan and non-profit national organization, with over a hundred branches throughout North Carolina, which seeks the social, political, and legal advancement of African-American interests. She is also an active member in the Maple Hill Civic Club (an organization which seeks social health within the African-American community of Pender County) and is one of Pender County's local business owners, among whom African-Americans are a significant minority.

In their individual capacities, Ms. Moore, Mr. Farrior, and Ms. Jordan supported the African-American candidate of choice in every election during which they resided in Pender County. They supported Thomas Wright, an African-American Democrat, in each of his candidacies for the NC House from 1994 to 2004. Because they are African-American residents of Pender County and remain significantly involved in African-American political,

social and civic functions in Pender County, they have an interest in ensuring that African-American voters of Pender County have an equal opportunity to elect representatives of their choice.

Minority voters in Pender County have been able to elect their candidate of choice in District 18 despite the fact that they are not an absolute numerical majority. However, they will likely not be able to elect their candidate of choice in a district where Pender County is 61.25% of the district population because their numbers will decrease to below 50% of the Democratic registered voters in the district and because of the persistence of racial polarization in this region of the state. White bloc voting is strong enough to usually defeat the African-Americans' candidate of choice where black voters are less than 50% of the Democratic registered voters. Therefore, it is crucial for *Amici Curiae* Moore, Farrior, and Jordan that this Court rule in favor of the Appellees and hold that the 2003 redistricting plan's creation of NC House District 18, a district in which African-Americans can continue to elect their candidate of choice, is permissible under the North Carolina Constitution because it was legitimate for the legislature to conclude that the district was necessary to comply with Section 2 of the Voting Rights Act.

ARGUMENT

THE NORTH CAROLINA GENERAL ASSEMBLY CORRECTLY CONCLUDED THAT SECTION 2 OF THE VOTING RIGHTS ACT REQUIRED THE CREATION OF NORTH CAROLINA HOUSE DISTRICT 18, ONE IN WHICH MINORITY VOTERS CAN CONTINUE TO ELECT THEIR CANDIDATE OF CHOICE.

ASSIGNMENT OF ERROR NOS. 3, 4, 5, 6, 7, 8, 9, 10
(R. pp. 190-191)

The North Carolina General Assembly concluded that Section 2 of the Voting Rights Act (*42 U.S.C. 1973*) requires drawing District 18 so that its minority population could continue to elect their candidate of choice, even though the district contains less than an absolute numerical majority of voting age African-Americans. (R. p. 48-49) If Section 2 of the Voting Rights Act requires creation of such a district, then the district is permissible under Article II, Section 5(3) of the North Carolina Constitution, as interpreted by this Court in *Stephenson v. Bartlett (Stephenson I)*, in which it held "any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law." 355 N.C. at 383-84, 562 S.E.2d at 396-98 and *Stephenson v. Bartlett (Stephenson II*), 357 N.C. 301, 582 S.E.2d 247 (2002).

Appellants contend that Article II, Section 5(3) of the North Carolina Constitution is violated by creation of the district in controversy because Section 2 of the Voting Rights Act never requires creation of a district when African-American voters within the district constitute less than an absolute numerical majority of the population and less than an absolute numerical majority of the voting age population.

The three judge panel correctly agreed with the appellees that the district in controversy is permissible under Article II, Section 5(3) because *Thornburg v. Gingles* and subsequent United States Supreme Court cases have established no "bright line" rule requiring a district to contain an absolute numerical majority of minority voters before Section 2 of the Voting Rights Act can be applied. 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986).

A violation of Section 2 occurs where,

> based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens. . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). In *Thornburg v. Gingles*, the United States Supreme Court established an initial three-part vote dilution test—geographical compactness, political cohesion, and bloc voting-- that must be met before a

court may consider whether, based on the totality of the circumstances, the political structure denies minority voters equal political participation. 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986). Appellants are not contesting the three-judge panel's application of the second and third elements of the *Gingles* test or its subsequent application of the totality of the circumstances test. The only issue on appeal is whether the first element operates as a "bright line" rule, barring all claims in which minority voters do not possess the potential for comprising an absolute numerical majority in a single member district. The Supreme Court has not drawn such "bright lines," and the overwhelming majority of federal courts have not seen nor employed them, in interpreting *Gingles*.

A. <u>The Supreme Court has not articulated a "bright line test" requiring an absolute numerical majority of minority voters to be present in a single member district before Section 2 of the Voting Rights Act can be applied.</u>

In *Gingles*, African-American voters challenged six multimember districts and one single member district, alleging that the redistricting scheme diluted the ability of African-American voters to elect candidates of their choice in violation of § 2. Each multimember district contained African-American populations large and compact enough to comprise a majority in single member districts. At the time, it was not clear that African-American voters would ever be able to elect their candidates of

choice except in districts with large numerical majorities of African-American voters. When *Gingles* was litigated, only thirteen African-Americans were serving in the NC House, and only five African-American representatives (from Southern districts) were serving in the United States Congress. Virtually all of these representatives were elected from districts with more than an absolute numerical majority of voting age African-Americans. Under these facts, the Court generalized that "unless there is a conjunction of the following circumstances [a minority population large enough to create an absolute numerical majority in a single member district], the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice." *Id*. at 45. In short, in the political environment in which the case arose, African-American voters had never been able to elect a candidate of their choice except in districts with at least a majority of African-American voters, and usually not without a "supermajority". *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1415-16 (7th Cir. 1984) (discussing cases which illustrate this point). Hence, the Court naturally used the term "majority" in discussing the first *Gingles* precondition. Without an absolute numerical majority, as the Court reasonably concluded in that era, African-American voters had no potential of electing a representative and, therefore, could allege no harm or seek no

remedy in filing a claim under Section 2 of the Voting Rights Act. *Gingles*, 478 U.S. at 51 n.17.

The Court never defined what its use of the term "majority" required in mathematical figures. However, the Court did not intend "majority" to simply mean "more than fifty percent of the electorate" because the Court upheld the trial courts finding that "the extant 55.1% black population majority does not constitute an effective voting majority,. . ." *Gingles v. Edmisten*, 590 F. Supp. 345, 358 n.21 (E.D.N.C. 1984) (three-judge court). For the Court in *Gingles*, "majority" seems to have been synonymous with "enough voters to elect a group's candidate of choice." The Court clearly stopped short of articulating any "bright line" rule or "magical number" for meeting the first element of its three-prong test, as it stressed in footnote 12:

> We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to the sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id. at 46.

Although under the facts of *Gingles,* the Court concluded that the potential for minority representation was invariably tied to majority-minority districts, the Court has consistently subsequently declined to equate, in all cases, majority-minority districts with the potential for minority voters to elect their candidate of choice and has applied *Gingles*' first precondition flexibly depending on the facts of each case: "The practice challenged here, the creation of majority-minority districts, does not invariably, minimize, or maximize minority voting strength. . . Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993). *See also Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994) (acknowledging that "when applied to a claim that single-member districts dilute minority votes, the first *Gingle*s condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of choice"); *McNeil v. Legislative Apportionment Comm'n*, 828 A.2d 840, 853 (N.J. 2003) *cert. denied*, 540 U.S. 1107, 157 L. Ed. 2d 893 (2004) (concluding that a New Jersey district where minority voters were less than an absolute numerical majority but were able to elect a candidate of their choice survives the first precondition of *Gingles*). In considering whether the first *Gingles* precondition was met when minority

voters had been "crammed" into Ohio majority-minority districts, in *Voinovich*, the court discussed the flexibility of the *Gingles* preconditions:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim . . . The complaint in such a case is not that the black voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority.

Voinovich, 507 U.S. at 158.

The case before this Court is exactly that case described by the *Voinovich* Court. Unlike the setting in the earlier era in which the *Gingles* claim arose, this case arises at a time and in a state where minority group members have consistently elected their candidates of choice in districts where they are a majority of the Democratic registered voters, even with less than an absolute numerical majority of total voters. When *Gingles* was decided, virtually all of the African-American NC House representatives and US Congress representatives were elected from districts with more than an absolute numerical majority of voting age African-Americans. When the 2003 redistricting plan was drawn, the number of African-American NC House representatives had risen to eighteen. As racial attitudes have moderated, African-Americans in North Carolina in the 21st century have

demonstrated their potential to elect candidates of choice with less than an absolute numerical majority. Almost unfathomable during the time when the United States Supreme Court considered *Gingles*, African-Americans have demonstrated their ability, with a sufficiently large population, to elect their candidate of choice with the assistance of some cross-over voters from the white majority in the general election.

Therefore, neither *Gingles* nor any subsequent rulings by the Supreme Court, presents any "bright line" absolute numerical majority requirement barring application of Section 2 of the Voting Rights Act to district 18.

B. Minority voters can elect their candidate of choice through coalition districts as efficiently as through majority-minority districts, depending on the political realities of each case.

As the Panel found in its Opinion below:

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

This has indeed always been the proper inquiry in applying *Gingles'* first element. While majority-minority districts were once invariably tied to minority voters' ability to elect their candidate of choice, in more recent times minority voters have had greater success in electing their candidate of

choice in coalition districts (districts where "minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority with a single district in order to elect candidates of their own choice" *Georgia v. Ashcroft*, 539 U.S. 461, 481 (2003)). In *Georgia v. Ashcroft*, the United States Supreme Court discussed how the risks of effectiveness of both majority-minority districts and coalition districts in producing minority representation throughout a state can vary depending on the political realities of each state:

> spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help achieve the electoral aspirations of the minority group. *Id.* at 480-481.

After studying twenty Southern elections from the 1990s, political scientists Bernard Grofman, Lisa Handley, and David Lublin discuss how the factual analysis of whether minority groups can elect their candidate of choice is not based on numbers, but on the political realities of each case:

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

necessary to create an effective minority district. *What Minority Populations Are Sufficient To Afford Minorities a Realistic Chance To Elect Candidates of Choice? Drawing Effective Minority Districts: A Conceptual Framework and some Empirical Evidence* 79 N. C. L. Rev.1383, 1407 (2001). Grofman, Handley, and Lublin conclude that in most cases African-American voters needed to constitute only 33-39% of the voters to give an African-American candidate 50% of the votes. *Id*. at 1409

Many other studies have argued that coalition districts have replaced majority-minority districts as either an equivalent method or as the best method for achieving minority representation in some instances. *See, e.g*., *The Ties That Bind: Coalitions and Governance Under Section 2 the Voting Rights Act,* 117 Harv. L. Rev. 2621, 2625 (2004) ("The coalitional remedy offers a substantial alternative to the predominant majority-minority district. . ."); Ellen D. Katz, *The Law of Democracy: New Issues In Minority Representation : Resurrecting the White Primary* 153 U. Pa. L. Rev. 325, 368 (2004) (concluding "Democratic success, however, need not hinge on a reduction in black descriptive representation. The coalition districts upheld in *Ashcroft* allow black voters to elect black candidates to office even when these voters do not comprise a majority of the population"); David Lublin, *Racial Redistricting and African-American Representation: A Critique of*

"Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?" 93 Am. Pol. Sci. Rev. 183, 185 (1999); Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 90 N.C.L.Rev. 1517, 1535-36, and 1555 (2002); David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* 39-48 (1997); Carol M. Swain, *Black Faces, Black Interests: The Representation of Black Americans in Congress* 209 (1993); Bullock III & Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 Emory L. J. 1209 (1999); Charles S. Bullock, III, *Winners and Losers in the Latest Round of Redistricting*, 44 Emory L. J. 943, 950 (1995); Cameran, Epstein & O'Halloran , *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?* 90 Am. Pol. Sci. Rev. 794, 794 (1996); Epstein & O'Halloran, *A Social Science Approach to Race, Redistricting, and Representation*, 93 Am. Pol. Sci. Rev. 187 (1999); Grofman & Handley, *1990s Issues in Voting Rights*, 65 Miss. L.J. 205, 249 (1995).

In *Georgia v. Ashcroft*, the Court concluded that it is not unreasonable for a State to choose coalition districts as a more effect means for electing minority representation:

> The ability of minority voters to elect a candidate of their choice is important but often complex to determine. In order to maximize the

> electoral success of a minority group, a State may choose to create a certain number of "safe districts," in which it is highly likely that minority voters will be able to elect the candidate of choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.

Ashcroft 539 U.S. at 480.

The appellants contend that case law, such as *Georgia v. Ashcroft*, dealing with retrogression and Section 5 is wholly inapplicable to the question of application of Section 2 to the minority voters in district 18 because *Reno v. Bossier Parish School Board (Bossier II*), 528 U. S. 320, 334, 120 S. Ct. 866, 875 145 L.Ed.2d 845 prohibits such application. This is incorrect. *Bossier II* merely prohibits expansion of the legal retrogression standard to Section 2 claims. As the Court holds in *Georgia v. Ashcroft*, "some parts of the § 2 analysis may overlap with the § 5 inquiry." 539 U.S. at 478. The question presented by this case is completely engulfed by such an overlap. In determining the factual conclusion of whether minority voters are able to elect their candidate of choice, it simply does not matter whether a case was brought under the legal framework of Section 5 or the legal framework of Section 2 of the Voting Rights Act: The facts are the facts. In many instances, depending on the political realities of each case, coalition districts are as effective as majority-minority districts in electing the

minority group's candidate of choice. This is true whether a case is brought under Section 2 or arises under Section 5.

C. Minority voters in district 18 have demonstrated their potential to elect their candidates of choice through coalition districts.

As emphasized in the Panel's opinion, African-American voters in district 18 have consistently demonstrated their ability to elect their candidate of choice with a sufficiently large, although short of an absolute numerical majority, African-American population. Representative Thomas Wright, an African-American Democrat found by the court to be unquestionably the candidate of choice of African-American voters, was elected in House District 98 in 1992, 1994, 1996, 1998, and 2000 though district 98 had a total African-American voting age population of 47.07%. District 98 was not identical to District 18, but contained much of the minority population now incorporated in District 18. The three judge panel found that districts with a black voting age population (BVAP) of at least 37.81% are usually able to elect their candidates of choice with the assistance of white majority voters, who tend to be registered Democrats:

> District 18 has a total black population of 27, 023(42.89%), a black voting age population of 19,173 (39.36%) and a black Democratic voter registration of 12,334 (53.72%). With the majority of Democratic voters being black, it is not rocket science to conclude that the candidate in the Democratic primary for House District 18 who will be successful in that primary will be the black Democratic voters' candidate of choice.

District 18 (not identical to the current district 18 though it contained much of the minority population now incorporated in the current district 18), created by the court in the 2001 *Stephenson* litigation, elected Representative Wright in 2002 though the district had a total African-American census population of 46.99% and an African American census voting age population of 43.44%.

Therefore, African-American voters in Pender County have demonstrated their ability to elect their candidate of choice with less than an absolute numerical majority.

CONCLUSION

The North Carolina General Assembly legitimately concluded that the drawing of NC House District 18 was necessary to comply with Section 2 of the Voting Rights Act and, therefore, was permitted to create the district under the North Carolina Constitution and this Court's holdings in *Stephenson I* and *II*. It would have been illogical for the legislature to conclude that a claim, brought by any member of the minority population in District 18, would be barred by lack of the necessary number of voters to constitute a majority-minority district when the Supreme Court has articulated no "bright line" rule requiring such and the minority population

has consistently demonstrated its ability to elect its candidate of choice.

Therefore, this Court should affirm the decision of the three-judge panel.

Respectfully submitted, this the 8th day of May, 2006

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CERTIFICATE OF SERVICE

I hereby certify that as Counsel for *Amici Curiae* I have this day filed a copy of the foregoing Brief of Cindy Moore, Milford Farrior and Mary Jordan as *Amici Curiae* in Support of Appellees with the Clerk of the North Carolina Supreme Court by electronic means pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure and served a copy of same upon Counsel for Appellees in accordance with said rules by electronic means to their correct and current electronic mail addresses as follows:

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