No. 11-1127

IN THE

Supreme Court of the United States

CHRISTINE RADOGNO, IN HER OFFICIAL CAPACITY AS MINORITY LEADER OF THE ILLINOIS SENATE, *et al.*,

Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

ON APPEAL FROM THE THREE-JUDGE PANEL SITTING IN OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

APPELLANTS' REPLY BRIEF

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I. APPELLANTS' PROFFERED STANDARD FOR POLITICAL GERRYMANDERING IS JUDICIALLY MANAGEABLE.

The District Court acknowledged that Appellants' proposed standard for political gerrymandering claims is objective, measurable and that courts could adjudicate it. App. B, p. 41a. Moreover, the proposed standard is comprised of requirements which courts have used in evaluating gerrymandering claims under the Equal Protection Clause of the Fourteenth Amendment. Accordingly, Appellants' proposed standard is not arbitrary and is an acceptable standard to judge political gerrymandering claims.

Each of the elements of the proposed standard is founded in the Equal Protection Clause and has been used by courts in evaluating claims of racial gerrymandering in a redistricting plan. The first three factors have been accepted as circumstantial evidence of intent by this Court. *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488 (1995). Similarly, the fifth and sixth factors have been relied upon in evaluating gerrymandering claims. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1334, 1347 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947, 124 S. Ct. 2806 (2004). Thus, courts have used these factors in evaluating gerrymandering claims. Accordingly, Appellees' argument that these factors conflict with this Court's precedent is incorrect. While the foregoing cases are not political gerrymandering cases, the factors remain viable tests of legislative intent in drafting a redistricting plan in both racial and political gerrymandering claims.

Moreover, nothing about Appellants' proposed standard would "constitutionalize" state law, as Appellees assert. No factor by itself can invalidate a redistricting plan; hence, none can trump a constitutional provision. Furthermore, Appellees' complaint that the fifth and six factors are indeterminate and arbitrary is unfounded. As for the fifth factor, courts routinely make judgments about whether the weight of the evidence is "substantial" in deciding cases (*see, e.g., Turner Broadcasting System, Inc., v. F.C.C.*, 520 U.S. 180, 213, 117 S. Ct. 1174, 1198 (1997)) and, therefore, can properly determine whether such evidence, in conjunction with evidence of the other factors, is sufficient to show political gerrymandering. The sixth factor's requirement that more than two-thirds of incumbent pairings pit minority candidates against one another ensures that only those instances where a significant majority of incumbent pairings occurs may give rise to a claim.

In sum, the factors offered by Appellants are already used by courts in gerrymandering claims under the Equal Protection Clause to examine legislative intent and determine whether the evidence reaches a minimum threshold to show gerrymandering. A claimant who can show each of the six factors has, at a minimum, shown facts sufficient to state a claim that the legislature's intention was to eliminate political opposition and should be permitted to present the claim, in full, on the merits at trial. Here, the facts Appellants alleged are sufficient to meet the standard they propose and state a claim for political gerrymandering. Accordingly, Appellants should have been permitted a trial on the merits.

II. *GINGLES* PERMITS AGGREGATION OF VOTES FOR MULTIPLE WHITE CANDIDATES IN AN ELECTION.

Although no court has squarely addressed the narrow issue raised here, this Court in *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752 (1986) contemplated this very situation when it acknowledged that success by a minority group's candidate of choice in prior elections does not preclude a finding of racial bloc voting and may not be viewed in a vacuum. *Id.* at 57. Thus, the Court determined that the facts and circumstances of those elections must be examined to see if special circumstances explain the victory despite racial bloc voting. *Gingles*, 478 U.S., at 51, 57.

Appellees acknowledge that special circumstances can explain minority victories in the face of racial bloc voting. Mot. to Affirm, p. 15. Moreover, although Appellants fail to acknowledge it, elections pitting multiple white candidates against a lone minority candidate are one of the special circumstances contemplated by *Gingles* which might explain a minority victory. *See, e.g. United States v. Charleston County*, 365 F.3d 341, 342 (4th Cir. 2004); *Jenkins v. Manning*, 116 F.3d 685, 694 (3d Cir. 1997); *Little Rock School Dist. v. Pulaski County Special School Dist.*, 56 F.3d 904, 911 (8th Cir. 1995); *Neal v. Coleburn*, 689 F. Supp. 1426, 1436 (E.D. Va. 1988). Instead, Appellees argue that *Jenkins, Little Rock School Dist.* and *Neal* require that courts disregard or discount those elections. Mot. to Affirm p. 17. Appellants read these cases too broadly. While the foregoing cases recognize that multiple white candidates' splitting white votes is a special circumstance which can explain victory by a minority's candidate

of choice, none ruled that the only proper method of accounting for this special circumstance is to discount or ignore those elections. In fact, none even considered Appellants' method, let alone rejected it. Even *Valladolid v. City of Nat'l City*, 976 F.2d 1293, 1297-98 (9th Cir. 1992), on which Appellees rely, failed to reject such a method and, in fact, did not even analyze it. Rather, the court in *Valladolid* found that multiple white candidates running in an election was not a special circumstance because of the frequency with which it occurred. *Id.* at 1298. This makes sense because the elections at issue were at-large elections. *Id.* at 1294. Thus, all of the elections to the city council involved multiple white candidates. That situation is not present in this case.

Courts should not merely discount or ignore entirely this category of elections. While doing so may be one proper method of accounting for the existence of this special circumstance, it should not be the exclusive method because that method would fail to fully recognize and account for the impact of multiple white candidates splitting the votes of white voters to allow a lone minority to win with a plurality. Another acceptable method of analyzing and accounting for the special circumstance in districts exhibiting racial bloc voting is to aggregate the votes of multiple candidates of the same race to determine whether the minority's candidate of choice does in fact have a fair opportunity to win the election. This method more accurately predicts whether a minority group is likely to have a fair opportunity to elect its candidate of choice because it accounts for all votes for all candidates in an election, not just the two highest vote getters. This is particularly true in this case because, as Dr. Liu noted, there has never been a race for state representative

where a lone Latino candidate ran against multiple white candidates. Accordingly, it is inappropriate to compare single candidate races to multiple candidate races such as those analyzed here because doing so produces an inaccurate evaluation of a minority group's opportunity to elect its preferred candidate. At a minimum, it should be up to the fact finder to determine, based on all the evidence in a particular case and district, whether aggregating the votes of multiple white voters more accurately determines whether a minority group has a fair opportunity to elect its candidate of choice. This Court has never rejected such an analysis.

Indeed, Appellants' method of analysis correctly predicted the eventual result in Representative District 23. Dr. Liu's analysis showed that racial bloc voting existed in Representative District 23 and that a minority's preferred candidate could not win against a single white candidate. The Democrat candidate in Representative District 23 is Michael Zalewski, who is white. Mr. Zalewski faced no opponent in the March, 2012 primary. App. D, p. 48a. Consistent with Dr. Liu's analysis, no Latino candidate even bothered to run against Mr. Zalewski because, absent multiple white candidates to split white votes, no Latino candidate had a chance to prevail with a plurality.

The *Gingles* factors may not be applied mechanically and without regard to the claim at issue. *Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 1157 (1993). Appellees and the District Court, however, espouse a mechanical application of *Gingles* and ignore the impact of the special circumstances of the elections and the claims at issue in this case. This Court has rejected these types of

mechanical applications and pronounced that the success of a minority candidate in a particular election does not necessarily establish that the district lacked racial bloc voting. Moreover, a minority candidate's success does not discern the degree of racial bloc voting necessary to state a § 2 claim because the degree will "vary according to a variety of factual circumstances" and because "there is no simple doctrinal test for the existence of legally significant racial bloc voting." *Gingles*, 478 U.S. at 57-58. As a result, Appellants should be permitted to present evidence explaining the victories by minorities in the elections at issue so that a trier of fact may determine how to properly account for the special circumstance and determine whether, in the absence of the special circumstance, white voters vote in a bloc to usually defeat the minority's preferred candidate. Accordingly, this Court should hear argument and find that Appellants may present their claim at a trial on the merits.

III. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' RACIAL GERRYMANDERING CLAIM.

The District Court improperly granted summary judgment to Appellees on Appellants' racial gerrymandering claim because Representative District 96 contained only 24% African-American voting age population. App. A, p. 14a. The District Court's ruling was in error.

According to the District Court, the first and foremost reason for its ruling was that Voting Age Population of Representative District 96 was only 24.87% African

American. App. A, p. 14a. A majority-minority district is not required to state a racial gerrymandering claim under the Fourteenth Amendment. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 546-550, 119 S. Ct. 1545, 1549 (1999); *Easley v. Cromartie*, 532 U.S. 234, 240, 121 S. Ct. 1452, 1457 (2001). Accordingly, the District Court's basing its decision on the fact that Representative District 96 contained only 24% African-American voting age population was improper.

Moreover, while Appellees presented some evidence of a political motivation for the shape of Representative District 96, Appellants presented sufficient evidence of a racial motivation in drafting Representative District 96 sufficient to warrant a trial on the merits. The conflicting evidence offered by the parties presented a question of fact which should not have been determined on summary judgment. This is particularly true in light of the absence of any controlling authority that a minority voting age population over 50% is required to state a racial gerrymandering claim.

CONCLUSION

This Court should note probable jurisdiction and set this case for argument.

Respectfully submitted,

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